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Subject Files - FG050 (Judicial Branch)

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	11	7	11	1	12136	24999	12172	11962

Folder Title:

572780

5792780SS
FG050

LB

THE WHITE HOUSE
WASHINGTON

03 JUL 25 AM 8:45

July 25, 2003

MEMORANDUM FOR THE PRESIDENT

THROUGH THE EXECUTIVE CLERK

FROM: ALBERTO R. GONZALES ag

SUBJECT: Judicial Nomination

Attached for your signature is the nomination of the following individual:

Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman.

You approved this nomination on May 16, 2003.

All necessary clearances have been completed.

7-26-03
OK to autopen

The White House,

JUL 2 5 2003

To the

Senate of the United States.

I nominate Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

GEORGE W. BUSH

Office of the Attorney General

Washington, D.C. 20530

July 17, 2003

Dear Mr. President:

It is an honor to enclose the nomination of Brett M. Kavanaugh, of the District of Columbia, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

Mr. Kavanaugh was born February 12, 1965, in the District of Columbia, and is single. He received a B.A. degree, *cum laude,* in 1987 from Yale College and a J.D. degree in 1990 from Yale Law School. He was admitted to the Maryland State Bar in 1990 and the District of Columbia Bar in 1992.

Since 2001, Mr. Kavanaugh has served as an Associate Counsel, 2001-2003, as Senior Associate Counsel, 2003 and as Staff Secretary, 2003-present, to President George W. Bush. Prior to his service with the Executive Office of the President, he was a partner with Kirkland & Ellis, 1997-1998, 1999-2001; an Associate Counsel with the Office of Independent Counsel Kenneth W. Starr, 1994-1997, 1998; a law clerk to the Honorable Anthony M. Kennedy of the Supreme Court of the United States, 1993-1994; an attorney with the Office of the Solicitor General, United States Department of Justice, 1992-1993; a summer associate with Munger Tolles & Olson, 1992; a law clerk to the Honorable Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, 1991-1992; a law clerk to the Honorable Walter K. Stapleton of the United States Court of Appeals for the Third Circuit, 1990-1991; and a summer associate with Williams & Connolly, 1990.

Mr. Kavanaugh has an excellent reputation as to character and integrity, possesses judicial temperament and is, I believe, worthy of appointment as a United States Circuit Judge.

I recommend the nomination.

Respectfully,

John Ashcroft

John Ashcroft
Attorney General

Office of the Attorney General

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Brett M. Kavanaugh

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Office:	Eisenhower Executive Office Building Washington, D.C. 20502 202-456-2702	

Home:	3633 M Street Washington, D.C. 20007 301-951-8956
Ethnic Group:	Caucasian
Salary:	$164,000

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07/18/03 FRI 12:20 FAX 005

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07/18/03 FRI 12:22 FAX 005

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF LEGAL POLICY

950 Pennsylvania Avenue, NW
Washington, DC 20530

DATE: _____

TO: Jon Saunders atty Bill

FAX: 456-2569

PAGES: _____ (excluding cover)

FROM: Steve Bradbury

VOICE: _____

FAX: 202-514-2424

MESSAGE:

001

07/18/03 FRI 12:22 FAX

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Records Management, White House Office of

Subject Files - FG050 (Judicial Branch)

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W	11	7	11	2	12135	24998	12173	11963

Folder Title:

713837

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Congratulations] - To: Michael Ryan Barrett - From: POTUS	1	07/07/2006	P6/b6;
002	Letter	[Congratulations] - To: Renee Marie Bumb - From: POTUS	1	07/07/2006	P6/b6;
003	Letter	[Congratulations] - To: Brian Cogan - From: POTUS	1	07/07/2006	P6/b6;
004	Letter	[Congratulations] - To: Sean Cox - From: POTUS	1	07/07/2006	P6/b6;
005	Letter	[Congratulations] - To: Thomas Golden - From: POTUS	1	07/07/2006	P6/b6;
006	Letter	[Congratulations] - To: Andrew Guilford - From: POTUS	1	07/07/2006	P6/b6;

COLLECTION TITLE:
Records Management, White House Office of

SERIES:
Subject Files - FG050 (Judicial Branch)

FOLDER TITLE:
713837

FRC ID:
12135

RESTRICTION CODES

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

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

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

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

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

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

Records Not Subject to FOIA

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

Withdrawn/Redacted Material
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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
007	Letter	[Congratulations] - To: Noel Hillman - From: POTUS	1	07/07/2006	P6/b6;
008	Letter	[Congratulations] - To: Sandra Segal Ikuta - From: POTUS	1	07/07/2006	P6/b6;
009	Letter	[Congratulations] - To: Thomas Ludington - From: POTUS	1	07/07/2006	P6/b6;
010	List	[List]	1	N.D.	P6/b6;
011	Email	[Email - page 2] - To: David Kalbaugh - From: Susan Courtwright	1	07/07/2006	P6/b6;
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RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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

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

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

Records Not Subject to FOIA

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

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
013	Letter	[Congratulations] - To: Patrick Joseph Schiltz - From: POTUS	1	07/07/2006	P6/b6;
014	Letter	[Congratulations] - To: Peter Sheridan - From: POTUS	1	07/07/2006	P6/b6;
015	Letter	[Congratulations] - To: Milan Smith - From: POTUS	1	07/07/2006	P6/b6;
016	Letter	[Congratulations] - To: Frank Whitney - From: POTUS	1	07/07/2006	P6/b6;
017	Letter	[Congratulations] - To: Susan Davis Wigenton - From: POTUS	1	07/07/2006	P6/b6;
018	Letter	[Congratulations] - To: Brett Kavanaugh - From: POTUS	1	07/07/2006	P6/b6;
019	List	[List]	1	N.D.	P6/b6;

COLLECTION TITLE:
Records Management, White House Office of

SERIES:
Subject Files - FG050 (Judicial Branch)

FOLDER TITLE:
713837

FRC ID:
12135

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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Records Not Subject to FOIA

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

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
020	Email	FW: Congrat Letters for Judges - To: Lynn Crable, et al. - From: David Kalbaugh	1	07/07/2006	P6/b6;
021	Letter	[Congratulations] - To: Brett Kavanaugh - From: POTUS	1	07/11/2006	P6/b6;
022	Letter	[Congratulations] - To: Brett Kavanaugh - From: POTUS	1	07/11/2006	P6/b6;

COLLECTION TITLE:
Records Management, White House Office of

SERIES:
Subject Files - FG050 (Judicial Branch)

FOLDER TITLE:
713837

FRC ID:
12135

RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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b(1) National security classified information [(b)(1) of the FOIA]
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Records Not Subject to FOIA

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

SAUNDERS_C

713837

FG050

Barcode Scanning Sheet

Collection Code: **SECLOG**

Staff Name: **PRESIDENT BUSH**

Document Date: **07/05/2006**

Correspondent: **HARRIET MIERS**

Subject/Description: **CONGRATULATORY LETTERS TO NEWLY APPOINTED JUDGES: -- MICHAEL RYAN BARRETT, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO -- RENEE MARIE BUMB, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY -- BRIAN M. COGAN, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT ...**

SCANNED BY ORM

THE WHITE HOUSE

WASHINGTON

July 5, 2006

MEMORANDUM FOR RAUL F. YANES

FROM: HARRIET MIERS

SUBJECT: CONGRATULATORY LETTERS TO NEWLY APPOINTED JUDGES

Attached are congratulatory letters to newly appointed federal judges for the President's signature.

The following judges should receive a letter:

Michael Ryan Barrett, United States District Judge for the Southern District of Ohio
Renee Marie Bumb, United States District Judge for the District of New Jersey
Brian M. Cogan, United States District Judge for the Eastern District of New York
Sean F. Cox, United States District Judge for the Eastern District of Michigan
Thomas M. Golden, United States District Judge for the Eastern District of Pennsylvania
Andrew J. Guilford, United States District Judge for the Central District of California
Noel Lawrence Hillman, United States District Judge for the District of New Jersey
Sandra Segal Ikuta, United States Circuit Judge for the Ninth Circuit
Brett M. Kavanaugh, United States Circuit Judge for the District of Columbia Circuit
Thomas L. Ludington, United States District Judge for the Eastern District of Michigan
Gray Hampton Miller, United States District Judge for the Southern District of Texas
Patrick Joseph Schiltz, United States District Judge for the District of Minnesota
Peter G. Sheridan, United States District Judge for the District of New Jersey
Milan D. Smith, Jr., United States Circuit Judge for the Ninth Circuit
Frank D. Whitney, United States District Judge for the Western District of North Carolina
Susan Davis Wigenton, United States District Judge for the District of New Jersey

If you have any questions, please feel free to contact the Executive Clerk's office.

Thank you.

OK for AP

7/9/06

July 7, 2006

The Honorable Michael Ryan Barrett
United States District Judge
for the Southern District of Ohio
Potter Stewart United States Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

Dear Judge Barrett:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4492683)
(spjudge.frm)
SENT TO:
The Honorable Michael Ryan Barrett

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006673 President: George W. Bush

2. Full Name: BARRETT, Michael Ryan 3. State: OH

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 05/05/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Southern District of Ohio

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 12/16/2005

24. Nomination Date: 12/16/2005 25. Confirmation Date: 05/01/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 05/02/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 01/06/2006 33. Date Signed: 05/05/2006

34. Document Ordered Date: 12/16/2005

35. Document Returned To: JUSTICE 36. Return Date: 05/08/2006

37. Nominating Language:

Michael Ryan Barrett, of Ohio, to be United States District Judge for the Southern District of Ohio, vice Walter Herbert Rice, retired.

38. Comments:

July 7, 2006

The Honorable Renée Marie Bumb
United States District Judge
for the District of New Jersey
Martin Luther King, Jr. Federal Building
and United States Courthouse
50 Walnut Street
Newark, New Jersey 07102

Dear Judge Bumb:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4492734)
(spjudge.frm)

SENT TO:
The Honorable Renée Marie Bumb
(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006743 President: George W. Bush

2. Full Name: BUMB, Renée Marie 3. State: NJ

4. Politics: 5. Gender: F

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/12/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the District of New Jersey

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 06/06/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/06/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed: 06/12/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/12/2006

37. Nominating Language:

Renée Marie Bumb, of New Jersey, to be United States District Judge for the District of New Jersey, vice William H. Walls, retired.

38. Comments:

package received 1/17/06. 1/24/06 NOTE: Middle name on nomination and commission to be spelled-out, per David Best and Counsel's Office. wm 2/6/06: Per David Best, Commission has an accent mark on second to last "e" of first name (Renée), not on the nomination or background, but she does use the accent with her name. wm

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-4212

IN RE: KENSINGTON INTERNATIONAL LIMITED and
SPRINGFIELD ASSOCIATES, LLC, Petitioners
(Related to U.S. Bankruptcy Court for the District of DE No. 00-03837)

and

No. 03-4526

IN RE: D.K. ACQUISITION PARTNERS, L.P.; FERNWOOD ASSOCIATES, L.P.;
DEUTSCHE BANK TRUST COMPANY AMERICAS, Petitioners
(Related to U.S. Bankruptcy Court for the District of DE No.01-01139)

Present: FUENTES, SMITH and GARTH, Circuit Judges

1. Motion by Petitioners, Kensington International et al, to Set Briefing Schedule also construed as Motion to Designate USG and USG Creditors as Petitioners

2. Response to Motion by Respondents, Owens Corning et al also construed as a Motion to Compel Filing of a Joint Appendix

3. Response in Opposition to Motion by Respondent, W. R. Grace

ORDER

The foregoing motions and responses are considered. Owens Corning's motion to compel the filing of a joint appendix is granted. Petitioners' motion is denied as presented to the extent it seeks to have a particular briefing schedule ordered. Rather, briefing shall proceed as follows:

Petitioners' briefs and the joint appendix shall be filed and served on or before 12 noon on February 23, 2004.
Respondents' briefs shall be filed and served on or before 12 noon on March 12, 2004.
Petitioners' reply briefs shall be filed and served on or before 12 noon on March 19, 2004.
Oral argument shall take place on April 19, 2004.

The parties are hereby directed to file two (2) copies of each brief with each member of the Court's panel, addressed as follows:

The Honorable Julio M. Fuentes
Martin Luther King, Jr. Federal Building & US Courthouse
Room 5032
50 Walnut Street
Newark, NJ 07102

July 7, 2006

The Honorable Brian M. Cogan
United States District Judge
for the Eastern District of New York
Emanuel Celler United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Cogan:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4492963)
(spjudge.frm)

SENT TO:
The Honorable Brian M. Cogan

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006794 President: George W. Bush

2. Full Name: COGAN, Brian M. 3. State: NY

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/07/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Eastern District of New York

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 05/04/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 05/04/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed: 06/07/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/07/2006

37. Nominating Language:

Brian M. Cogan, of New York, to be United States District Judge for the Eastern District of New York, vice Frederic Block, retired.

38. Comments:

Northeast & Caribbean (2)

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New York Regional Buildings

James T. Foley U.S.

Courthouse
445 Broadway
Albany, NY 12207
(518) 431-0397

Leo W. O'Brien Federal Building
Clinton Avenue & Pearl Street
Albany, NY 12207
(518) 431-0317

Federal Building and Courthouse
15 Henry Street
Binghamton, NY 10601
(607) 773-2745

Emanuel Celler U.S. Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201
(718) 254-7104

Thaddeus J. Dulski Federal Building
111 W. Huron Street
Buffalo, NY 14202
(716) 551-4588

Michael J. Dillon U.S. Courthouse
68 Court Street
Buffalo, NY
(716) 551-4520

Alfonse M. D'Amato U.S. Courthouse
170 Federal Plaza

CONTACTS

Northeast and Caribbean Region
(212) 264-3305
R2Contact@gsa.gov
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July 7, 2006

The Honorable Sean F. Cox
United States District Judge
for the Eastern District of Michigan
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

Dear Judge Cox:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4493031)
(spjudge.frm)

SENT TO:
The Honorable Sean F. Cox

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2005492 President: George W. Bush

2. Full Name: COX, Sean F. 3. State: MI

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/12/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Eastern District of Michigan

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: Lawrence P. Zatkoff, retired

22. Term Expires: 23. Announced Date:

24. Nomination Date: 02/14/2005 25. Confirmation Date: 06/08/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/08/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 09/22/2004 33. Date Signed: 06/12/2006

34. Document Ordered Date:

35. Document Returned To: JUSTICE 36. Return Date: 06/12/2006

37. Nominating Language:

Sean F. Cox, of Michigan, to be United States District Judge for the Eastern District of Michigan, vice Lawrence P. Zatkoff, retired.

38. Comments:

Renomination following the convening of the 109-1 Congress.

United States District Court
Eastern District of Michigan

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Locations - Detroit

Theodore Levin United States Courthouse
231 W. Lafayette Blvd.
Detroit, Michigan 48226

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July 7, 2006

The Honorable Thomas M. Golden
United States District Judge
for the Eastern District of Pennsylvania
James A. Byrne United States Federal Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Golden:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4493133)
(spjudge.frm)

SENT TO:
The Honorable Thomas M. Golden

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006793 President: George W. Bush

2. Full Name: GOLDEN, Thomas M. 3. State: PA

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/13/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Eastern District of Pennsylvania

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: Franklin Van Antwerpen, elevated

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 05/04/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 05/04/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed: 06/13/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/14/2006

37. Nominating Language:

Thomas M. Golden, of Pennsylvania, to be United States District Judge for the Eastern District of Pennsylvania, vice Franklin Van Antwerpen, elevated.

38. Comments:

Package recv'd. 1/24/06. NOTE ON VICE: Franklin S. Van Antwerpen, APPOINTED 5/24/04, as United States Circuit Judge for the Third Circuit.

Eastern District of Pennsylvania
Justice Integrity Service "America's Star"

Courthouse Locations

Philadelphia - District Headquarters

James A. Byrne - U.S. Federal Courthouse
601 Market Street, 2nd Floor, Room #2110
Philadelphia, PA 19106

Contact Number: (215) 597-8158/7272

Task Force (HIDTA): (215) 560-1652
Task Force (Philadelphia): (215) 597-4204

The James A. Byrne U.S. Federal District Courthouse is located on the corner of 6th Street and Market Street which is attached to the William Green Federal Building, Philadelphia, Pennsylvania.

The entrance to the courthouse is on Market Street. There are commercial parking facilities on all the surrounding streets. The courthouse is located in the central business district and easily accessible from several highway exits. The courthouse is adjacent to Independents Hall and the Liberty Bell Pavilion.

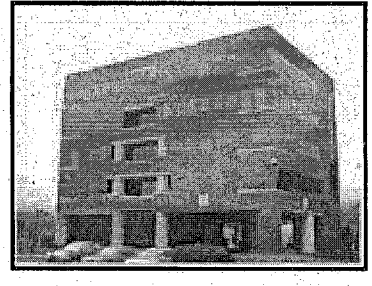
There is a parking lot for visitors available at the intersection of 8th Street and Arch Street, which has a earlier bird parking rate of $8.00 per day if in by 10:00 am and out by 07:00 pm.

Allentown

504 Hamilton Street, Room 1700
Allentown, PA 18101

Contact: (610) 433-4307

Easton



Larry Holmes Building
2nd and Ferry Street, 4th Floor
Easton, PA 18042

Contact: (610) 250-0310

Reading

July 7, 2006

The Honorable Andrew J. Guilford
United States District Judge
for the Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Dear Judge Guilford:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4493162)
(spjudge.frm)

SENT TO:
The Honorable Andrew J. Guilford

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006792 President: George W. Bush

2. Full Name: GUILFORD, Andrew J. 3. State: CA

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/26/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Central District of California

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 06/22/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/23/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed:

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/26/2006

37. Nominating Language:

Andrew J. Guilford, of California, to be United States District Judge for the Central District of California, vice Dickran M. Tevrizian, Jr., retired.

38. Comments:

Received 1/24/06.

Central District of California

Justice Integrity Service "America's Star"

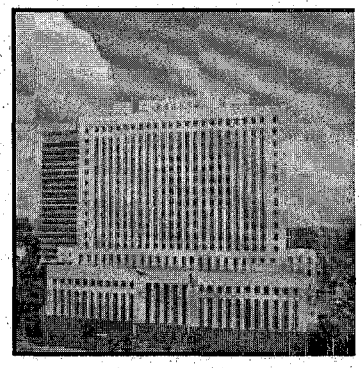
Courthouse Locations

Los Angeles - District Headquarters

U.S. Courthouse

312 North Spring Street, Room G-23
Los Angeles, CA 90012

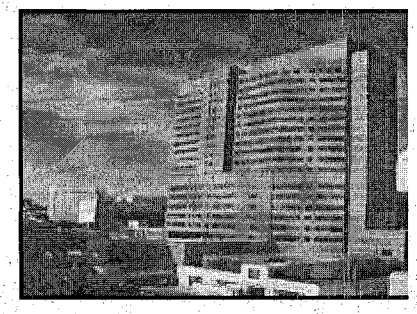
Contact Number: (213) 894-2485



Los Angeles - Roybal Federal Building

255 East Temple Street
Los Angeles, CA 90012

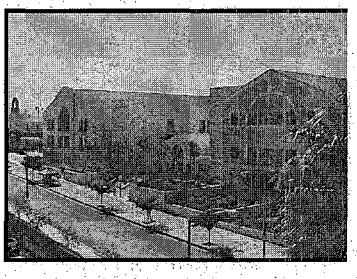
Contact Number: (213) 894-6820



Riverside

3470 Twelfth Street, Room G122
Riverside, CA 92501

Contact: (909) 276-6120

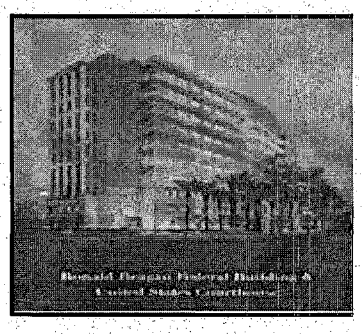


Santa Ana

Ronald Reagan Federal Building & Courthouse

411 West 4th Street
Santa Ana, CA 92701

Contact: (714) 338-4610



Pasadena

U.S. Circuit Court
125 South Grand Avenue
Pasadena, CA 91109

July 7, 2006

The Honorable Noel Lawrence Hillman
United States District Judge
for the District of New Jersey
Martin Luther King, Jr. Federal Building
and United States Courthouse
50 Walnut Street
Newark, New Jersey 07102

Dear Judge Hillman:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4493184)
(spjudge.frm)

SENT TO:
The Honorable Noel Lawrence Hillman

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006745 President: George W. Bush

2. Full Name: HILLMAN, Noel Lawrence 3. State: NJ

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/12/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the District of New Jersey

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 06/08/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/08/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed: 06/12/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/12/2006

37. Nominating Language:

Noel Lawrence Hillman, of New Jersey, to be United States District Judge for the District of New Jersey, vice William G. Bassler, retired.

38. Comments:

Package received: 1/17/06.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-4212

IN RE: KENSINGTON INTERNATIONAL LIMITED and
SPRINGFIELD ASSOCIATES, LLC, Petitioners
(Related to U.S. Bankruptcy Court for the District of DE No. 00-03837)

and

No. 03-4526

IN RE: D.K. ACQUISITION PARTNERS, L.P.; FERNWOOD ASSOCIATES, L.P.;
DEUTSCHE BANK TRUST COMPANY AMERICAS, Petitioners
(Related to U.S. Bankruptcy Court for the District of DE No.01-01139)

Present: FUENTES, SMITH and GARTH, Circuit Judges

1. Motion by Petitioners, Kensington International et al, to Set Briefing Schedule also construed as Motion to Designate USG and USG Creditors as Petitioners

2. Response to Motion by Respondents, Owens Corning et al also construed as a Motion to Compel Filing of a Joint Appendix

3. Response in Opposition to Motion by Respondent, W. R. Grace

O R D E R

The foregoing motions and responses are considered. Owens Corning's motion to compel the filing of a joint appendix is granted. Petitioners' motion is denied as presented to the extent it seeks to have a particular briefing schedule ordered. Rather, briefing shall proceed as follows:

Petitioners' briefs and the joint appendix shall be filed and served on or before 12 noon on February 23, 2004.
Respondents' briefs shall be filed and served on or before 12 noon on March 12, 2004.
Petitioners' reply briefs shall be filed and served on or before 12 noon on March 19, 2004.
Oral argument shall take place on April 19, 2004.

The parties are hereby directed to file two (2) copies of each brief with each member of the Court's panel, addressed as follows:

The Honorable Julio M. Fuentes
Martin Luther King, Jr. Federal Building & US Courthouse
Room 5032
50 Walnut Street
Newark, NJ 07102

July 7, 2006

The Honorable Sandra Segal Ikuta
United States Circuit Judge
for the Ninth Circuit
James R. Browning United States Courthouse
95 Seventh Street
San Francisco, California 94103

Dear Judge Ikuta:

I congratulate you on your appointment as a United States Circuit Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4493316)
(spjudge.frm)

SENT TO:
The Honorable Sandra Segal Ikuta

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006820 President: George W. Bush

2. Full Name: IKUTA, Sandra Segal 3. State: CA

4. Politics: 5. Gender: F

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/23/2006 10. On Senate Calendar: Y

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States Circuit Judge for the Ninth Circuit

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 02/08/2006

24. Nomination Date: 02/08/2006 25. Confirmation Date: 06/19/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/20/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/13/2006 33. Date Signed: 06/23/2006

34. Document Ordered Date: 02/08/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/26/2006

37. Nominating Language:

Sandra Segal Ikuta, of California, to be United States Circuit Judge for the Ninth Circuit, vice James R. Browning, retired.

38. Comments:

Package recv'd. 2/7/06.

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James R. Browning U.S. Courthouse AND 95 Search Advanced Search Preferences

The **"AND"** operator is unnecessary -- we include all search terms by default. [details]

Web Results **1** - **10** of about **43,300** for **James R. Browning U.S. Courthouse AND 95 Seventh Street**. (**0.43**

Search Results - THOMAS (Library of Congress)
HR 2804 designates the **United States courthouse** located at **95 Seventh Street** in San Francisco, California as the `**James R. Browning United States Courthouse ...**
thomas.loc.gov/cgi-bin/cpquery/R?cp107:FLD010:@1(hr378) - 14k -
Cached - Similar pages

Search Results - THOMAS (Library of Congress)
The **United States courthouse** located at **95 Seventh Street** in San Francisco, California, shall be known and designated as the ``**James R. Browning United ...**
thomas.loc.gov/cgi-bin/query/R?r107:FLD001:H50966 - 20k - Cached - Similar pages

Pelosi Statement on Passage of the California Missions ...
Pelosi Announces Naming of **James R. Browning United States Courthouse ...** at **95 Seventh Street** in San Francisco as the "**James R. Browning United States ...**
www.house.gov/pelosi/press/releases/ Nov04/BrowningAppointment112004.html - 5k -
Cached - Similar pages

Floor Statement by Congresswoman Pelosi
Pelosi Floor Statement on Designating the '**James R. Browning ...** the **United States courthouse** located at **95 Seventh Street** in San Francisco, California, **...**
www.house.gov/pelosi/flbrowningcourthouse.htm - 6k - Cached - Similar pages
[More results from www.house.gov]

[PDF] **UNITED STATES** COURT OF APPEALS FOR THE NINTH CIRCUIT CALENDAR FOR ...
File Format: PDF/Adobe Acrobat - View as HTML
James R. Browning US Courthouse. United States Court of Appeals - 9th Circuit. **95 Seventh Street**. San Francisco, California 94103 **...**
www.ca9.uscourts.gov/ca9/calendar.nsf/ E590F30CCBE3292888257175007B741C/ $file/sf05_06.pdf?openelement - Similar pages

ERA: Media Advisory August, 3, 2005
WHERE: **US** Court of Appeals 9th Circuit **James R. Browning Courthouse 95 Seventh Street**, 3rd Floor San Francisco, CA. WHO: The circuit court panel will be **...**
www.equalrights.org/media/walmart0805.asp - 9k - Cached - Similar pages

ADF: CLS attorney available for comment following hearing in right ...
WHERE: **James R. Browning US Courthouse**, **95 Seventh Street**, San Francisco SAN FRANCISCO â€" An attorney with the Christian Legal Society will be available **...**
www.alliancedefensefund.org/news/story.aspx?cid=3759 - 70k - Cached - Similar pages

[XLS] Sheet1
File Format: Microsoft Excel - View as HTML
36, The Honorable, **James R. Browning**, **United States** Court of Appeals for the Ninth Circuit, **95 Seventh Street**, PO Box 193939, San Francisco,, CA, 94119-3939 **...**
webtest.lls.edu/careerservices/ students/clerkship/judges/judgeslist8-2005.xls - Similar pages

[PDF] Additional information about the case is at ., and . **US** COURT OF ...
File Format: PDF/Adobe Acrobat - View as HTML

July 7, 2006

The Honorable Thomas L. Ludington
United States District Judge
for the Eastern District of Michigan
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

Dear Judge Ludington:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4494232)
(spjudge.frm)

SENT TO:
The Honorable Thomas L. Ludington

(b)(6)

6. Andrew J. Guilford

(b)(6)

(W) 312 North Spring Street
Los Angeles, CA 90012-8533
(213) 894-1565

7. Noel Lawrence Hillman

(b)(6)

(W) 50 Walnut Street
Newark, NJ 07102
(973) 645-3730

8. Sandra Segal Ikuta

(b)(6)

(W) 95 Seventh Street
San Francisco, CA 94103
(415) 556-6162

9. Brett M. Kavanaugh
(W) E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW
Room 3004, Washington, DC 20001
(202) 216-7180

10. Thomas L. Ludington
(W) 231 West Lafayette Boulevard
Detroit, MI 48226
(313) 234-5051

11. Gray Hampton Miller

(b)(6)

(W) 515 Rusk Avenue
Houston, TX 77002
(713) 250-5500

United States District Court
Eastern District of Michigan

Return to Home Page
General Information
Case Information
Juror Information
Local Rules/Practices
Forms
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Related Sites

Locations - Detroit

Theodore Levin United States Courthouse
231 W. Lafayette Blvd.
Detroit, Michigan 48226

Click here for vicinity map Back to main map

Get driving directions to the courthouse

1 Where do you want to start?

Enter an address or intersection
U.S. automatically selected, type the address in the box below.

United States

Street address or intersection:

City: State: - Any State - Postal code:

Click to Get driving directions

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2005487 President: George W. Bush

2. Full Name: LUDINGTON, Thomas L. 3. State: MI

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/12/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Eastern District of Michigan

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: Paul V. Gadola, retired

22. Term Expires: 23. Announced Date:

24. Nomination Date: 02/14/2005 25. Confirmation Date: 06/08/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/08/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 10/03/2002 33. Date Signed: 06/12/2006

34. Document Ordered Date:

35. Document Returned To: JUSTICE 36. Return Date: 06/12/2006

37. Nominating Language:

Thomas L. Ludington, of Michigan, to be United States District Judge for the Eastern District of Michigan, vice Paul V. Gadola, retired.

38. Comments:

Renomination following the convening of the 109-1 Congress.

David,

Here's Ludington's home address. I'm still trying to track down Brett's.

Thomas Ludington

(b)(6)

Susan

From: Kalbaugh, David E.
Sent: Friday, July 07, 2006 10:44 AM
To: Courtwright, Susan M.
Subject: FW: Congrat Letters for Judges

Just waiting for the addresses below. Or would you like us to send to their offices?

David Kalbaugh
Deputy Executive Clerk
The White House
Rm. 4 OEOB
Office: 202.456.5553
Fax: 202.456.2569

From: Kalbaugh, David E.
Sent: Thursday, July 06, 2006 4:50 PM
To: Courtwright, Susan M.
Subject: RE: Congrat Letters for Judges

The letters have been prepared. Two small issues, in the future, can we get the names of the courthouses that go along with the business addresses. It saves our typists from having to look all of them up. And finally, did you have an opportunity to get home addresses for Brett and Judge Ludington??

David Kalbaugh
Deputy Executive Clerk
The White House
Rm. 4 OEOB
Office: 202.456.5553
Fax: 202.456.2569

From: Courtwright, Susan M.
Sent: Thursday, July 06, 2006 11:22 AM
To: Kalbaugh, David E.
Subject: Congrat Letters for Judges

David,

I have attached the list of addresses for judges that should receive congratulatory letters. I'll drop by the cover memo momentarily.

July 7, 2006

The Honorable Gray Hampton Miller
United States District Judge
for the Southern District of Texas
Bob Casey Federal Building
and United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Dear Judge Miller:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/ddj (Correspondence #4493330)
(spjudge.frm)
SENT TO:
The Honorable Gray Hampton Miller

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006791 President: George W. Bush

2. Full Name: MILLER, Gray Hampton 3. State: TX

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 04/25/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Southern District of Texas

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 04/25/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 04/25/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed: 04/25/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 04/26/2006

37. Nominating Language:

Gray Hampton Miller, of Texas, to be United States District Judge for the Southern District of Texas, vice Ewing Werlein, Jr., retired.

38. Comments:

Package recv'd. 1/24/06. Checking on retirement date on vice with DOJ. wm

Fritz Lanham Federal Building
819 Taylor Street
Room 13A25, P.O. Box 17298
Fort Worth, TX 76102-0298
Phone: 817-978-2870
Hours: M-F 7:30 - 4:00
Map It

Bob Casey Federal Bldg. & Courthouse
515 Rusk Avenue
Room B-305
Houston, TX 77002
Phone: 713-718-4540
Hours: 7:30am-4:00pm
Map It

Micky Leland Building
1919 Smith Street
Room 1135
Houston, TX 77002
Phone: 713-209-3227
Hours: 7:30am-4:30pm
Map It

San Antonio Federal Bldg
727 E. Durango
Room A123
San Antonio, TX 78206
Phone: 210-472-6020
Hours: 7:30 am - 4:00 pm
Map It

Federal Office Bldg.
125 S State Street
Room 2107
Salt Lake City, UT 84138
Phone: 801-524-5239
Hours: 7:30-4
Map It

Norfolk Federal Bldg.
200 Granby Mall
Room 233
Norfolk, VA 23510-1828
Phone: 757-441-6501
Hours: 8:00am-1:00pm M>TH
Map It

U.S. Geological Survey Natl Ctr.
12201 Sunrise Valley Drive
Room 1B-205 Mail Stop 604
Reston, VA 20192
Phone: 703-648-7333
Hours: 7:00am-4:00pm
Map It

July 7, 2006

The Honorable Patrick Joseph Schiltz
United States District Judge
for the District of Minnesota
United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Dear Judge Schiltz:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/pp (Correspondence #4493104)
(spjudge.frm)

SENT TO:
The Honorable Patrick Joseph Schiltz

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006662 President: George W. Bush

2. Full Name: SCHILTZ, Patrick Joseph 3. State: MN

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 04/28/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the District of Minnesota

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 12/14/2005

24. Nomination Date: 12/14/2005 25. Confirmation Date: 04/26/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 04/27/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 01/06/2006 33. Date Signed: 04/28/2006

34. Document Ordered Date: 12/14/2005

35. Document Returned To: JUSTICE 36. Return Date: 05/01/2006

37. Nominating Language:

Patrick Joseph Schiltz, of Minnesota, to be United States District Judge for the District of Minnesota, vice Richard H. Kyle, retired.

38. Comments:

July 7, 2006

The Honorable Peter G. Sheridan
United States District Judge
for the District of New Jersey
Martin Luther King, Jr. Federal Building
and United States Courthouse
50 Walnut Street
Newark, New Jersey 07102

Dear Judge Sheridan:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/pp (Correspondence #4493172)
(spjudge.frm)
SENT TO:
The Honorable Peter G. Sheridan

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2005490 President: George W. Bush

2. Full Name: SHERIDAN, Peter G. 3. State: NJ

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/12/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the District of New Jersey

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: Stephen M. Orlofsky, resigned

22. Term Expires: 23. Announced Date:

24. Nomination Date: 02/14/2005 25. Confirmation Date: 06/08/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/08/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 11/21/2003 33. Date Signed: 06/12/2006

34. Document Ordered Date:

35. Document Returned To: JUSTICE 36. Return Date: 06/12/2006

37. Nominating Language:

Peter G. Sheridan, of New Jersey, to be United States District Judge for the District of New Jersey, vice Stephen M. Orlofsky, resigned.

38. Comments:

Renomination following the convening of the 109-1 Congress.

July 7, 2006

The Honorable Milan D. Smith, Jr.
United States Circuit Judge
for the Ninth Circuit
James R. Browning United States Courthouse
95 Seventh Street
San Francisco, California 94103

Dear Judge Smith:

I congratulate you on your appointment as a United States Circuit Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/pp (Correspondence #4493318)
(spjudge.frm)

SENT TO:
The Honorable Milan D. Smith, Jr.

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006846 President: George W. Bush

2. Full Name: SMITH, Milan D., Jr. 3. State: CA

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 05/18/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States Circuit Judge for the Ninth Circuit

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 02/14/2006

24. Nomination Date: 02/14/2006 25. Confirmation Date: 05/16/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 05/16/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/21/2006 33. Date Signed: 05/18/2006

34. Document Ordered Date: 02/14/2006

35. Document Returned To: JUSTICE 36. Return Date: 05/19/2006

37. Nominating Language:

Milan D. Smith, Jr., of California, to be United States Circuit Judge for the Ninth Circuit, vice A. Wallace Tashima, retired.

38. Comments:

5/15/06 NOTE: Per David Best, DOJ, no impediment to appointment when confirmed. wm

July 7, 2006

The Honorable Frank D. Whitney
United States District Judge
for the Western District of North Carolina
Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, North Carolina 28202

Dear Judge Whitney:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/pp (Correspondence #4493333)
(spjudge.frm)

SENT TO:
The Honorable Frank D. Whitney

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006847 President: George W. Bush

2. Full Name: WHITNEY, Frank D. 3. State: NC

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 07/05/2006 10. On Senate Calendar: Y

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the Western District of North Carolina

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: deceased

22. Term Expires: 23. Announced Date: 02/14/2006

24. Nomination Date: 02/14/2006 25. Confirmation Date: 06/22/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 06/23/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/21/2006 33. Date Signed: 07/05/2006

34. Document Ordered Date: 02/14/2006

35. Document Returned To: JUSTICE 36. Return Date: 07/06/2006

37. Nominating Language:

Frank D. Whitney, of North Carolina, to be United States District Judge for the Western District of North Carolina, vice H. Brent McKnight, deceased.

38. Comments:

FDWhitney currently serving as USA for the Eastern Dist. of North Carolina. 2/14/06 NOTE: Per Counsel's Office (Susan Courtwright) use middle initial on nomination and commission. wm

Historic Federal Buildings

Charles R. Jonas Federal Building
401 W Trade St., Charlotte, NC 28202
Architect: Wetmore, James A.
Constructed: 1918
Nat'l Register ID #: 78001965
GSA Building #: NC0013ZZ

Explore other historic federal buildings by Wetmore, James A., or explore other historic federal buildings in Charlotte, or in the state of NC.

Statement of Significance

Return to the Photograph, explore other historic federal buildings by Wetmore, James A., or explore other historic federal buildings in Charlotte, or in the state of NC.

July 7, 2006

The Honorable Susan Davis Wigenton
United States District Judge
for the District of New Jersey
Martin Luther King, Jr. Federal Building
and United States Courthouse
50 Walnut Street
Newark, New Jersey 07102

Dear Judge Wigenton:

I congratulate you on your appointment as a United States District Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush

GWB/Clerk/pp (Correspondence #4493350)
(spjudge.frm)
SENT TO:
The Honorable Susan Davis Wigenton
(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006744 President: George W. Bush

2. Full Name: WIGENTON, Susan Davis 3. State: NJ

4. Politics: 5. Gender: F

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 06/12/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States District Judge for the District of New Jersey

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 05/26/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 05/26/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 02/02/2006 33. Date Signed: 06/12/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 06/12/2006

37. Nominating Language:

Susan Davis Wigenton, of New Jersey, to be United States District Judge for the District of New Jersey, vice John W. Bissell, retired.

38. Comments:

THE WHITE HOUSE

WASHINGTON

July 5, 2006

MEMORANDUM FOR RAUL F. YANES

FROM: HARRIET MIERS

SUBJECT: CONGRATULATORY LETTERS TO NEWLY APPOINTED JUDGES

Attached are congratulatory letters to newly appointed federal judges for the President's signature.

The following judges should receive a letter:

Michael Ryan Barrett, United States District Judge for the Southern District of Ohio
Renee Marie Bumb, United States District Judge for the District of New Jersey
Brian M. Cogan, United States District Judge for the Eastern District of New York
Sean F. Cox, United States District Judge for the Eastern District of Michigan
Thomas M. Golden, United States District Judge for the Eastern District of Pennsylvania
Andrew J. Guilford, United States District Judge for the Central District of California
Noel Lawrence Hillman, United States District Judge for the District of New Jersey
Sandra Segal Ikuta, United States Circuit Judge for the Ninth Circuit
Brett M. Kavanaugh, United States Circuit Judge for the District of Columbia Circuit
Thomas L. Ludington, United States District Judge for the Eastern District of Michigan
Gray Hampton Miller, United States District Judge for the Southern District of Texas
Patrick Joseph Schiltz, United States District Judge for the District of Minnesota
Peter G. Sheridan, United States District Judge for the District of New Jersey
Milan D. Smith, Jr., United States Circuit Judge for the Ninth Circuit
Frank D. Whitney, United States District Judge for the Western District of North Carolina
Susan Davis Wigenton, United States District Judge for the District of New Jersey

If you have any questions, please feel free to contact the Executive Clerk's office.

Thank you.

OLC + AP

7/11/06

July 7, 2006

The Honorable Brett M. Kavanaugh
United States Circuit Judge
for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Kavanaugh:

I congratulate you on your appointment as a United States Circuit Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush
GWB/Clerk/ddj-pp (Correspondence #4494219)
(spjudge.frm)
SENT TO:
The Honorable Brett M. Kavanaugh

(b)(6)

APPOINTEE RECORD SUMMARY 7/6/2006

1. Appointment Number: 2006725 President: George W. Bush

2. Full Name: KAVANAUGH, Brett M. 3. State: MD

4. Politics: 5. Gender: M

6. Status: A

7. Senate Return Date: 8. Covering Nomination Due Date:

9. Appt Date: 05/30/2006 10. On Senate Calendar: N

11. Acting: N 12. Acting Expiration Date:

13. Resigned: N 14. Appt Code: PAS

15. No. of Positions: 1

16. Position:

United States Circuit Judge for the District of Columbia Circuit

17. Additional Designation:

18. Area of Responsibility:

19. Full Time: Y 20. Vice:

21. Vice Info: Laurence H. Silberman, retired

22. Term Expires: 23. Announced Date: 01/25/2006

24. Nomination Date: 01/25/2006 25. Confirmation Date: 05/26/2006

26. Nomination Rejected: 27. Nomination Returned:

28. Nomination Withdrawn: 29. Conf Res Received: 05/26/2006

30. Appt/Designation: Appointment

31. Appt/Designation By: Commission

32. Received WH: 08/28/2003 33. Date Signed: 05/30/2006

34. Document Ordered Date: 01/25/2006

35. Document Returned To: JUSTICE 36. Return Date: 05/30/2006

37. Nominating Language:

Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

38. Comments:

Package recv'd. 1/6/05. If nominated, this will be the third time for this position.

6. Andrew J. Guilford

(b)(6)

(W) 312 North Spring Street
Los Angeles, CA 90012-8533
(213) 894-1565

7. Noel Lawrence Hillman

(b)(6)

(W) 50 Walnut Street
Newark, NJ 07102
(973) 645-3730

8. Sandra Segal Ikuta

(b)(6)

(W) 95 Seventh Street
San Francisco, CA 94103
(415) 556-6162

9. Brett M. Kavanaugh
(W) E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW
Room 3004, Washington, DC 20001
(202) 216-7180

10. Thomas L. Ludington
(W) 231 West Lafayette Boulevard
Detroit, MI 48226
(313) 234-5051

11. Gray Hampton Miller

(b)(6)

(W) 515 Rusk Avenue
Houston, TX 77002
(713) 250-5500

DeGuzman Jr., Danilo

From: Kalbaugh, David E.
Sent: Friday, July 07, 2006 1:36 PM
To: Crable, Lynn A.; DeGuzman Jr., Danilo; Patlan, Philip A.; Showers, Wendy W.
Subject: FW: Congrat Letters for Judges

here are the addresses for Brett and the other judge

David Kalbaugh
Deputy Executive Clerk
The White House
Rm. 4 OEOB
Office: 202.456.5553
Fax: 202.456.2569

-----Original Message-----
From: Courtwright, Susan M.
Sent: Friday, July 07, 2006 12:11 PM
To: Kalbaugh, David E.
Subject: RE: Congrat Letters for Judges

David,

Brett's home address is listed below.

Let me know if you need anything else.

Regards, Susan

Brett Kavanaugh
(b)(6)

From: Kalbaugh, David E.
Sent: Friday, July 07, 2006 11:37 AM
To: Courtwright, Susan M.
Subject: RE: Congrat Letters for Judges

might want to ask bill burck in staff sec, bet he has it

David Kalbaugh
Deputy Executive Clerk
The White House
Rm. 4 OEOB
Office: 202.456.5553
Fax: 202.456.2569

From: Courtwright, Susan M.
Sent: Friday, July 07, 2006 11:35 AM
To: Kalbaugh, David E.
Subject: RE: Congrat Letters for Judges

July 11, 2006

The Honorable Brett M. Kavanaugh
United States Circuit Judge
for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Kavanaugh:

I congratulate you on your appointment as a United States Circuit Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush
GWB/Clerk/ddj-pp (Correspondence #4494219)
(spjudge.frm)
SENT TO:
The Honorable Brett M. Kavanaugh

(b)(6)

July 11, 2006

The Honorable Brett M. Kavanaugh
United States Circuit Judge
for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Kavanaugh:

I congratulate you on your appointment as a United States Circuit Judge. You now have a vital role in ensuring that our judicial system and the rule of law in our country allow justice, security, and prosperity to flourish not just for some in our Nation, but for all. I am sure you will have a distinguished tenure as you fulfill the promises of our Federal judicial system.

I nominated you to serve because your character, experience, and hard work demonstrated that you would fulfill the duties of the bench with wisdom, discernment, courage, independence, and humility. I appreciate your willingness to undertake this essential work for our Nation.

Laura joins me in wishing you and your family the very best. May God bless you, and may God continue to bless America.

Sincerely,

George W. Bush
GWB/Clerk/ddj-pp (Correspondence #4494219)
(spjudge.frm)
SENT TO:
The Honorable Brett M. Kavanaugh

(b)(6)

FOIA Marker

This is not a textual record. This FOIA Marker indicates that material has been removed during FOIA processing by George W. Bush Presidential Library staff.

Records Management, White House Office of

Subject Files - FG052 (United States Court of Appeals)

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	11	7	11	3	11164	24027	12174	11964

Folder Title:

697240

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	Brett M. Kavanaugh, Nominee to the U.S. Court of Appeals...	2	05/08/2006	P5;

COLLECTION TITLE:
Records Management, White House Office of

SERIES:
Subject Files - FG052 (United States Court of Appeals)

FOLDER TITLE:
697240

FRC ID:
11164

RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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

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

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

Records Not Subject to FOIA

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

PARKER_D

697240

FG052

Barcode Scanning Sheet

Collection Code: **SECLOG**

Staff Name:

SCANNED BY ORM

Document Date: **5/8/2006**

Correspondent:

Subject/Description: **DRAFT FACT SHEET: BRETT M. KAVANAUGH: NOMINEE TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT**

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	Brett M. Kavanaugh, Nominee to the U.S. Court of Appeals...	2	05/08/2006	P5;

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

COLLECTION:
Records Management, White House Office of

SERIES:
Subject Files - FG052 (United States Court of Appeals)

FOLDER TITLE:
697240

FRC ID:
11164

OA Num.:
11964

NARA Num.:
12174

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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

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

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

Records Not Subject to FOIA

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

This Document was withdrawn on 7/5/2018 by erg

FOIA Marker

This is not a textual record. This FOIA Marker indicates that material has been removed during FOIA processing by George W. Bush Presidential Library staff.

Records Management, White House Office of

Subject Files - FG059 (Courts of the District of Columbia)

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	11	8	2	1	11166	24029	12178	11968

Folder Title:

687841

SAUNDERS_C

687841

FG059

Barcode Scanning Sheet

Collection Code: **SECLOG**

Staff Name: **PRESIDENT BUSH**

Document Date: **01/18/2006**

Correspondent: **HARRIET MIERS**

Subject/Description: **RENOMINATION OF BRETT M. KAVANAUGH, OF MARYLAND, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SCANNED BY ORM

THE WHITE HOUSE

WASHINGTON

January 18, 2006

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE EXECUTIVE CLERK

FROM: HARRIET MIERS

SUBJECT: JUDICIAL NOMINATION

Attached for your approval and signature is the renomination of the following individual:

Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

You approved this nomination on May 16, 2003.

All necessary clearances have been completed.

Nominated: 1/25/06

Noted
Wash. 6

The White House,

JAN 2 5 2006

To the

Senate of the United States.

I nominate Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

GEORGE W. BUSH

Office of the Attorney General

Washington, D.C.

January 3, 2005

Dear Mr. President:

It is an honor to enclose the nomination of Brett M. Kavanaugh, of Maryland, to be a United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

Mr. Kavanaugh was born February 12, 1965, in the District of Columbia, and is married. He received a B.A. degree, *cum laude,* in 1987 from Yale College and a J.D. degree in 1990 from Yale Law School. He was admitted to the Maryland State Bar in 1990 and the District of Columbia Bar in 1992.

Since 2003, Mr. Kavanaugh has served as Assistant to the President and Staff Secretary and previously served as an Associate Counsel, 2001-2003, and Senior Associate Counsel, 2003. Prior to this service, he was a partner with Kirkland & Ellis, 1997-1998, 1999-2001; an Associate Counsel with the Office of Independent Counsel Kenneth W. Starr, 1994-1997, 1998; a law clerk to the Honorable Anthony M. Kennedy of the Supreme Court of the United States, 1993-1994; an attorney with the Office of the Solicitor General, United States Department of Justice, 1992-1993; a summer associate with Munger Tolles & Olson, 1992; a law clerk to the Honorable Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, 1991-1992; a law clerk to the Honorable Walter K. Stapleton of the United States Court of Appeals for the Third Circuit, 1990-1991; and a summer associate with Williams & Connolly, 1990.

Mr. Kavanaugh has an excellent reputation as to character and integrity, possesses judicial temperament and is, I believe, worthy of appointment as a United States Circuit Judge.

I recommend that he be nominated.

Respectfully,

/s/ Alberto Gonzales

Alberto R. Gonzales
Attorney General

The President
The White House

Brett M. Kavanaugh

Birth:	February 12, 1965	Washington, D.C.
Legal Residence:	District of Columbia	
Marital Status:	Married	Ashley Estes Kavanaugh
Education:	1983 - 1987	Yale College B.A. degree, *cum laude*
	1987 - 1990	Yale Law School J.D. degree
Bar:	1990 1992	Maryland District of Columbia
Experience:	1990	Williams & Connolly Summer Associate
	1990 - 1991	Law Clerk to the Honorable Walter K. Stapleton United States Court of Appeals for the Third Circuit
	1991 - 1992	Law Clerk to the Honorable Alex Kozinski United States Court of Appeals for the Ninth Circuit
	1992	Munger Tolles & Olson Summer Associate
	1992 - 1993	United States Department of Justice Office of the Solicitor General Attorney
	1993 - 1994	Law Clerk to the Honorable Anthony M. Kennedy Supreme Court of the United States
	1994 - 1997 1998	Office of Independent Counsel Kenneth W. Starr Associate Counsel
	1997 - 1998 1999 - 2001	Kirkland & Ellis Partner
	2001 - present	Associate Counsel to the President, 2001 -2003 Senior Associate Counsel to the President, 2003 Assistant to the President and Staff Secretary, 2003-present
Office:	Eisenhower Executive Office Building Washington, D.C. 20502 202-456-2702	

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

Brett M. Kavanaugh

Birth:	February 12, 1965	Washington, D.C.
Legal Residence:	District of Columbia	
Marital Status:	Married	Ashley Estes Kavanaugh
Education:	1983 - 1987	Yale College B.A. degree, *cum laude*
	1987 - 1990	Yale Law School J.D. degree
Bar:	1990 1992	Maryland District of Columbia
Experience:	1990	Williams & Connolly Summer Associate
	1990 - 1991	Law Clerk to the Honorable Walter K. Stapleton United States Court of Appeals for the Third Circuit
	1991 - 1992	Law Clerk to the Honorable Alex Kozinski United States Court of Appeals for the Ninth Circuit
	1992	Munger Tolles & Olson Summer Associate
	1992 - 1993	United States Department of Justice Office of the Solicitor General Attorney
	1993 - 1994	Law Clerk to the Honorable Anthony M. Kennedy Supreme Court of the United States
	1994 - 1997 1998	Office of Independent Counsel Kenneth W. Starr Associate Counsel
	1997 - 1998 1999 - 2001	Kirkland & Ellis Partner
	2001 - present	Associate Counsel to the President, 2001 -2003 Senior Associate Counsel to the President, 2003 Assistant to the President and Staff Secretary, 2003-present

Office:	Eisenhower Executive Office Building Washington, D.C. 20502 202-456-2702
Home:	3633 M Street Washington, D.C. 20007 301-951-8956
Ethnic Group:	Caucasian
Salary:	$175,100

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

Office of the Attorney General

Washington, D.C.

January 3, 2005

Dear Mr. President:

It is an honor to enclose the nomination of Brett M. Kavanaugh, of Maryland, to be a United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

Mr. Kavanaugh was born February 12, 1965, in the District of Columbia, and is married. He received a B.A. degree, *cum laude,* in 1987 from Yale College and a J.D. degree in 1990 from Yale Law School. He was admitted to the Maryland State Bar in 1990 and the District of Columbia Bar in 1992.

Since 2003, Mr. Kavanaugh has served as Assistant to the President and Staff Secretary and previously served as an Associate Counsel, 2001-2003, and Senior Associate Counsel, 2003. Prior to this service, he was a partner with Kirkland & Ellis, 1997-1998, 1999-2001; an Associate Counsel with the Office of Independent Counsel Kenneth W. Starr, 1994-1997, 1998; a law clerk to the Honorable Anthony M. Kennedy of the Supreme Court of the United States, 1993-1994; an attorney with the Office of the Solicitor General, United States Department of Justice, 1992-1993; a summer associate with Munger Tolles & Olson, 1992; a law clerk to the Honorable Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, 1991-1992; a law clerk to the Honorable Walter K. Stapleton of the United States Court of Appeals for the Third Circuit, 1990-1991; and a summer associate with Williams & Connolly, 1990.

Mr. Kavanaugh has an excellent reputation as to character and integrity, possesses judicial temperament and is, I believe, worthy of appointment as a United States Circuit Judge.

I recommend that he be nominated.

Respectfully,

/s/ A. Gonzales

Alberto R. Gonzales
Attorney General

The President
The White House

The White House,

To the

Senate of the United States.

I nominate Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired.

Office of the Attorney General
Washington, D.C.

January 3, 2005

Dear Mr. President:

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I recommend that he be nominated.

Respectfully,

/s/ A. Gonzales

Alberto R. Gonzales
Attorney General

The President
The White House

Brett M. Kavanaugh

Birth:	February 12, 1965	Washington, D.C.
Legal Residence:	District of Columbia	
Marital Status:	Married	Ashley Estes Kavanaugh
Education:	1983 - 1987	Yale College B.A. degree, *cum laude*
	1987 - 1990	Yale Law School J.D. degree
Bar:	1990 1992	Maryland District of Columbia
Experience:	1990	Williams & Connolly Summer Associate
	1990 - 1991	Law Clerk to the Honorable Walter K. Stapleton United States Court of Appeals for the Third Circuit
	1991 - 1992	Law Clerk to the Honorable Alex Kozinski United States Court of Appeals for the Ninth Circuit
	1992	Munger Tolles & Olson Summer Associate
	1992 - 1993	United States Department of Justice Office of the Solicitor General Attorney
	1993 - 1994	Law Clerk to the Honorable Anthony M. Kennedy Supreme Court of the United States
	1994 - 1997 1998	Office of Independent Counsel Kenneth W. Starr Associate Counsel
	1997 - 1998 1999 - 2001	Kirkland & Ellis Partner
	2001 - present	Associate Counsel to the President, 2001 -2003 Senior Associate Counsel to the President, 2003 Assistant to the President and Staff Secretary, 2003-present
Office:	Eisenhower Executive Office Building Washington, D.C. 20502 202-456-2702	

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

Brett M. Kavanaugh

Birth:	February 12, 1965	Washington, D.C.
Legal Residence:	District of Columbia	
Marital Status:	Married	Ashley Estes Kavanaugh
Education:	1983 - 1987	Yale College B.A. degree, *cum laude*
	1987 - 1990	Yale Law School J.D. degree
Bar:	1990 1992	Maryland District of Columbia
Experience:	1990	Williams & Connolly Summer Associate
	1990 - 1991	Law Clerk to the Honorable Walter K. Stapleton United States Court of Appeals for the Third Circuit
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	1994 - 1997 1998	Office of Independent Counsel Kenneth W. Starr Associate Counsel
	1997 - 1998 1999 - 2001	Kirkland & Ellis Partner
	2001 - present	Associate Counsel to the President, 2001 -2003 Senior Associate Counsel to the President, 2003 Assistant to the President and Staff Secretary, 2003-present

Office: Eisenhower Executive Office Building
Washington, D.C. 20502
202-456-2702

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

Ethnic Group: Caucasian

Salary: $175,100

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

The White House,

To the

Senate of the United States.

I nominate Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Colubmia Circuit, vice Laurence H. Silberman, retired.

McCathran, William W.

From: McCathran, William W.
Sent: Tuesday, January 24, 2006 5:19 PM
To: Courtwright, Susan M.
Cc: Saunders, G. Timothy; Kalbaugh, David E.
Subject: RE: Tomorrow's Judicial Nominations

Susan,

As you know, only nominations up to S. Pamela Gray have been signed by the President.

Are you going to bring us paper on Bryant down tonight or tomorrow?

-----Original Message-----
From: Courtwright, Susan M.
Sent: Tuesday, January 24, 2006 5:14 PM
To: Miers, Harriet; Kelley, William K.; Brown, Jamie E.; Friedrich, Dabney; Healy, Erin E.; Goeglein, Tim; Taylor, Sara M.; Jennings, Jeffery S.; Carroll, Carlton F.; Rao, Neomi J.; Brosnahan, Jennifer R.; Hoyt, Robert F.; Gerry, Brett C.; Dixton, Grant; Saunders, G. Timothy; Kalbaugh, David E.; McCathran, William W.
Cc: Roebke, Heather M.; Persinger, John M.; Drummond, Michael
Subject: Tomorrow's Judicial Nominations

Tomorrow's Judicial Nominations

The President intends to nominate the following individuals tomorrow:

Brett M. Kavanaugh, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Laurence H. Silberman, retired. *(Renomination)*

Renee Marie Bumb, of New Jersey, to be United States District Judge for the District of New Jersey, vice William H. Walls, retired.

Noel Lawrence Hillman, of New Jersey, to be United States District Judge for the District of New Jersey, vice William G. Bassler, retired.

Susan Davis Wigenton, of New Jersey, to be United States District Judge for the District of New Jersey, vice John W. Bissell, retired.

S. Pamela Gray, of the District of Columbia, to be Judge on the Superior Court of the District of Columbia, vice Susan R. Holmes Winfield.

Vanessa Lynne Bryant, of Connecticut, to be United States District Judge for the District of Connecticut, vice Dominic J. Squatrito, retired.

Michael A. Chagares, of New Jersey, to be United States Circuit Judge for the Third Circuit, vice Michael Chertoff, resigned.

Brian M. Cogan, of New York, to be United States District Judge for the Eastern District of New York, vice Frederic Block, retired.

Thomas M. Golden, of Pennsylvania, to be United States District Judge for the Eastern

District of Pennsylvania, vice Franklin Van Antwerpen, elevated.

Andrew J. Guilford, of California, to be United States District Judge for the Central District of California, vice Dickran Tevrizian, retired.

Gray Hampton Miller, of Texas, to be United States District Judge for the Southern District of Texas, vice Ewing Werlein, Jr., retired.

Please let me know if you have any questions.

Regards,
Susan Courtwright
White House Counsel's Office
202-456-5049

Ok.

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Staff Name: **PRESIDENT BUSH**

Document Date: **05/26/2006**

Correspondent:

Subject/Description: **GEORGE W. BUSH CONFIRMATIONS FOR MAY 26 06: -- BRETT M. KAVANAUGH -- UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CONFIRMATIONS ON 5/26/2006
(By Last Name)
1 Records Processed

Name	Title	Nominated	Confirmed	Appointed
KAVANAUGH, Brett M.	United States Circuit Judge for the District of Columbia Circuit	01/25/2006	05/26/2006	

Appointed: 5/30/06

Noted: WHM-C

McCathran, William W.

From: White House Communications [WhiteHouseCommunications@whitehouse.gov]
Sent: Monday, May 08, 2006 5:35 PM
To: McCathran, William W.
Subject: FACT SHEET: Brett M. Kavanaugh: Nominee To The U.S. Court Of Appeals For The D.C. Circuit
Attachments: 5.8.06 Kavanaugh Fact Sheet.pdf

Brett M. Kavanaugh
Nominee To The U.S. Court Of Appeals For The D.C. Circuit

Throughout His Career, Brett M. Kavanaugh Has Demonstrated Legal Excellence And The Fair-Minded Temperament To Serve As A Federal Appellate Judge. Kavanaugh has an extraordinary range of experience in the public and private sectors. He has dedicated the majority of his 16 years of practice to public service as an appellate lawyer, a government lawyer, and an Assistant to the President.

Brett M. Kavanaugh Is Superbly Qualified For The D.C. Circuit

Kavanaugh Now Serves As Assistant To The President And Staff Secretary. He is responsible for coordinating virtually all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on numerous constitutional, legal, and ethical issues.

Prior To His Service In This Administration, Kavanaugh Was A Partner At The Law Firm Of Kirkland & Ellis, Where His Practice Focused On Appellate Matters. Kavanaugh also served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of difficult constitutional issues presented during that investigation. Kavanaugh specialized in appellate law and has extensive experience in the Federal appellate courts, both as a law clerk and as counsel. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appellate courts throughout the country.

Kavanaugh Clerked For U.S. Supreme Court Justice Anthony Kennedy, As Well As Judge Alex Kozinski Of The Ninth Circuit And Judge Walter Stapleton Of The Third Circuit. Prior to his Supreme Court clerkship, Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

The American Bar Association (ABA) Has Consistently Rated Kavanaugh "Well Qualified" Or "Qualified" To Serve On The D.C. Circuit. The ABA has rated Brett Kavanaugh qualified to serve on the D.C. Circuit on three separate occasions. In other words, 42 out of 42 ABA individual ratings found that Mr. Kavanaugh is either Well Qualified or Qualified to serve on the D.C. Circuit. And the majority of those 42 raters found Mr. Kavanaugh to be Well Qualified to serve on the D.C. Circuit.

Kavanaugh Has Impeccable Academic Credentials. He received his B.A. cum laude from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the *Yale Law Journal*.

Kavanaugh Has Offered His Legal Expertise And Personal Time To Serving His Community. While in private practice, Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in

Montgomery County, Maryland, against the attempt to stop construction of a synagogue in the county. Kavanaugh also represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba.

People From Across The Political Spectrum Support Brett M. Kavanaugh's Nomination To The D.C. Circuit

Bipartisan Group Of Former U.S. Attorneys General: "Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... We believe that Mr. Kavanaugh possesses each characteristic of an outstanding nominee to the U.S. Court of Appeals for the D.C. Circuit, including academic and professional credentials and integrity." (William P. Barr On Behalf Of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft, Letter To Sen. Arlen Specter (R-PA), 5/5/06)

Bipartisan Group Of Kavanaugh's Classmates From The Yale Law School Class Of 1990: "We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, honesty, good sense, and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals for the District of Columbia Circuit." (Bipartisan Group Of Brett Kavanaugh's Classmates From The Yale Law School Class Of 1990, Letter To Sen. Arlen Specter (R-PA) And Sen. Patrick Leahy (D-VT), 5/3/06)

Former U.S. Solicitors General Theodore Olson, Kenneth Starr, And Charles Fried: "Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity." (Theodore B. Olson On Behalf Of Kenneth W. Starr and Charles Fried, Letter To Sen. Arlen Specter (R-PA), 5/3/06)

Judge Walter K. Stapleton, U.S. Court Of Appeals For The Third Circuit: "In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals." (Judge Walter K. Stapleton, Letter To Sen. Arlen Specter (R-PA), 5/3/06)

Former Counsels And Deputy Counsels To The President: "In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytic skills." (Fred F. Fielding On Behalf Of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens, Letter To Sen. Arlen Specter (R-PA), 5/5/06)

Mark H. Tuohey, III, Former President Of The District Of Columbia Bar: "[Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner." (Mark H. Tuohey, III, Letter To Sen. Orrin Hatch (R-UT), 4/26/04)

Pamela Harris, Washington, D.C., Attorney And Yale Law School Class Of 1990: "... Brett stands out as someone who refuses to personalize policy disagreements. ... His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (Pamela Harris, Letter To Sen. Orrin Hatch (R-UT), 4/27/04)

Editorial On Brett M. Kavanaugh's Nomination To The D.C. Circuit

***The Wall Street Journal*: In A "Rational World," Kavanaugh "Wouldn't Be Considered Anything Close To Controversial Enough" To Merit A Filibuster.** "Anything is possible, but it's hard to believe Democrats are nuts enough to launch a judicial filibuster in the middle of an election year with a GOP President so low in the polls. Talk

about a get-out-the-vote gift for Republicans. ... In a rational world, he wouldn't be considered anything close to controversial enough to trigger that accord's 'extraordinary circumstances' exception." (Editorial, "The Next Filibuster?" *The Wall Street Journal*, 5/4/06)

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McCathran, William W.

From: White House Communications [WhiteHouseCommunications@WhiteHouse.Gov]
Sent: Monday, May 08, 2006 8:02 PM
To: McCathran, William W.
Subject: SETTING THE RECORD STRAIGHT: The ABA Finds Brett Kavanaugh Is "Indeed Qualified To Serve On The Federal Bench"
Attachments: 5.8.06 Kavanaugh.pdf

Setting The Record Straight:

The ABA Finds Brett Kavanaugh Is "Indeed Qualified To Serve On The Federal Bench"

"In 42 votes cast in the three ABA reviews, all 42 found Mr. Kavanaugh to be well qualified or qualified to serve on the DC Circuit. The ABA itself says that even the lowest of the three ratings is, in its words, 'a very high standard.'"

–White House Deputy Press Secretary Dana Perino
May 8, 2006

***The Associated Press*: "ABA Downgrades Rating For White House Aide From Well-Qualified To Qualified."**
(Laurie Kellman, "ABA Downgrades Rating For White House Aide From Well-Qualified To Qualified," *The Associated Press*, 5/8/06)

But According To ABA Review Panel Chairman Stephen Tober, Kavanaugh Is "Indeed Qualified To Serve On The Federal Bench." TOBER: "This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. ... A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the federal bench." (Stephen L. Tober, Committee On The Judiciary, U.S. Senate, Testimony, 5/8/06)

Tober Himself Notes That "There Is No Bright-Line Litmus Test As To Whether A Nominee Is 'Well Qualified' Or 'Qualified.'" TOBER: "It is, at its most basic, the difference between the 'highest standard' and a 'very high standard.'" (Stephen L. Tober, Committee On The Judiciary, U.S. Senate, Testimony, 5/8/06)

According To The ABA's "Backgrounder," A "Qualified" Rating Means The Committee Believes A Nominee Will Be Able To Perform "All Duties And Responsibilities" Of A Federal Judge. TOBER: "The Backgrounder also makes clear that '(t)he rating of 'Qualified' means that the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge.'" (Stephen L. Tober, Committee On The Judiciary, U.S. Senate, Testimony, 5/8/06)

Sen. Arlen Specter (R-PA): "[The ABA Rating Is] Just A Shading. ... He's Got A Very Strong Record."
(Laurie Kellman, "ABA Downgrades Rating For White House Aide From Well-Qualified To Qualified," *The Associated Press*, 5/8/06)

Brett M. Kavanaugh Is Superbly Qualified For The D.C. Circuit

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McCathran, William W.

From: White House Communications [WhiteHouseCommunications@whitehouse.gov]
Sent: Wednesday, May 10, 2006 5:39 PM
To: McCathran, William W.
Subject: WHAT THEY'RE SAYING: Brett Kavanaugh's Nomination To The U.S. Court Of Appeals For The D.C. Circuit

What They're Saying ...

Brett Kavanaugh's Nomination To The U.S. Court Of Appeals For The D.C. Circuit

"It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. ...I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit."
–Neal Katyal, Georgetown University Law Center Professor, Former Attorney To Vice President Gore, And Former Clinton Administration Official, Letter To Sen. Arlen Specter (R-PA), 5/9/06

Professor Neal Katyal On Brett Kavanaugh's Nomination

Katyal: Kavanaugh "Would Be A Welcome, Terrific Addition To The United States Court Of Appeals." "I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a pro bono case in which I am lead counsel, Hamdan v. Rumsfeld (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you. Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals." (Neal Katyal, Letter To Sen. Arlen Specter (R-PA), 5/9/06)

- **Katyal: "This Is An Entirely Unsolicited Letter."** "This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination." (Neal Katyal, Letter To Sen. Arlen Specter (R-PA), 5/9/06)

Media Reports And Editorials On Brett Kavanaugh's Nomination

***Congress Daily*: "Kavanaugh Breezes Through 2nd Judicial Nomination Hearing."** "An unruffled Brett Kavanaugh weathered a barrage of critical Democratic questions Tuesday and pledged to be nonpartisan if confirmed as a judge on U.S. Circuit Court of Appeals for the District of Columbia." (Michael Posner, "Kavanaugh Breezes Through 2nd Judicial Nomination Hearing," *Congress Daily*, 5/10/06)

***The Washington Post*: Kavanaugh "Does Not Appear To Be An Ideologue."** "Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that

court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale Of Two Judges," *The Washington Post*, 5/9/06)

***National Review's* Edward Whelan: Kavanaugh "Has A Remarkable Breadth Of Experience That Few Judicial Nominees Could Match."** (Edward Whelan, Op-Ed, "A Public Disservice," *National Review*, 5/3/06)

***The Wall Street Journal*: In A "Rational World," Kavanaugh "Wouldn't Be Considered Anything Close To Controversial Enough" To Merit A Filibuster.** "In a rational world, he wouldn't be considered anything close to controversial enough to trigger that accord's 'extraordinary circumstances' exception." (Editorial, "The Next Filibuster?" *The Wall Street Journal*, 5/4/06)

***The Washington Times*: "After Nearly Three Long Years Since He Was First Nominated, Mr. Kavanaugh Should Finally Get His Long-Deserved Vote On The Senate Floor."** "After Senate Judiciary Committee Chairman Arlen Specter received a letter from the seven Democratic members of the 'Gang of 14' promising not to support a filibuster against Mr. Kavanaugh's nomination if he appeared before the committee a second time, the chairman scheduled today's hearing. A committee vote could come Thursday. Before the Memorial Day recess, after nearly three long years since he was first nominated, Mr. Kavanaugh should finally get his long-deserved vote on the Senate floor." (Editorial, "The Kavanaugh Hearing," *The Washington Times*, 5/9/06)

Senators On Brett Kavanaugh's Nomination

Sen. Majority Leader Bill Frist (R-TN): Kavanaugh's "Forthcoming And Candid Responses Before The Senate Judiciary Committee [On Tuesday] Further Confirm That He Will Be The Kind Of Fair And Independent Judge America Expects In Its Courtrooms." (David G. Savage, "Bench Nominee Denies Role In Controversies," *Los Angeles Times*, 5/10/06)

Sen. Orrin Hatch (R-UT): Kavanaugh "Merits Our Support And When Confirmed Will Serve The Public Well As A Fair And Impartial Jurist." "I have confidence that Mr. Kavanaugh will again today demonstrate his deep understanding and knowledge of the law. I expect that he will once again display his intellect, sound judgment and judicial temperament. I have no doubt that [he] fully appreciates the proper role and limitations placed on federal appellate judges in our constitutional system. ... I only hope that we focus on the qualifications and character of the nominee we have before us today. If we do that, I have no doubt that Brett Kavanaugh merits our support and when confirmed will serve the public well as a fair and impartial jurist." (Sen. Orrin Hatch (R-UT), "Sen. Hatch Comments On Kavanaugh's Nomination," Press Release, 5/9/06)

Sen. John Cornyn (R-TX): Kavanaugh "Is An Outstanding Nominee And Someone Who I Think Should Be Confirmed To The District Of Columbia Circuit Court Of Appeals." (Sen. John Cornyn (R-TX), Media Availability, 5/9/06)

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McCathran, William W.

From: bounce-232942-254308@list.whitehouse.gov on behalf of White House Press Releases [Press.Releases@WhiteHouse.Gov]
Sent: Friday, May 26, 2006 10:05 AM
To: McCathran, William W.
Subject: STATEMENT BY THE PRESIDENT

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release May 26, 2006

STATEMENT BY THE PRESIDENT

I applaud the Senate's vote to confirm Brett Kavanaugh to the U.S. Court of Appeals for the District of Columbia Circuit. Brett Kavanaugh is superbly qualified for the Court of Appeals and will be a brilliant, thoughtful, and fair-minded judge. I appreciate his distinguished service in the Executive Branch for the last five years, as Associate Counsel and then Senior Associate Counsel to the President, and since July 2003 in the vital role of Staff Secretary. I congratulate Brett and his family on today's confirmation and thank him for his continued service to the law and our Nation.

# # #

McCathran, William W.

From: bounce-235618-254308@list.whitehouse.gov on behalf of White House Press Releases [Press.Releases@WhiteHouse.Gov]

Sent: Thursday, June 01, 2006 2:35 PM

To: McCathran, William W.

Subject: CORRECTED: REMARKS BY THE PRESIDENT IN SWEARING-IN CEREMONY FOR BRETT KAVANAUGH TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release June 1, 2006

REMARKS BY THE PRESIDENT
IN SWEARING-IN CEREMONY FOR BRETT KAVANAUGH
TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Rose Garden

1:06 P.M. EDT

THE PRESIDENT: Please be seated. Thanks for coming. Welcome to the Rose Garden where, in a few moments, Brett Kavanaugh will be sworn in as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Today, a court that is often considered the second-highest in our land gains a brilliant and talented new member. The staff of the White House celebrates a friend they admire and a colleague they will miss. I congratulate a good man and a fine public servant on a job well done.

I'm especially pleased to be with Brett's wife, Ashley -- (laughter) -- whose face I know well and whose marriage was the first lifetime appointment I arranged for Brett. (Laughter and applause.)

We welcome Brett's parents, Martha and Ed, and his mother-in-law and father-in-law, Nancy and John Estes from Abilene, Texas.

I welcome the star of Brett's most recent televised hearing, Margaret Murphy Kavanaugh. (Laughter.) Margaret has his mother's -- has her mother's good looks, and her dad's preference for hearings that do not last too long. (Laughter.)

We're honored this afternoon by the presence of Justice Anthony Kennedy who hired Brett as a law clerk more than a decade ago. He now welcomes him as a fellow judge. And I'm also pleased that Mary Kennedy is with us today. Thanks for coming.

The Vice President has joined us. Mr. Vice President, welcome. Appreciate Al -- Attorney General Al Gonzales for being here. And former Attorney General John Ashcroft is with us, as well. I want to extend a warm welcome to Brett's new colleagues on the D.C. Court of Appeals. Thank you all for coming.

The power to nominate judges is one of the most serious responsibilities the Constitution gives the President. Our founders thought carefully about the role they wanted judges to play in the American Republic. They decided on a court system that would be free of political and public pressure with judges who are prudent in exercising judicial power and firm in defending judicial independence.

When a President chooses a judge, he owes it to the Constitution and to the country to choose with care, and I have done so in choosing Brett Kavanaugh. I chose Brett because of the force of his mind, his breadth of experience, and the strength of his character.

Brett grew up in Maryland. In high school, he distinguished himself both in academics and athletics. He graduated from Yale with honors. What did that feel like? (Laughter.) He stayed at Yale to earn his law degree. Brett was an editor of the Yale Law Review, and impressed all around him with his mastery of the law and his strong work ethic.

After Yale, he embarked on a law career that has spanned judicial -- on a career that has spanned the judicial branch, the executive branch, and the private sector. He clerked for Judges Walter Stapleton and Alex Kozinski on the federal appellate courts, and for Justice Kennedy on the Supreme Court. He served in the Solicitor General's Office and in the Office of the Independent Council. He was a partner in a leading national law firm. For the past five years, he has served in the White House as Associate Counsel, a senior Associate Counsel, and as Staff Secretary.

Over his career, he's argued cases before the Supreme Court, appellate courts, and trial courts. He has given his time and talent to provide legal services for those in need. He's earned a reputation for integrity and independence. Brett's abilities and professionalism have been recognized by members of both political parties. After I nominated Brett, a bipartisan group of his law school classmates wrote a letter of support saying Brett would bring credit to the distinguished court to which he has been nominated.

Brett's nomination also earned the backing of many leaders of the Bar, including former attorney generals of both parties. And in three separate evaluations by the American Bar Association, all 42 reviewers rated him as well qualified or qualified to serve on the federal bench.

In the history of the D.C. Circuit, no judge has undergone a more thorough and rigorous confirmation process. And all who watched this process saw what I know: That he's a man of fairness, humility, and a reverence for the laws and the Constitution of our country.

Brett Kavanaugh is one of the many highly qualified men and women I've nominated to the federal courts. These nominees come from many different backgrounds, and they bring different experiences to the bench. Yet they all have met the same high standards of legal ability, temperament and judgment. I'll continue to fulfill my responsibility to nominate men and women of character and integrity who administer the law and not legislate from the bench. And I call upon the United States Senate to meet its responsibility to give every nominee a fair hearing and a timely up or down vote.

When Brett Kavanaugh takes his oath this afternoon, he will carry on a fine family tradition. His mother, Martha, was a public school teacher in the District of Columbia and went on to serve as a prosecutor and a state judge in Maryland. Martha instilled in her son a passion for service and raised him to be true to the motto of his Jesuit high school: "Men for others."

Throughout his life, Brett has used his many talents to serve others, and today he walks a new path of service: to administer justice equally, impartially, without fear or favor. Our nation is fortunate that Brett Kavanaugh has accepted these responsibilities, and I'm proud to stand with Brett as he takes his place as a judge on the D.C. Circuit Court of Appeals. And now I ask Justice Kennedy to administer the oath.

(The oath is administered.) (Applause.)

MR. KAVANAUGH: Mr. President, I am honored to have served you and the presidency for the last five-and-a-half years. Ashley and I leave with the deepest gratitude to you and to Mrs. Bush for the many personal courtesies you've extended to us over the years. I depart with the greatest respect for the presidency and for you.

I carry with me a wealth of experiences that I will never forget, lessons that I will never discard, and friends who I'll never lose. Sir, thank you for the privilege of working here, and thank you for the honor of nominating me to the Court.

I also appreciate the opportunity to have served under the Vice

President and under Chiefs of Staff Andy Card and Josh Bolten. The White House staff are dedicated public servants who have been good colleagues and good friends, and I'll miss working with all of you very much.

Many members of the administration worked very hard on my nomination. I appreciate former Attorney General Ashcroft for being here. Judge Gonzales was with me at the starting line, and he was right there with me at the finish line, and I'll always be I'll always be grateful to him. Harriet Miers, David Leitch, Bill Kelley, Dabney Friedrich and Kristi Macklin all spent a lot of long hours, and I thank them. And I thank all the colleagues and friends who have helped me along the way.

I appreciate the Senate, and particularly Senators Frist, McConnell, Specter and Hatch for all their efforts and their strong support.

I now join the judicial branch. Justice Kennedy, thank you for administering the oath, and thank you and Mrs. Kennedy for being here.

Thirty one years ago today, a young Anthony Kennedy took the oath to be a court of appeals judge. Since then he has taught all of his law clerks that the Constitution of the United States is a compact between generations that must be preserved and revered and cherished and passed on. I feel that lesson very powerfully today. And I assume my new responsibilities with humility.

I clerked for two exceptional court of appeals judges, Alex Kozinksi and Walter Stapleton, and I'll try to live up to their model of independence and integrity. I've benefited as a lawyer and as a person from my work for Judge Starr, who has always combined devotion to the rule of law with great personal decency. Chief Judge Ginsburg and distinguished judges of the D.C. Circuit, I am honored to have the opportunity to serve with each one of you. And I'm proud to be filling the seat that was held by Judge Laurence Silberman, who continues his extraordinary service to country and to law.

In the Kavanaugh family, Judge Kavanaugh will always be my mom. My mom and dad have been married for 43 years. Almost as impressive, they have sat through two Senate confirmation hearings without changing their facial expressions. (Laughter.) I will continue to follow their lesson and to be a man for others.

Ashley and our little girl Margaret are a daily inspiration. Ashley, as the President noted, is from Abilene, Texas. For those of you who don't know much about Texas geography, it's about halfway between Dallas and Midland. Ashley's parents are here, and I thank them for coming. Ashley likes to remind me that true love, true love

is a Texas girl who is willing to marry a guy with a lifetime appointment in Washington, D.C. (Laughter.)

I revere the law, and I'll do my best every day to live up to the great trust that has been placed in me. I'll exercise the judicial power with modesty and restraint. I'll interpret the law as written. And at all times, I'll work to maintain the absolute independence of the judiciary, which, in my judgment, is the crown jewel of our constitutional democracy. Thank you all. (Applause.)

END 1:18 P.M. EDT

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Correspondent: **THE HONORABLE DAVID B. SENTELLE**

Subject/Description: **CONGRATULATIONS ON CELEBRATING 20 YEARS OF SERVICE AS A FEDERAL APPELLATE JUDGE.**

November 8, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia
Washington, D.C. 20001

Dear Judge Sentelle:

Congratulations on celebrating 20 years of service as a Federal Appellate Judge. This milestone is a tribute to your hard work and dedication.

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

GEORGE W. BUSH (A)

George W. Bush

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OPL
Counsel
Vetting E:11/10

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THE WHITE HOUSE

WASHINGTON

November 8, 2007

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THE WHITE HOUSE

WASHINGTON

Dear Friend:

I am pleased to enclose a message from President George W. Bush.

Please be aware that the White House has strict guidelines governing the use of presidential messages. The enclosed message may only be used for the specific date and purpose for which it was provided. Under no circumstances is the message to be altered, displayed in other media including the Internet, or used for recruiting, fundraising, annual reports, advertising, as an endorsement, or for any other purpose without written consent from the White House.

Thank you for your cooperation in adhering to these guidelines. If applicable, please forward a copy of any printed material where the message has been used to the Office of Presidential Messages at the White House, Washington, D.C. 20502.

Sincerely,

Darren K. Hipp
Special Assistant to the President
and Director of Presidential Correspondence

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WASHINGTON

November 1, 2007

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United States Court of Appeals
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Washington, D.C. 20001

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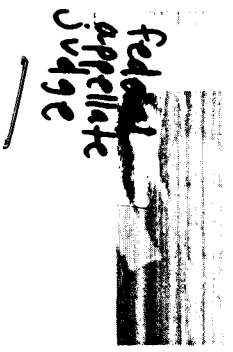
THE WHITE HOUSE

PRESIDENT GEORGE W. BUSH

Judge Brett M. Kavanaugh

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



Confirmed May 26, 2006

- Brett Kavanaugh was confirmed on May 26, 2006, as a Judge of the United States Court of Appeals for the District of Columbia Circuit. The DC Circuit hears appeals from the U.S. District Court for the District of Columbia, and reviews the decisions of a number of administrative agencies.
- Throughout his career as an appellate lawyer, a prosecutor, and an Assistant to the President, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.
- The American Bar Association (the Democrat's "gold-standard") rated Judge Kavanaugh "Well Qualified" to serve on the DC Circuit.
- Judge Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him uniquely qualified for the D.C. Circuit. He has dedicated the majority of his 15 years of practice to public service.
    - Prior to his appointment to the United States Court of Appeals, Judge Kavanaugh served as Assistant to the President and Staff Secretary. In that capacity, he was responsible for coordinating all documents to and from the President. Before that, he served for two years as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues handled by that office.
    - Prior to his service in this Administration, Judge Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.
    - Judge Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.
- Judge Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.
    - Judge Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.
    - Prior to his Supreme Court clerkship, Judge Kavanaugh earned a prestigious one- year fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

RELATED ITEMS

June 1, 2006
President Announces Ceremony for Swearing-In of U.S. Court of Appeals at Columbia

May 26, 2006
President's Statement on Confirmation of Nominee to the U.S. Court of Appeals

May 8, 2006
Setting the Record Straight: Brett Kavanaugh Qualified to Serve on Bench

May 8, 2006
Fact Sheet: Brett M. Kavanaugh Nominated to the U.S. Court of Appeals for the D.C. Circuit

May 9, 2005
President's Statement on Nominations

February 14, 2003
Nominations Sent to Senate

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Nominations Sent to Senate

December 2, 2002
Statement on Judicial Nominations

July 25, 2002
Nominations Sent to Senate

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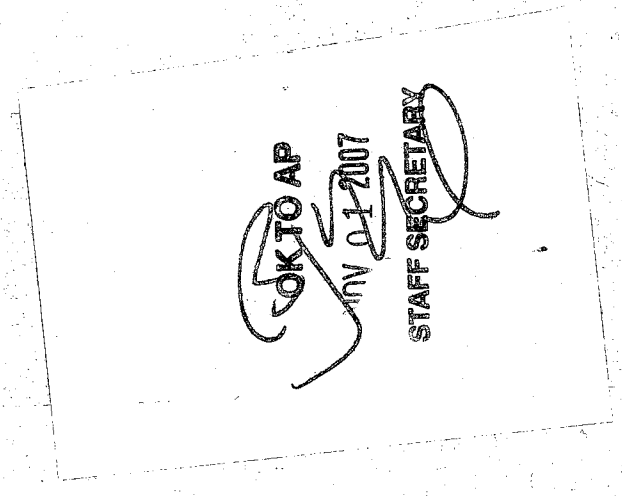
Enclosure

November 1, 2007



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PRESIDENTIAL MESSAGE

US Court of Appeals

Assigned:
Writer Oseng Date 10/11

Due:
For Edit 10/16 To Messages 10/18

IQ Outgoing ID 4977932
Instructions/Enclosures

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Approvals Needed

□Media Affairs	□Political Affairs
□NSC	X Public Liaison
□Legislative Affairs	□Domestic Policy
□Cabinet Affairs	□Vetting
□WHMO	X Other Counsel

COB THUR 10/25

Presidential Writers:
Deputy HCG 10/16 Director RLC 10/17

Director's Office:
Deputy KSW 10/17 Director

Final QC

OCT 18

October 15, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Sentelle:

Congratulations on celebrating 20 years of service to the American judiciary. This milestone is a tribute to your hard work and dedication.

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

George W. Bush

GWB/(>>)/dms (Corres. #4977932)
((>>))
cc: Daena Stanek, Pres. Corr., 9th FL/1800 G Street, N.W.
cc: Christine Warner, 9th FL/1800 G Street, N.W.
cc: Duke Hipp, Pres. Corr., 9th FL/1800 G Street, N.W.
(>>)

SENT TO:
(>>)

November 1, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia ~~Circuit~~
Washington, D.C. 20001

2 spaces

Dear Judge Sentelle:

Congratulations on celebrating 20 years of service to the American judiciary. This milestone is a tribute to your hard work and dedication.

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

George W. Bush
GWB/DS/RK/CW/DH/arb (Corres. #4977932)
(10.sentelle.msg.ds)
cc: Daena Stanek, Pres. Corr., 9th FL/1800 G Street, N.W.
cc: Christine Warner, 9th FL/1800 G Street, N.W.
cc: Duke Hipp, Pres. Corr., 9th FL/1800 G Street, N.W.
cc: John D. Adams, Counsel's Office, EEOB 156
*****DO NOT MAIL. RETURN TO JOHN D. ADAMS, EEOB 156, EXT. 6-3754*****

edits CBW 11/1

October 15, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Sentelle:

Congratulations on celebrating 20 years of service to the American judiciary. This milestone is a tribute to your hard work and dedication.

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

George W. Bush

GWB/(>>)/dms (Corres. #4977932)
((>>))

KSW
10/17

cc: Daena Stanek, Pres. Corr., 9th FL/1800 G Street, N.W.
cc: Christine Warner, 9th FL/1800 G Street, N.W.
cc: Duke Hipp, Pres. Corr., 9th FL/1800 G Street, N.W.
(>>)

SENT TO:
(>>)

October 15, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Sentelle:

Congratulations ~~as you~~ on celebrating 20 years of service to the American judiciary. This milestone is a tribute to your hard work and dedication.

RK 10/17

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes on this special occasion.

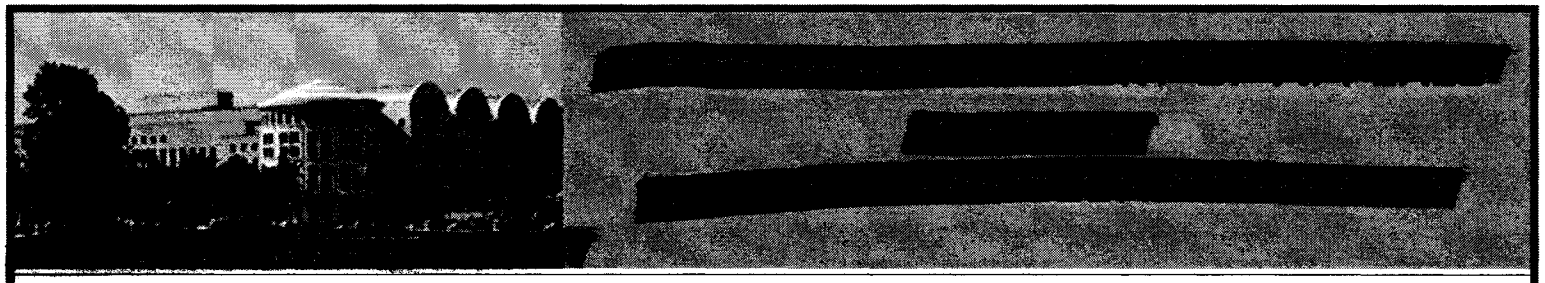
Sincerely,

George W. Bush

GWB/(>>)/dms (Corres. #4977932)
((>>))

cc: Daena Stanek, Pres. Corr., 9th FL/1800 G Street, N.W.
cc: Christine Warner, 9th FL/1800 G Street, N.W.
cc: Duke Hipp, Pres. Corr., 9th FL/1800 G Street, N.W.
(>>)

SENT TO:
(>>)



DAVID B. SENTELLE
(202) 216-7330

Judge Sentelle was appointed United States Circuit Judge in October 1987. He is a 1968 graduate of the University of North Carolina Law School. Following law school, he practiced with the firm of Uzzell & DuMont until he became an Assistant U.S. Attorney in Charlotte, N.C. in 1970. From 1974 to 1977, he served as a North Carolina State District Judge but left the bench in 1977 to become a partner with the firm of Tucker, Hicks, Sentelle, Moon & Hodge. In 1985, Judge Sentelle joined the U.S. District Court, Western District of North Carolina, in Asheville, where he served until his appointment to the D.C. Circuit. Judge Sentelle is the Presiding Judge of the Special Division for the Purpose of Appointing Independent Counsels (1992-present). Judge Sentelle serves as President of the Edward Bennett Williams Inn of the American Inns of Court. He also is chair of the U.S. Judicial Conference's Judicial Security Committee.

Courthouse Information | Resources & Contacts | Rules & Operating Procedures | Other Courts & Public Sites | Federal Judiciary Information
Employment | Site Map | Archived News & Announcements | Search | Contact Us

David B. Sentelle
US Court of
Courthouse (202?)

Sentelle, David Bryan

Born 1943 in Canton, NC

Federal Judicial Service:
Judge, U. S. District Court, Western District of North Carolina
Nominated by Ronald Reagan on July 25, 1985, to a seat vacated by Woodrow W. Jones;
Confirmed by the Senate on October 16, 1985, and received commission on October 17, 1985.
Service terminated on October 19, 1987, due to appointment to another judicial position.

Judge, U. S. Court of Appeals for District of Columbia Circuit
Nominated by Ronald Reagan on February 2, 1987, to a seat vacated by Antonin Scalia;
Confirmed by the Senate on September 9, 1987, and received commission on September 11, 1987.

Education:
University of North Carolina, B.A., 1965

University of North Carolina School of Law, J.D., 1968

Professional Career:
Private practice, Asheville, North Carolina, 1968-1970
Assistant U.S. attorney, Charlotte, North Carolina, 1970-1974
Judge, North Carolina General Courts of Justice, Charlotte, North Carolina, 1974-1977
Visiting professor, University of North Carolina, Charlotte, 1977
Private practice, Charlotte, North Carolina, 1977-1985
Visiting professor, University of North Carolina Chapel Hill, 1991-1992

Race or Ethnicity: White

Gender: Male

Oral History

October 6, 2006

The Honorable Joel F. Dubina
Judge
United States Court of Appeals
for the 11th Circuit
Montgomery, Alabama

Congratulations

Dear Judge Dubina:

Congratulations as you celebrate 20 years of dedicated service to the American judiciary. This milestone is a tribute to your hard work, and I am pleased to join your family, friends, clerks, and colleagues in honoring your achievements.

Freedom

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes on this special occasion.

Sincerely,

Thank you

George W. Bush

GWB/FF/BH/DH/ca (Corres. #4587859)
(9.dubina.j.fhf.doc)
cc: Freddy Ford, Pres. Corres., 9thFL/1800 G Street, N.W.
cc: Duke Hipp, Pres. Corres., 9thFL/1800 G Street, N.W.
cc: Betty Houser, Youth Responses, 9thFL/1800 G Street, N.W.
cc: Will Rue, PPO, 9thFL/1800 G Street, N.W.
cc: Bill Kelley, Counsel's Office, 2nd/FL, WW
SENT TO:
The Honorable Joel F. Dubina
Judge
United States Court of Appeals

Laura and I

for the 11th Circuit
United States Court House
1 Church Street
Montgomery Alabama 36104

February 2, 2006

The Honorable Patrick E. Higginbotham
Austin, Texas

Dear Judge:

Congratulations as you celebrate more than 30 years of service on the Federal bench. This milestone is a tribute to your hard work and dedication.

With enormous skill and integrity, you have helped guard our constitutional freedoms and protect our founding promise of equal justice under the law. Thank you for your many contributions to the judiciary. I appreciate your continued service to our great Nation.

Laura and I send our best wishes on this special occasion.

Sincerely,

George W. Bush

GWB/SG/RK/KB/MM/lcf-pp (Corres. #4286038)
(1.higginbotham.sg.msg)
cc: Sarah Greer, Pres. Corres., 9thFL/1800 G Street, N.W.
cc: Katye Balls, Pres. Messages, 9thFL/1800 G Street, N.W.
cc: Marguerite Murer, Pres. Corres., 9thFL/1800 G Street, N.W.
cc: Harriet Miers, WH Counsel, 2ndFL/WW

SENT TO:
The Honorable Patrick E. Higginbotham
United States Court of Appeals
for the Fifth Circuit
Room 400
903 San Jacinto Boulevard
Austin, Texas 78701

This milestone

With skill

PL104I JUDICIAL RETIREMENT

«letterdate»

«nameline»
«title»
«organization1»
«organization2»
«address1»
«address2»
«city», «statelong» «zip»

Dear «salutation2a»:

Congratulations on your retirement after «numberofyears» years of dedicated service.

Freedom and justice depend on fair and impartial judges. As a member of our Nation's judicial system, you play an important role in ensuring these rights for every American and maintaining the balance between individual freedom and civil order. I applaud your integrity, professionalism, and devotion.

Laura and I send our best wishes for an enjoyable retirement. May God bless you, and may God bless America.

Sincerely,

George W. Bush
GWB/MP/HMS/DT/«staff» (Corres. #«out_id»)
PL104I
«out_comments»

«SENDTO1»
«SENDTO2»
«SENDTO3»
«SENDTO4»

Released: 7/16/03
Updated 2/15/05
Updated 1/5/07

GEORGE W. BUSH CORRESPONDENCE
Office of Presidential Messages

Event: US Court of Appeals

Print Date: _____ Event Date: 11.10.07

Staff Request? (Yes)/No John D. Adams

Workflow 415683 Date Rec'd 10.4.07

♦♦♦

X ☐Assign to Writer _____

Due: 10/10 Dispatch by: _____

☐ROBO Message: _____

Due: _____ Dispatch by: _____

Vet with: ☐Jeff Berkowitz ☐Matt Smith

Vetting Due by: _____

Enclosures: _____

♦♦♦

☐Call for add'l info ☐Call for home address

☐Send GBA Photo ☐Send Inscribed Photo

☐Send to Agency: _____

☐Send to WH Office: _____

♦♦♦

☐REGRET ☐NRN

☐ Need 6 weeks Notice

☐ Cannot do message for fundraisers

☐ Better for State/Local Officials

☐ Delayed by the Mail

☐ Not milestone anniversary

☐ Event is outside the U.S.

☐ Unable to provide message at this time

♦♦♦

Note: DQ for all anniversaries of District Court Judges

♦♦♦

☐Talk with MM

Comments: _____

To Messages SLR CA 10/3

RECEIVED
Presidential Support
OCT 03 2007
Received in
OCT 04 2007
Presidential Messages

PRESIDENTIAL ACKNOWLEDGEMENT LETTER

STAFF REQUEST FORM

PLEASE MAKE SURE THAT ALL INFORMATION IS CORRECT AND COMPLETE
Staff may request *either* a letter *or* a photograph for any single occasion. *Thank You*

TODAY'S DATE: 10/03/2007 DATE OF EVENT: 11/10/2007

Request to: *Presidential Support*
Office of Presidential Correspondence
1800 G Street, 9th Floor
Ext. 6-5752
Fax: 6-5753

From: Name John D. Adams
Department Counsel's Office
Building EEOP Room 376-A
Ext. 6-3754
☐ cc copy is needed for requestor

EEOB 156 per web

A minimum of two weeks notice is required for processing. All requests are subject to final approval by the Director of Presidential Correspondence.

Mark ☒ in appropriate box and include any additional comments pertinent to the request in the "information" space below.

TYPE OF EVENT

BIRTH OF BABY
☐ to child
(child's full name & date of birth)
OR
☐ to parents
(parents' full name & child's full name)

☐ **BIRTHDAY**
(number of years)

☐ **GRADUATION**
(name of school & degree awarded)

☐ **ADOPTION**
(full name of parent(s) & child)

WEDDING
☐ processed prior to wedding
(full name of groom & full maiden name of bride, date of wedding)
OR
☐ processed after wedding
(full married names, date of wedding)

☐ **WEDDING ANNIVERSARY**
(number of years)

☐ **RETIREMENT**
(number of years; name of company or government agency)

☐ **CONDOLENCE**
(sent to next of kin only)

☐ **ILLNESS**
(type: surgery, accident, cancer, etc.)

☐ **RELIGIOUS OCCASIONS**
(event type: baptism, bar/bat mitzvah, etc.)

☒ **OTHER**
(please provide written request to be approved by the Director of Correspondence)

Information: See the attached proposed letter, congratulating Judge David Sentelle on 20 years of service.

Inside address for letter (complete address to appear on letter) ☐ Mr. ☐ Mrs. ☐ Miss ☐ Mr. & Mrs. ☐ Dr. ☐ Ms.

Name: The Honorable David B. Sentelle

Address: United States Court of Appeals for the District of Columbia Circuit

City/State/Zip Code: 333 Constitution Avenue, N.W.; Washington, D.C. 20001

Mailing address for label (if different from "inside address") ☐ Mr. ☐ Mrs. ☐ Miss ☐ Mr. & Mrs. ☐ Dr. ☐ Ms.

Name:

Address:

City/State/Zip Code:

☒ Do not mail HOLD for staff member pickup at 1800 G Street, 8th Floor
(the Office of Records Management will contact staff member when letter is ready)

Request

OFFICE OF COUNSEL TO THE PRESIDENT

FACSIMILE TRANSMITTAL SHEET

TO: OFFICE OF PRESIDENTIAL CORRESPONDENCE	**FROM: JOHN D. ADAMS**
AGENCY: OFFICE OF COUNSEL TO THE PRESIDENT	**DATE:** OCTOBER 2, 2007
FAX NUMBER:6-1103	**PHONE NUMBER:6-3754**
NUMBER PAGES: 3	**FAX NUMBER:**

COMMENTS:

I have never done one of these, so please feel free to let me know if I need to take another crack at it. Judge Sentelle's actual 20th anniversary is on October 19, 2007, but the dinner at which he will receive the proposed letter is not until November 11. 2007.

Confidentiality Notice

The document accompanying this telecopy transmission contains confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, or distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone to arrange for return of the original documents to us.

Dear Judge Sentelle,

It is fitting that we celebrate your 20 years of service as a United States Circuit Judge. In hundreds of written opinions, you have addressed important and complicated questions that go to the core of our legal system. In addition to your efforts as a Circuit Judge, I commend your additional service as Presiding Judge, Special Division of the Court for the Appointment of Independent Counsels, and Chairman of the Judicial Conference on Judicial Security. Through it all, you have demonstrated unwavering integrity, and you have been resolute in upholding the rule of law.

Of course, by the time of your appointment as a Circuit Judge twenty years ago, serving your fellow citizens was not new for you. Your four years of service as an Assistant United States Attorney in North Carolina, three years of service as a North Carolina State District Judge, and two years of service as a Federal District Judge for the Western District of North Carolina are also to be commended. It is not surprising that you have endeavored to pass along the wisdom you have gained over the years by teaching our young people at the University of North Carolina, Florida State, and George Mason University.

As you and I both know, the person serving in an official capacity is not the only one who sacrifices on behalf of the country. Your wife Jane, and your daughters Sharon, Reagan, and Rebecca, also have my thanks and appreciation for sharing you with the country.

I thank you for your faithful and dedicated service to our great Nation. Yours is a life well lived in the service of others.

Budds, Sarah A. 10/25

From: Budds, Sarah A.
Sent: Thursday, October 18, 2007 9:55 AM
To: Plack, John S.; Todd, Kathryn L.
Cc: Brady, Ryan D.; Warner, Christine B.; Walkenhorst, Katherine W.
Subject: Presidential Message Clearance Request: Honorable David B. Sentelle celebrating 20 years of service to the American judiciary

All:

Below please find the Presidential Draft Message for the **Honorable David B. Sentelle celebrating 20 years of service to the American judiciary.**

Please have the appropriate individual in your office review and send comments, edits, or approval **as soon as possible, but no later than 5pm Thursday, October 25th.**

If you have any questions regarding this message, please don't hesitate to contact me.

Thank you.

OK ✓ OPL
OK ✓ Counsel

--
Sarah Budds
Presidential Messages
The White House
202-456-5545 (tel.)
202-456-2806 (fax)
sbudds@who.eop.gov

DRAFT MESSAGE:

October 15, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Sentelle:

Congratulations on celebrating 20 years of service to the American judiciary. This milestone is a tribute to your hard work and dedication.

Freedom depends on fair and impartial judges. With skill and integrity, you have helped guard our constitutional liberties and protect our founding promise of equal justice under the law. Thank you for your contributions to our democracy. I appreciate your continued service to our great Nation.

Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

George W. Bush

Budds, Sarah A.

From: Plack, John S.
Sent: Thursday, October 18, 2007 6:18 PM
To: Budds, Sarah A.
Subject: RE: Presidential Message Clearance Request: Honorable David B. Sentelle celebrating 20 years of service to the American judiciary

Opl clears

From: Budds, Sarah A.
Sent: Thursday, October 18, 2007 9:55 AM
To: Plack, John S.; Todd, Kathryn L.
Cc: Brady, Ryan D.; Warner, Christine B.; Walkenhorst, Katherine W.
Subject: Presidential Message Clearance Request: Honorable David B. Sentelle celebrating 20 years of service to the American judiciary

All:

Below please find the Presidential Draft Message for the **Honorable David B. Sentelle celebrating 20 years of service to the American judiciary.**

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Thank you.

--
Sarah Budds
Presidential Messages
The White House
202-456-5545 (tel.)
202-456-2806 (fax)
sbudds@who.eop.gov

DRAFT MESSAGE:

October 15, 2007

The Honorable David B. Sentelle
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for the District of Columbia Circuit
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Dear Judge Sentelle:

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Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

George W. Bush

Budds, Sarah A.

From: Todd, Kathryn L.
Sent: Thursday, November 01, 2007 9:34 AM
To: Budds, Sarah A.
Cc: Brady, Ryan D.
Subject: RE: Presidential Message Clearance Request: Honorable David B. Sentelle celebrating 20 years of service to the American judiciary

No legal objection.

[redacted]

From: Budds, Sarah A.
Sent: Thursday, November 01, 2007 9:29 AM
To: Todd, Kathryn L.
Cc: Brady, Ryan D.
Subject: FW: Presidential Message Clearance Request: Honorable David B. Sentelle celebrating 20 years of service to the American judiciary

Good morning Kate & Ryan,

The vetting for the individual follows; please provide comments, edits, or approval for this message as soon as possible.
Thank you!

PRESIDENTIAL MESSAGE FOR JUDGE DAVID SENTELLE

Judge David B. Sentelle (Judge, US Federal Court of Appeals)

- ***No need to vet***

20 Years of Service to the US Court of Appeals by Judge David B. Sentelle

- Confirmed 20 Years
- No problematic news articles found.
  - Press is limited to various websites that state Sentelle was appointed to the Court in 1987.

Sarah Budds
Presidential Messages
The White House
202-456-5545 (tel.)
202-456-2806 (fax)
sbudds@who.eop.gov

From: Budds, Sarah A.
Sent: Thursday, October 18, 2007 9:55 AM
To: Plack, John S.; Todd, Kathryn L.
Cc: Brady, Ryan D.; Warner, Christine B.; Walkenhorst, Katherine W.
Subject: Presidential Message Clearance Request: Honorable David B. Sentelle celebrating 20 years of service to the American judiciary

All:

Below please find the Presidential Draft Message for the **Honorable David B. Sentelle celebrating 20 years of**

service to the American judiciary.

Please have the appropriate individual in your office review and send comments, edits, or approval **as soon as possible, but no later than 5pm Thursday, October 25th.**

If you have any questions regarding this message, please don't hesitate to contact me.

Thank you.

--

Sarah Budds
Presidential Messages
The White House
202-456-5545 (tel.)
202-456-2806 (fax)
sbudds@who.eop.gov

DRAFT MESSAGE:

October 15, 2007

The Honorable David B. Sentelle
United States Court of Appeals
for the District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Sentelle:

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Laura and I send our best wishes to you and your family on this special occasion.

Sincerely,

George W. Bush

GEORGE W. BUSH CORRESPONDENCE
Office of Presidential Messages

Event: US Court of Appeals
Print Date: _____ Event Date: 11.10.07
Staff Request? (Yes)/No John D Adams
Workflow 415683 Date Rec'd 10.4.07

♦♦♦

X Assign to Writer _____
Due: 10/18 Dispatch by: _____
□ROBO Message: _____
Due: _____ Dispatch by: _____
Vet with: Jeff Berkowitz □Matt Smith
Vetting Due by: _____
Enclosures: _____

♦♦♦

□Call for add'l info □Call for home address
□Send GBA Photo □Send Inscribed Photo
□Send to Agency
□Send to WH O

SB - no need for home address to vet Judge /

□REGRET
□ Need 6 weeks
□ Cannot do m
□ Better for Sta
□ Delayed by the Mail
□ Not milestone anniversary
□ Event is outside the U.S.
□ Unable to provide message at this time

Note: DQ for all anniversaries of District Court Judges

♦♦♦

□Talk with MM

Comments: _____

DLT
CA
10/3

RECEIVED
Presidential Support
OCT 03 2007
Received in
OCT 04 2007
Presidential Messages

WLEDGEMENT LETTER

TION IS CORRECT AND COMPLETE
ph for any single occasion. *Thank You*

John D. Adams
rtment Counsel's Office
ing EEOP Room 376-A
6-3754
copy is needed for requestor

[redacted]

he request in the "information" space below.

wedding
m & full maiden
e of wedding)
edding
es, date of wedding)
ERSARY

name of company
ncy)

□ CONDOLENCE
(sent to next of kin only)

□ ILLNESS
(type: surgery, accident, cancer, etc.)

□ RELIGIOUS OCCASIONS
(event type: baptism, bar/bat mitzvah, etc.)

☑ OTHER
(please provide written request to be approved by the Director of Correspondence)

tter, congratulating Judge David
e.

Mr. □ Mrs. □ Miss □ Mr. & Mrs. □ Dr. □ Ms.

ia Circuit
, D.C. 20001

Mr. □ Mrs. □ Miss □ Mr. & Mrs. □ Dr. □ Ms.

t 1800 G Street, 8th Floor
t staff member when letter is ready)

To Messages CA 10/3

RECEIVED
Presidential Support
OCT 03 2007
Received in
OCT 04 2007
Presidential Messages

PRESIDENTIAL ACKNOWLEDGEMENT LETTER

STAFF REQUEST FORM

PLEASE MAKE SURE THAT ALL INFORMATION IS CORRECT AND COMPLETE
Staff may request *either* a letter *or* a photograph for any single occasion. *Thank You*

TODAY'S DATE: 10/03/2007 DATE OF EVENT: 11/10/2007

Request to: *Presidential Support*
Office of Presidential Correspondence
1800 G Street, 9th Floor
Ext. 6-5752
Fax: 6-5753

From: Name John D. Adams
Department Counsel's Office
Building EEOP *Room* 376-A
Ext. 6-3754
☐ cc copy is needed for requestor

A minimum of two weeks notice is required for processing. All requests are subject to final approval by the Director of Presidential Correspondence.

Mark ☒ in appropriate box and include any additional comments pertinent to the request in the "information" space below.

TYPE OF EVENT

BIRTH OF BABY
- ☐ to child *(child's full name & date of birth)*
- OR
- ☐ to parents *(parents' full name & child's full name)*

☐ **BIRTHDAY** *(number of years)*

☐ **GRADUATION** *(name of school & degree awarded)*

☐ **ADOPTION** *(full name of parent(s) & child)*

WEDDING
- ☐ processed prior to wedding *(full name of groom & full maiden name of bride, date of wedding)*
- OR
- ☐ processed after wedding *(full married names, date of wedding)*

☐ **WEDDING ANNIVERSARY** *(number of years)*

☐ **RETIREMENT** *(number of years; name of company or government agency)*

☐ **CONDOLENCE** *(sent to next of kin only)*

☐ **ILLNESS** *(type: surgery, accident, cancer, etc.)*

☐ **RELIGIOUS OCCASIONS** *(event type: baptism, bar/bat mitzvah, etc.)*

☒ **OTHER** *(please provide written request to be approved by the Director of Correspondence)*

Information: See the attached proposed letter, congratulating Judge David Sentelle on 20 years of service.

Inside address for letter (complete address to appear on letter) ☐ Mr. ☐ Mrs. ☐ Miss ☐ Mr. & Mrs. ☐ Dr. ☐ Ms.

Name: The Honorable David B. Sentelle

Address: United States Court of Appeals for the District of Columbia Circuit

City/State/Zip Code: 333 Constitution Avenue, N.W.; Washington, D.C. 20001

Mailing address for label (if different from "inside address") ☐ Mr. ☐ Mrs. ☐ Miss ☐ Mr. & Mrs. ☐ Dr. ☐ Ms.

Name:

Address:

City/State/Zip Code:

☒ Do not mail HOLD for staff member pickup at 1800 G Street, 8th Floor
(the Office of Records Management will contact staff member when letter is ready)

TO: Scheduling Research Unit
Ext. 6-2363 **Fax: 6-7169**

FROM: Christine Warner
Director, Presidential Messages

SUBJECT: Vetting Request- 20 years of service to the US Court of Appeals by Judge David Sentelle (Washington, DC)

DUE TO MESSAGES: *Due 3 weeks before the Print/Event Date (6 weeks if 2007 is listed)
*If earlier than 3 weeks or a Past Event, vetting is due ASAP please

Staff Request: YES Outside Request: YES

Organization To Be Vetted
Name of Organization:
Organization Address:

Organization Website (if available):

Please Confirm Anniversary: 20 years of service to the US Court of Appeals by Judge David Sentelle

Event To Be Vetted
Name of Event: 20 years of service to the US Court of Appeals by Judge David Sentelle

Print Date (if applicable):
Event Date: 11/10/07

Honoree To Be Vetted
Name of Honoree: Judge David Sentelle
Honoree Home address: (b)(6)

Honoree Title:

Additional Comments
Address per whitepages.com

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0724	
CONNECTION TEL		67169
SUBADDRESS		
CONNECTION ID		
ST. TIME	10/05 14:39	
USAGE T	00'32	
PGS. SENT	2	
RESULT	OK	

October 5, 2007 Page 1

TO: Scheduling Research Unit
Ext. 6-2363 **Fax: 6-7169**

FROM: Christine Warner
Director, Presidential Messages

SUBJECT: Vetting Request- 20 years of service to the US Court of Appeals by Judge David Sentelle (Washington, DC)

DUE TO MESSAGES: *Due 3 weeks before the Print/Event Date (6 weeks if 2007 is listed)
*If earlier than 3 weeks or a Past Event, vetting is due ASAP please

Staff Request: YES Outside Request: YES

Organization To Be Vetted
Name of Organization:
Organization Address:

Organization Website (if available):

Please Confirm Anniversary: 20 years of service to the US Court of Appeals by Judge David Sentelle

Event To Be Vetted
Name of Event: 20 years of service to the US Court of Appeals by Judge David Sentelle

Print Date (if applicable):
Event Date: 11/10/07

Honoree To Be Vetted
Name of Honoree: Judge David Sentelle
Honoree Home address: (b)(6)

openly gay Bishop V. Gene Robinson and blessing of same-sex unions is undermining the sacrament of marriage. Bridge said he expects the future status of the Episcopal Church to be a topic of discussion at this weekends convention of the Diocese of Central Florida. Neither Diocese Bishop John W. Howe nor his spokesman returned calls." (*News-Journal, 1/21/04*)

100th Anniversary of St. Paul's Church (New Smyrna Beach, FL)

- Confirmed Anniversary
- No problematic news articles found.
  - Typical event press

PRESIDENTIAL MESSAGE FOR JUDGE DAVID SENTELLE

Judge David B. Sentelle (Judge, US Federal Court of Appeals)

- ***No need to vet***

20 Years of Service to the US Court of Appeals by Judge David B. Sentelle

- Confirmed 20 Years
- No problematic news articles found.
  - Press is limited to various websites that state Sentelle was appointed to the Court in 1987.

PRESIDENTIAL MESSAGE FOR HOLY FAMILY PASSIONIST RETREAT CENTER

Holy Family Passionist Retreat Center (West Hartford, CT) http://www.holyfamilyretreat.org

- ***No need to vet public records***
- No problematic news articles found.
  - Typical church press.

Bishop Peter Rosazza Honored by Holy Family Passionist Retreat Center with the Passionist Heart Award

- Confirmed Honoring
- No problematic news articles found.
  - Press focuses on Rosazza's life work.
  - In October 2007, it was reported that, "Join Holy Family Passionist Retreat Center as we honor Bishop Peter A. Rosazza with the first ever Passionist Heart Award for his work for peace and social justice around the world." (http://www.stritachurch.org/OCT28.pdf)

Peter A. Rosazza (Auxiliary Bishop, Archdiocese of Hartford)

- ***No need to fully vet public records***
- Problematic news articles found:
  - In June 2007, it was reported that, "U.S. Rep Rosa DeLauro, D-New Haven, joined a dozen members of Congress in calling on the Conference of Catholic Bishops to mobilize church members against the war in Iraq. The group Tuesday released a letter sent to the bishops last week asking for a meeting to discuss strategy. Several Catholic leaders, including Peter A. Rosazza in New Haven, auxiliary bishop for the Archdiocese of Hartford, said they could not recall a similar request from members of Congress. The letter bases its appeal on church tradition rather than statecraft or politics. 'The war in Iraq is not just a political

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Counsel's Office, White House

Burck, William (Bill) - Subject Files

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Folder Title:

Kavanaugh,[Brett]

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

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

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

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

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

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

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

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

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

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

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

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

When did you first review the memorandum?

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

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

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

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

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

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

Response: See response to 2C.

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

Response: See response to 2C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. During this time period, you have served as Associate Counsel to the President, Senior Counsel to the President, and Assistant to the President and Staff Secretary. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the NSA surveillance program, and your involvement, if any, in shaping the program and the legal justification for the program.

B. When did you first learn about the President's authorization of the program?

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

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

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

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

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

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

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

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

Response: Signing statements are generally drafted and reviewed by Department of Justice attorneys, Office of Management and Budget (OMB) attorneys, White House attorneys, and other Administration attorneys whose agencies are affected by a bill's provisions. This process is usually coordinated by OMB. After the signing statement has been drafted and cleared through the OMB process, it comes to the Staff Secretary's office for White House senior staffing and Presidential review and signature. I have been Staff Secretary since July 2003; the Staff Secretary's office staffs signing statements before they are reviewed and signed by the President.
Like Presidents before him, President Bush has issued signing statements to identify legislative provisions that implicate certain constitutional requirements -- for example, the Recommendations Clause, Presentment Clause, Opinions Clause, and Appointments Clause.

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

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

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

Response: No. None.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Based on information the ABA may have provided to you, and based on your extensive experience working with the ABA when you helped evaluate judicial nominees in the White House Counsels' office, what do you believe is the basis for the ABA's lowering of their rating of your nomination?

B. According to a May 3, 2006 article in the *Washington Post*, a White House spokesperson said that the ABA's revised rating of your nomination "resulted from changes in the ABA panel's personnel, not from new findings." Do you agree with this assertion? If so, please explain the basis for that belief and set forth the exact changes in the ABA panel's personnel that led to the lower rating of your nomination.

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

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

Response:

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

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

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

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

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

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

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

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

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

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

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

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

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Counsel's Office, White House

Campagna, Dianna

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Folder Title:

Brett M. Kavanaugh, Nominee to the D.C. Circuit [1]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;
003	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
004	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Campagna, Dianna

FOLDER TITLE:
Brett M. Kavanaugh, Nominee to the D.C. Circuit [1]

FRC ID:
11328

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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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This document was prepared on Tuesday, July 03, 2018

2014-0108-F
2018-0009-P

Brett M. Kavanaugh
Nominee to the D.C. Circuit

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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

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BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.
    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.
    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.
- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.
    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."
    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."
    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leah*y, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,

Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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Phone: (215)-597-9642
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May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

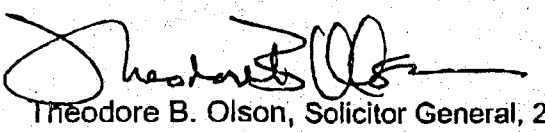
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

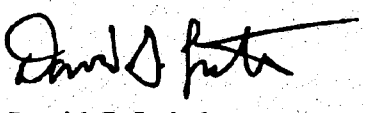
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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WRITER'S DIRECT NUMBER
202-736-8971

WRITER'S E-MAIL ADDRESS
bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
202.719.7349
hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
Kent Sinclair
Richard J. Sullivan

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mtuohey@velaw.com

April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

TELEPHONE: 301-972-1785 Home office
240-777-9105 Courthouse

FAX: 301-972-0786
E-Mail: (b)(6)

May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

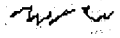
expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,



Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

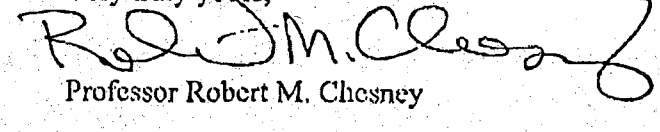
I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,



Professor Robert M. Chesney

cc by fax:
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

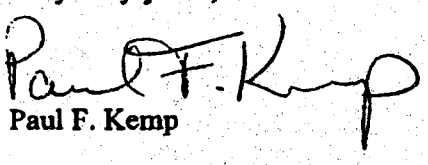
Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,



Paul F. Kemp

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

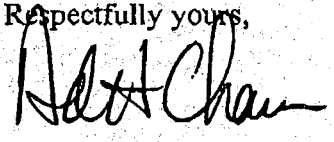
Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,



Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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ROBERT H. MICHEL
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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.
    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.
    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.
- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.
    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."
    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."
    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. … Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. …

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leah*y, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

The Washington Post, May 9, 2006

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
• NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,

Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

19613 United States Courthouse
Independence Mall West
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Phone: (215)-597-9642
Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

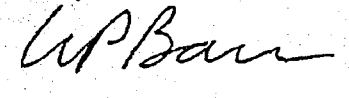
Dear Chairman Specter:

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

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

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

Sincerely,



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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

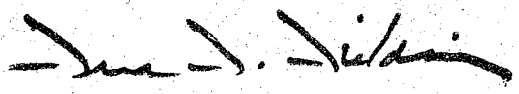
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

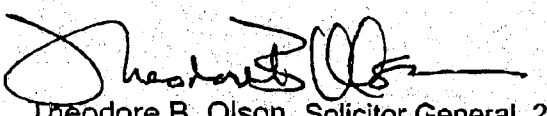
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

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William P. Barr
Executive Vice President and General Counsel

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Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

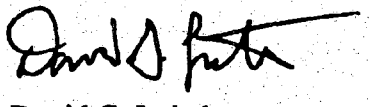
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
Kent Sinclair
Richard J. Sullivan

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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

TELEPHONE: 301-972-1785 Home office
240-777-9105 Courthouse

FAX: 301-972-0786
E-Mail: (b)(6)

May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

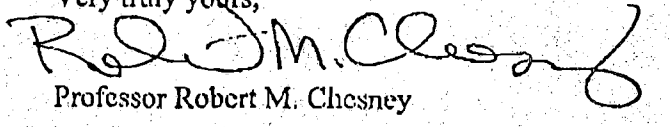
I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,



Professor Robert M. Chesney

cc by fax: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
202 879-5056
tyannucci@kirkland.com

May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

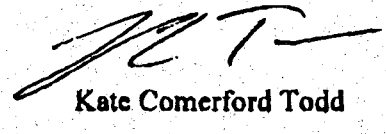
First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all comers. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;
003	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
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BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to à filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

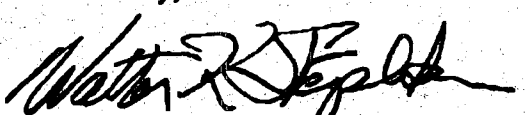
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

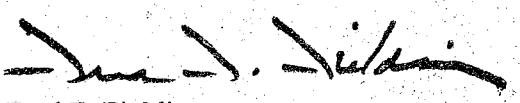
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

GIBSON, DUNN & CRUTCHER LLP

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May 3, 2006

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(202) 530-9575

Client No.

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

Dear Chairman Specter:

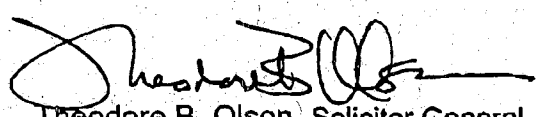
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

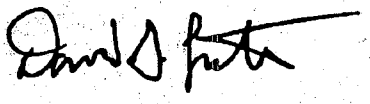
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
Kent Sinclair
Richard J. Sullivan

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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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240-777-9105 Courthouse

FAX: 301-972-0786
E-Mail: (b)(6)

May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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tyannucci@kirkland.com

May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
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Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to à filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

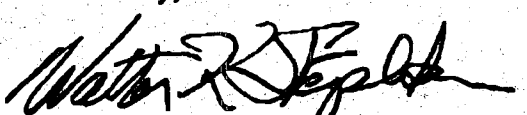
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

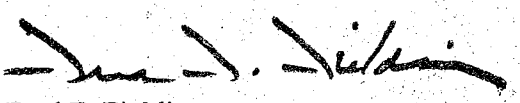
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

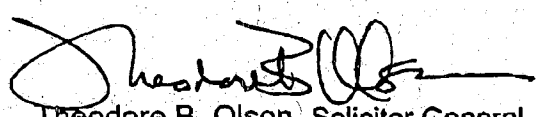
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

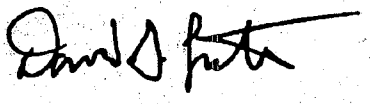
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

Wiley Rein & Fielding LLP

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May 26, 2005

Scott M. McCaleb
202.719.3193
smccaleb@wrf.com

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;
003	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

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BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to à filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
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WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

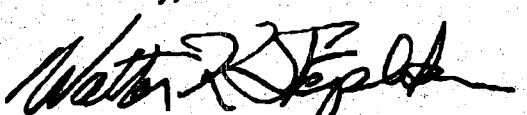
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

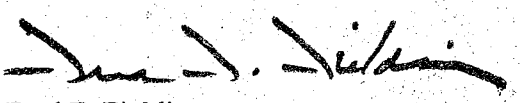
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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(202) 530-9575

Client No.

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

Dear Chairman Specter:

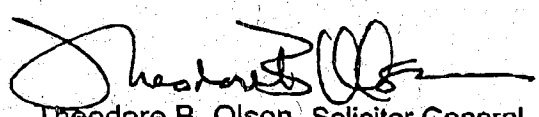
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

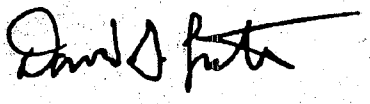
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
202.719.7349
hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

Scott M. McCaleb
202.719.3193
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The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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United States Senate
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to à filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

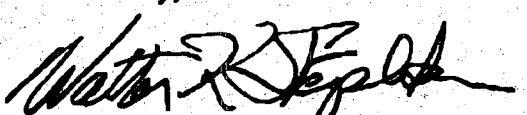
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, PA 19106-1782
Phone: (215)-597-9642
Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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Fred F. Fielding
202.719.7320
ffielding@wrf.com

May 5, 2006

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

Dear Chairman Specter:

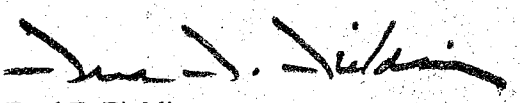
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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(202) 530-9575

Client No.

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

Dear Chairman Specter:

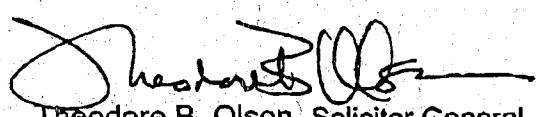
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

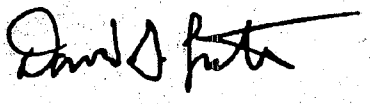
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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WRITER'S DIRECT NUMBER
202-736-8971

WRITER'S E-MAIL ADDRESS
bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
202.719.7349
hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;
003	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

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BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to à filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

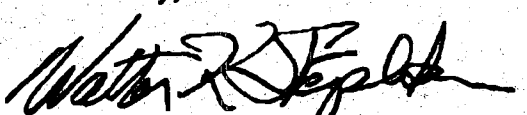
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, PA 19106-1782
Phone: (215)-597-9642
Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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Fred F. Fielding
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ffielding@wrf.com

May 5, 2006

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

Dear Chairman Specter:

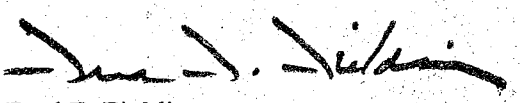
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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(202) 530-9575

Client No.

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

Dear Chairman Specter:

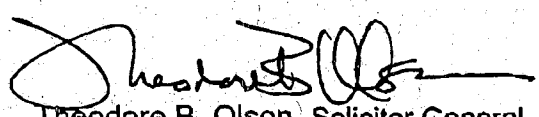
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

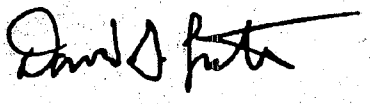
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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WRITER'S DIRECT NUMBER
202-736-8971

WRITER'S E-MAIL ADDRESS
bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
202.719.7349
hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
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Kent Sinclair
Richard J. Sullivan

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mtuohey@velaw.com

April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to à filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

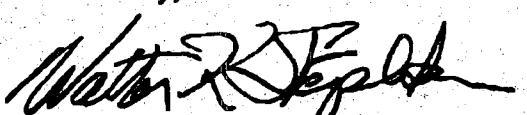
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, PA 19106-1782
Phone: (215)-597-9642
Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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Fred F. Fielding
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ffielding@wrf.com

May 5, 2006

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

Dear Chairman Specter:

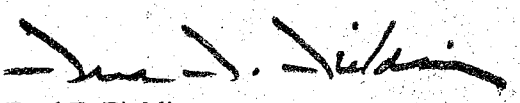
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

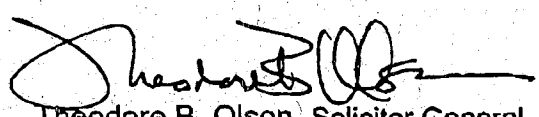
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

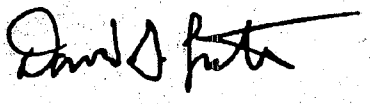
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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WRITER'S DIRECT NUMBER
202-736-8971

WRITER'S E-MAIL ADDRESS
bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
202.719.7349
hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
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Kent Sinclair
Richard J. Sullivan

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mtuohey@velaw.com

April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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240-777-9105 Courthouse

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
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May 12, 2006

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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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ROBERT H. MICHEL
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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;
003	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
004	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;

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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

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TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.
    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.
    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.
- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.
    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."
    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."
    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. …[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. …

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, … I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

The Washington Post, May 9, 2006

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,

Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

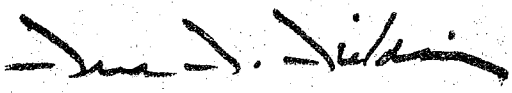
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

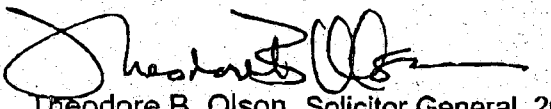
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

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New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

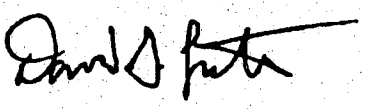
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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WRITER'S DIRECT NUMBER
202-736-8971

WRITER'S E-MAIL ADDRESS
bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
Kent Sinclair
Richard J. Sullivan

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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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240-777-9105 Courthouse

FAX: 301-972-0786
E-Mail: (b)(6)

May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

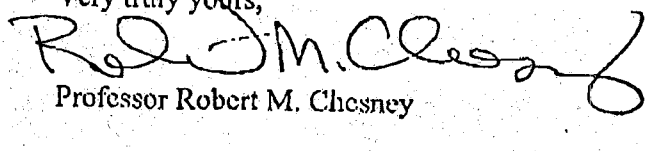
I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,



Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

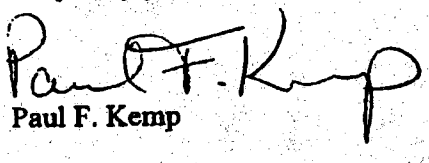
Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,



Paul F. Kemp

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
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152 Dirksen Senate Office Building
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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

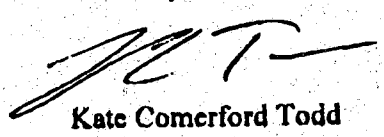
First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

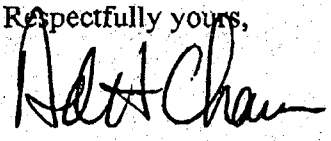
Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,



Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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ROBERT H. MICHEL
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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. … Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. …

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

The Washington Post, May 9, 2006

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,

Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
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May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

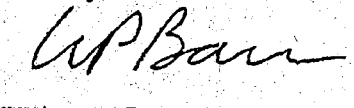
Dear Chairman Specter:

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

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

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

Sincerely,



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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

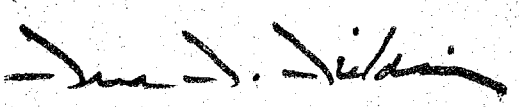
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,

Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

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Phone 212.395.1689
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May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

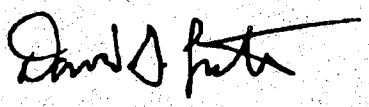
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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hwalker@wrf.com

VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
Kent Sinclair
Richard J. Sullivan

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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

TELEPHONE: 301-972-1785 Home office
240-777-9105 Courthouse

FAX: 301-972-9796
E-Mail: (b)(6)

May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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tyannucci@kirkland.com

May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

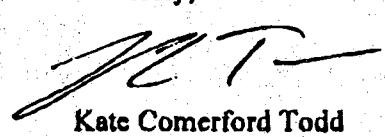
First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Bob.

RHM:sy

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;
003	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
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BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leah*y, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

The Washington Post, May 9, 2006

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,

Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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Philadelphia, PA 19106-1782
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Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

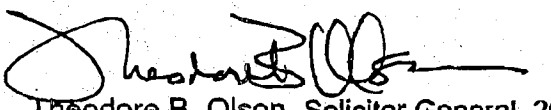
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

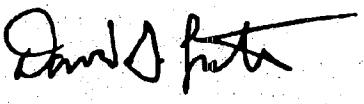
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
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Richard J. Sullivan

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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE
(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

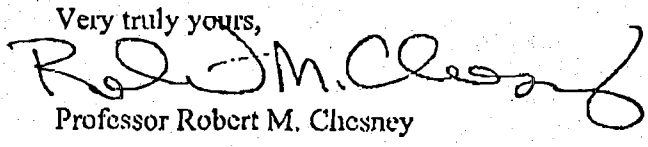
I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,



Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
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Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Bob.

RHM:sy

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

The Washington Post, May 9, 2006

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
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WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

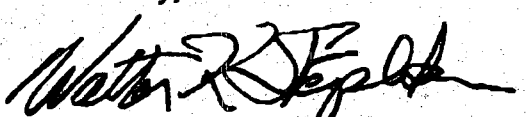
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

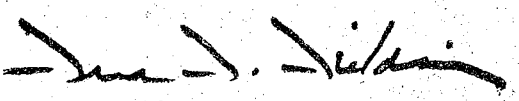
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,

Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

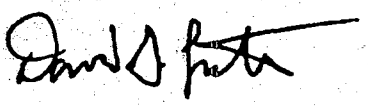
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

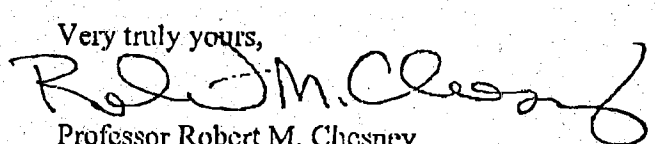
I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,



Professor Robert M. Chesney

cc by fax: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
202 879-5056
tyannucci@kirkland.com

May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

Wiley Rein & Fielding LLP

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May 26, 2005

Scott M. McCaleb
202.719.3193
smccaleb@wrf.com

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all comers. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;

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BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

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BRETT M. KAVANAUGH

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

The Washington Post, May 9, 2006

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
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WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

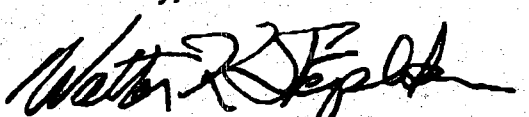
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

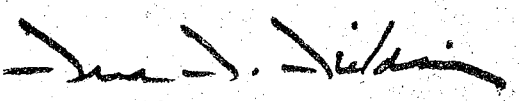
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,

Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

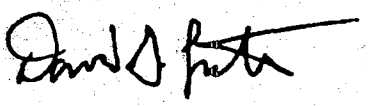
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

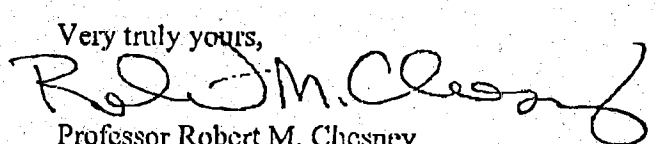
I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,



Professor Robert M. Chesney

cc by fax: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

Scott M. McCaleb
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smccaleb@wrf.com

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
202.719.3583
kcomerford@wrf.com

VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all comers. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 224-9516

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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

HOGAN & HARTSON
L.L.P.

ROBERT H. MICHEL
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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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Coffina, Scott

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Folder Title:

DC Circuit 11th/12th Seat: [Case Load]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Resume	[Biographical Information]	3	08/2007	P2; P6/b6;
002	Draft	D.C. Circuit Facts - 11th Seat	4	N.D.	P5;
003	Draft	D.C. Circuit Facts	3	N.D.	P5;
004	Newsletter	Time to Confirm Estrada and Roberts - From: United States Senate Republican Policy Committee	2	05/08/2002	PRM;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: [Case Load]

FRC ID:
14407

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Resume	[Biographical Information]	3	08/2007	P2; P6/b6;

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	D.C. Circuit Facts - 11th Seat	4	N.D.	P5;

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14407

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2018-0009-P

RESTRICTION CODES

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U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE

DISTRICT OF COLUMBIA				12 MONTHS ENDED SEPTEMBER 30					
				1997	1996	1995	1994	1993	1992
OVERALL CASELOAD STATISTICS	Appeals Filed	Total		1,531	1,347	1,625	1,770	1,791	1,723
		Prisoner		139	161	179	157	118	93
		Other		508	561	674	606	633	693
		Criminal		157	151	155	163	202	288
		Administrative		727	474	617	844	838	649
		% Change in Total Filings	Over Last Year		13.7				
			Over Earlier Years			-5.8	-13.5	-14.5	-11.2
	Appeals Terminated	Total		1,833	1,674	1,670	1,617	1,877	1,606
		Consolidations & Cross Appeals		223	293	286	264	280	366
		Procedural		878	686	681	578	781	517
		On The Merits	Total	732	695	703	775	816	723
			Prisoner	83	88	71	79	77	71
			Other	381	319	329	371	390	294
			Criminal	109	131	138	159	184	178
			Administrative	159	157	165	166	165	180
			Percent by Active Judges	98.5	99.8	99.9	97.7	99.9	98.9
	Pending Appeals			1,523	1,825	2,158	2,205	2,057	2,146
ACTIONS PER ACTIVE JUDGE	Terminations on the Merits			214	196	196	224	227	195
	Procedural Terminations			55	55	44	59	62	31
	Written Decisions	Total		72	62	67	67	77	65
		Signed		25	26	23	23	23	22
		Unsigned		47	36	44	44	54	43
		Without Comment		-	-	-	-	-	-

* Includes only judges active during the entire 12 month period.

Show Page Two

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
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SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: [Case Load]

FRC ID:
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NARA Num.:
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FOIA IDs and Segments:
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"Former Majority Leader Bob Dole spoke of this process himself when he once said, 'We should not be holding people up. If we need a vote, vote them down or vote them up, because the nominees probably have plans to make and there are families involved.' I think Senator Dole said it straight ahead. So I am really glad that Margaret's day has come finally." **144 Cong. Rec. S 640, 2/11/1998**

"So I hope we can work together for the good of, frankly, these people and their families and the criminal justice system. I don't think it does any good to have these judgeships vacant. Justice needs to be done, and it is hard to serve it when you don't have the judgeships filled." **142 Cong. Rec. S 9418, 8/1/1996**

"I also want to add my words on behalf of Judge Ware. I think it is really crucial we move on that Ninth Circuit. We've got a third of those seats are vacant. This is a great choice." **Hearing of the Senate Judiciary Committee, 10/29/1997**

Senator Richard Durbin (D-IL)

QUOTES:

"I stand here today and appeal to my colleagues, Democrats and Republicans, to consider seriously these two nominees and bring them up for consideration this week. Under the rules of the Senate, I can put a hold, incidentally, on people and a hold on bills. I can even do that in secret. That is what the Senate lets me do. In other words, they cannot move the person, they cannot move the bill, if this one Senator decides he does not want them to move it. I have not done that. I have never done that to an individual, and I don't want to start. I don't think it's fair. I hope I never reach the point where I have to use that strategy. I would much rather see us vote on these men and women on their merits. If they are worthy of appointment to the Federal bench, let us take the action and make sure it happens." **(144 Cong. Rec. S 1815, 3/12/1998)**

"I think, frankly, if we are going to assume some responsibility here, as we should, and impose responsibility on the executive branch, we should meet our responsibility. I think that responsibility requires us to act in a timely fashion on nominees sent before us. The reason I oppose cloture is I would like to see that the Senate shall also be held to the responsibility of acting in a timely fashion. If, after 150 days languishing in a committee there is no report on an individual, the name should come to the floor. If, after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down. They are qualified or they are not.

But to impose all of the burden on the executive branch and to step away from our responsibility I don't think is fair. It doesn't engage the symmetry, which I think is important." **(144 Cong. Rec. S 11021, 9/28/1998)**

"Let me also add here that I could go into detail, but I will not because I know it is the intent of the Chair to move this matter to a vote very quickly. I also want to comment for a moment on the period of time that this very able nominee has waited for confirmation. It is unfortunate. In fact, it is sad, and it borders on tragic, that men and women who are prepared to give their lives to public service, who have gone through a withering process of investigation, by the FBI, by the Judiciary Committee, by the White House, by the American Bar Association, and so many others, still must wait over a year, in many cases, for their nominations to be considered by the Judiciary Committee and by this Chamber." **(143 Cong. Rec. S 2515, 3/19/1997)**

"The people of Illinois and the parties to federal criminal and civil court cases deserve a fully-functioning legal system that does not delay justice," Senator Moseley-Braun said. "I continue to be disturbed by the slow pace of the Republican leadership in the Senate to fulfill its Constitutional responsibility to act on the President's nominations," Senator Durbin said. **(Congressional Press Release, 5/7/1998)**

Senators Carol Moseley-Braun and Dick Durbin, both Democrats, called on the Judiciary Committee and the Senate to move more quickly to fill judicial vacancies, according to a press release announcing the merit selection process for Mills' post. "The administration of justice has been hobbled by the Senate Judiciary Committee," Moseley-Braun said in the release. Its intentional foot-dragging on the confirmation process is an odious strategy to keep President Clinton's qualified nominees off the bench."
"The breakdown of the judicial appointment process does a disservice to the American people and nominees alike," Durbin said in the release. **(Chicago Daily Law Bulletin, 10/23/1997)**

"I submit that this debate is not just about numbers. It is about the administration of justice; the fair, prompt, equitable, and thorough administration of justice is at stake. In all fairness, I must confess that I would rather err on the side of too many judges than too few. I would rather have too many judges doing too thorough and too thoughtful a job than too few judges rushed and careless in frantic efforts to handle their caseload. No one but the most shortsighted argues that the D.C. circuit does not need this 11th judge. Indeed, last year when the debate turned on whether a 12th judge was needed,

the Reagan-appointed Judge Silberman was often cited in support of the effort to cut that 12th seat. However, he recently wrote to the Judiciary Committee and said, 'I still believe we should have 11 active judges.' So why are we arguing about this 11th seat today?" **(143 Cong. Rec. S 2515, 3/19/1997)**

"When the Senate fails to do its work and confirm judges, the hardship is imposed on ordinary people in America and they are puzzled: "Well, why is this the case? Why does it take so long for me to get my day in court?" Is justice delayed truly justice denied? In many cases, it is. In this situation, unfortunately, the burden is on us, those men and women who sit in this Chamber and have the singular responsibility to confirm Federal judges." **(144 Cong. Rec. S 1919, 3/13/1998)**

"Some in Congress say some of the nominees aren't of sufficient caliber for the federal judiciary. If they aren't qualified, put it before the Senate and let's debate it. The longer we wait in filling these positions, the longer the backup is." **(The State Journal-Register (Springfield, IL), 10/14/1997)**

"Promptly filling the judicial vacancies you refer to is not just a matter of giving Clinton his due. It is an urgent question of giving the American public its due--a justice system that they can respect and count on. The longer we delay filling judgeships, the larger the civil case backlog grows.

It is no exaggeration to say that judges are the keystone of our justice system. When there are too few judges, our justice system slows down, makes mistakes and reaches a crisis. And there is evidence that our system is indeed approaching a crisis.

Many senators are dragging their feet, claiming that they are not opposed to judges just 'bad judges.' If that is so, then let us have hearings on these so-called 'bad judges' that President Clinton is trying to appoint. Let us debate their merits on the floor of the Senate.

The time has come to give the American people their due--a criminal and civil justice system that works. That means confirming judges, the people who make the system work, sooner rather than later, and keeping politics out of the judiciary." **(Chicago Tribune, 3/14/1997)**

"But now, after almost four years of unprecedented attacks on the federal judiciary, the story has changed. When another judge was needed in central Illinois in the fall of 1997, only eight people applied for the job. I can only guess why people declined to apply. But a dispassionate look at the situation would give anyone pause.

We are facing a nationwide crisis. Our judicial system is being slowly but surely

strangled. Vacancies in the judiciary are not being filled promptly, as judges are being confirmed at the slowest rate in recent memory. People who are being nominated to fill these positions are being put through a brutal hazing ritual known as Senate confirmation. And those who do get confirmed are seeing their records distorted, are being threatened with impeachment and are seeing their salaries eroded.

Every American pays a price for this.

But the American people need to see the forest for the trees. Decisions that citizens occasionally disagree with are a small price to pay for a strong, healthy and independent judiciary. We must not let our disagreements with individual decisions drive us to scuttle the very justice system that we claim to respect so much." **(Insight on the News, 3/2/1998)**

"These two gentlemen, Mr. Murphy and Judge McCuskey, were nominated by President Clinton on July 31, 1997. They were unanimously recommended by the Judiciary Committee on November 6 of the same year. They have been sitting on this calendar for 127 days with absolutely no one raising questions as to their qualifications for the job.

What happens to a person who finds himself in this predicament? I have talked to many of them. Their lives are changed. The prospect of being appointed to the Federal bench makes life difficult on a professional and personal basis.

Judge McCuskey has a family. He is trying to find a place for his family to live. Think about buying a home and not knowing when you can move into it, and then the fear that if you move too soon, you will disqualify yourself from your previous judgeship. That is what he is facing. His family is going through a lot of turmoil this week because they had thought surely within 100 days the U.S. Senate would act on this nomination, but it has not happened.

Mr. Murphy is in the private practice of law. We have spoken from time to time. He has important cases representing people from his part of Illinois, and people are wondering: "Pat Murphy, are you going to be around? Can we count on you? Will you take this case to trial? Should we bring business to your office?"

All of these things weigh heavy on a person who has decided to make this commitment to move forward and ask to be appointed to the Federal bench.

I hope that Members of the Senate, those who will read my remarks and those who hear them, will understand that this type of thing is more than an inconvenience. It is a hardship that we should not impose on two people for whom there is no controversy." **(144 Cong. Rec. S 1919, 3/13/1998)**

Senator Patrick Leahy

5th Circuit

CASE SCREENING

HOW DO CASES GET TO THE COURT?

A discussion of the court's screening practices and procedures is found in the Internal Operating Procedures (IOP) following 5TH CIR. R. 34.

Cases with obvious jurisdictional deficiencies are not briefed, and we do not request the full record on appeal from the district court. Instead, after review by an attorney in the clerk's office, the cases are prepared for decision by our monthly jurisdictional review panel, discussed infra.

Cases which are briefed are either "screened" through the staff attorney's office or sent directly to an "initiating" screening judge. When we receive the briefs and the original record on appeal, we send the case on for screening. All direct criminal cases and prisoner cases - the majority of our docket - are sent to the staff attorney for review, preparation of a legal analysis of the appeal, and a recommendation whether the case merits oral argument, or should be decided on the "summary" calendar. We send direct criminal appeals as soon as we have the record on appeal and the appellant's and appellee's briefs, without waiting for a reply brief. If a reply brief is filed later, we send it to the staff attorney immediately. In civil cases, we wait until a reply brief is filed, or the time to file has expired and then send the case to the staff attorney.

A small number of cases are screened directly to an initiating judge, e.g., NLRB, private civil diversity, tax, bankruptcy, etc.

Staff Attorney Screening. The staff attorney reviews the cases we send and generally designates them as "Class I" through "Class IV":

> Class I cases are so lacking in merit they are deemed frivolous and subject to affirmance or dismissal under FED. R. APP. P. 34(a)(1) and 5TH CIR. R. 42.2 and 47.6;
>
> Class II cases constitute the court's summary calendar. This class of cases includes cases where counsel has waived argument. In general, Class II cases have a limited number of issues and the dispositive issue(s) recently have been decided, or the facts and legal arguments are presented adequately in the briefs and the record on appeal. Many Class II cases are decided at the Conference Calendar, see pp. 75-76.
>
> Classes III and IV cases represent the court's oral argument calendars and present difficult or new issues for the court to decide. Class III cases are given

20 minutes per side for argument; Class IV cases receive 30 minutes per side and represent the most complex cases involving major legal questions.

Once the staff attorney completes review on the case, he sends to the clerk the briefs, record on appeal, and recommendations on the merits of the case, and any pending motions. The staff attorney may also select cases with two or three issues, easy facts and a limited record, for decision on the "conference calendar," discussed in the Decision and Opinions Section, infra, without further screening. When we receive cases requiring submission to the court from the staff attorney, we send them in rotation to the next "screening panel" selected from our log. Screening panel assignments are made effective July 1st of each year and the three judges assigned to that panel sit together for one year. Within each panel, we rotate "initiating" judge assignments, so each judge has an equal opportunity to act as the first, second and third reviewer on the case.

When the initiating judge receives the appeal, his or her first task is to determine whether the case is properly classified. If the initiating judge agrees with a Class I or Class II recommendation, the case will be decided on the "summary calendar" without argument. The judge then normally has 45 days in civil cases and 31 days in criminal cases to draft an opinion and to send it on to the second judge on the panel. That judge can agree both with the proposed disposition and with the opinion, or can send the case to the oral argument calender. If the second judge agrees that a Class I or II disposition is proper, he or she then sends the case on to the third panel member. That judge can agree with the disposition, or can send the case to the oral argument calendar. The important thing to remember is that it takes all three judges' agreement to decide the case on the summary calendar.

Cases which the staff attorney classifies as Class III or Class IV and recommends for oral argument are sent to an initiating judge on a screening panel for approval of the recommendation, except for direct criminal cases which are sent to the oral argument calendar on the staff attorney's recommendation alone. If the judge concurs argument is needed, the case is returned to the clerk's office for assignment of the case to the next available oral argument calendar. If the initiating judge disagrees with the recommendation for oral argument, the judge's screening panel will decide the case without oral argument if all three panel members agree.

Judge Screening. Cases sent directly to the judges' chambers for screening are classified and handled in a similar manner to cases sent via the staff attorney.

ORAL ARGUMENT

WHAT ARE THE CHANCES I WILL GET ORAL ARGUMENT?

Overall fewer than 25% of the cases briefed are selected for oral argument, with

From 1997 Annual Report

The Court of Appeals, the legal community, and the nation suffered a grievous loss when retired Judge Spottswood W. Robinson III passed away on October 11, 1998. Judge Robinson was appointed to the United States District Court for the District of Columbia in 1964 and to the Court of Appeals in 1966, where he served with distinction until 1991, serving as Chief Judge of the Court of Appeals from 1981 to 1986. A memorial ceremony was held at the court on May 12, 1999, to celebrate Judge Robinson's life and work. Emceed by Karen Hastie Williams, a former Robinson law clerk, the speakers included Justice Ruth Bader Ginsburg, Professors Stephen L. Carter and Susan Low Bloch (both former law clerks as well), and the Chief Judges of the Court of Appeals and District Court. The many and varied guests were a testament to the depth and breadth of Judge Robinson's legacy.

At the start of the 2000-2001 term, the Court of Appeals will include ten active judges (Chief Judge Edwards, Judge Silberman, Judge Williams, Judge Ginsburg, Judge Sentelle, Judge Henderson, Judge Randolph, Judge Rogers, Judge Tatel, and Judge Garland) and no senior judges. Judge Silberman will be eligible for senior status in October 2000. Should Judge Silberman elect to leave active status and if no new appointments are confirmed by the Senate, the court will be at its lowest number of full-time judges, nine, since 1989, when there were nine active judges on the court for a brief period of two months.

In recent years, the judicial branch has faced heightened scrutiny in Congress. One recurring issue has focused on judicial appointments, with some members of the Senate questioning whether and to what extent new judges should be appointed to the various circuit courts. Traditionally, in order to support requests for new judgeship positions, the United States Judicial Conference has employed a simple formula that measures judgeship needs by reference to the numbers of cases filed in a circuit. The formula has never made much sense when applied to the D.C. Circuit, because the court's caseload, which is heavily laden with large administrative appeals, is so unlike other circuits. In an effort to address this problem, the Judicial Conference directed the Federal Judicial Center to conduct a study of the D.C. Circuit's caseload to determine factors in the court's work that could be used to establish guidelines for the assessment of judgeship needs.

The results of the FJC study were interesting, but not surprising. It is well known that the D.C. Circuit hears an unusually large number of administrative cases – in 1997, for example, administrative appeals accounted for 46.3% of the D.C. Circuit's caseload, while the proportion in other circuits ranged from 14.5% in the Ninth Circuit to 3.7% in the Eighth Circuit. The study was illuminating, however, in showing that more than 70% of the D.C. Circuit's agency cases came from the Environmental Protection Agency (EPA), Federal Energy Regulatory Commission (FERC), and Federal Communications Commission (FCC). The cases from these three agencies (as compared with other agency cases) tend to involve the weightiest records and the most complex and technically difficult issues. The proportion of agency cases from the EPA, FERC, and FCC in the circuits with the next heaviest agency caseloads was 1% in the Ninth Circuit, 7% in the Second Circuit, and 2% in the Fourth Circuit. By contrast, in the Ninth Circuit, which had the second highest agency caseload, 92% of the agency cases came from the Immigration and Naturalization Service (INS), Internal Revenue Service (IRS), and Benefits Review Board (BRB) – typically straightforward cases that involve well-developed bodies of law, few parties, and largely factual disputes.

The FJC study thus concluded that, not only do other circuits hear fewer agency cases than are heard in the D.C. Circuit, but that the agency cases heard in other circuits generally are not the difficult agency cases that are a staple in the D.C. Circuit. In addition, it was determined that the D.C. Circuit hears far fewer criminal and diversity cases than are heard in other circuits. This is significant because these cases generally tend to require fewer judicial resources than most other cases. Finally, the FJC report confirmed that the

D.C. Circuit hears an unusually large number of high-profile cases presenting difficult issues of national import. Based on these findings, the FJC's report to the Judicial Conference suggested that any filing-based formula for judgeship needs should include an adjustment for the D.C. Circuit to take account of the court's unique case mix.

Another major project that was recently concluded was the publication of a *Chief Judge's Manual.* The *Manual,* which is an internal working document, comprehensively details the policies and practices governing court operations and the Chief Judge's duties. For the first time, we have created a single document that captures both formal and informal management policies and practices at the court. The *Manual* should serve as a useful resource for Chief Judges and court managers in the years ahead.

The largest project for the court in the immediate future will be the construction of the "annex" to the E. Barrett Prettyman United States Courthouse, including renovation of the existing building. Architect Michael Graves has produced an extraordinary design that will meet the functional needs of the courts while complementing the existing architecture on Pennsylvania and Constitution Avenues. If Congress approves the necessary appropriations, construction will commence in January 2001. Funds for contruction remain an issue, however. In any event, it is anticipated that construction of the annex will take approximately three years and that renovation of the existing building will take an additional three years.

The annex will be a stunning marker of justice in our Nation's Capital. It will be a constant reminder to the judges and staff, and to the lawyers and litigants who we serve, of the important role of our courts over the past 200 years of American history. The timely commencement of the annex construction would lend great tribute and dignity to the courts' bicentennial celebration in 2001.

Harry T. Edwards
Chief Judge
United States Court of Appeals

One example of the D.C. Circuit's unique jurisdiction is given above, and others appear below. This list is not exhaustive, but some of the more important examples are shown:

1. The United States Court of Appeals for the District of Columbia Circuit is where a party must go to claim that agency regulations did not conform with certain "sunshine" requirements of the Administrative Procedures Act. 5 U.S.C.A. §552b(g).

2. An organization designated as a "foreign terrorist organization" may seek judicial review of such designation only in the D.C. Circuit. 8 U.S.C.A. §1189(b)(1).

3. Most rules "of general and national applicability" promulgated by the Federal Energy Administration can be reviewed only in the D.C. Circuit. 15 U.S.C.A. §766.

4. A constitutional challenge to the North American Free Trade Implementation Act or the United States-Canada Free Trade Agreement Implementation Act can be brought only in the D.C. Circuit. 19 U.S.C.A. §1516a(g)(4)(A).

5. Determinations of the Federal Election Commission as to which presidential candidates are eligible for Federal dollars to run their campaigns are reviewable only at the D.C. Circuit. 26 U.S.C.A. §9011(a) and §9041(a).

6. Only the D.C. Circuit is authorized to review certain decisions made by the Administrator of EPA under the Resource Conservation and Recovery Act (RCRA). 42 U.S.C.A. §6976(a)(1).

7. Judicial review of air quality standards, emission standards, and related matters that are promulgated by the Administrator of EPA under the Clean Air Act must be obtained in the D.C. Circuit. 42 U.S.C.A. §7607(b)(1).

8. Only the D.C. Circuit is authorized to review regulations promulgated under CERCLA (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980). 42 U.S.C.A. §9613(a).

9. When the Secretary of the Interior makes determinations regarding offshore plans for exploration, development, or production of oil or gas sites, those determinations are reviewable only at the D.C. Circuit. 43 U.S.C.A. §1349(c).

10. Certain decisions of the Federal Communications Commission are appealable only to the D.C. Circuit. 47 U.S.C.A. §402(b).

Miguel Estrada and John Roberts will be outstanding additions to the D.C. Circuit, the "second most important court in the land" – and it is time to confirm them.

Written by Lincoln Oliphant, 224-2946

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Newsletter	Time to Confirm Estrada and Roberts - From: United States Senate Republican Policy Committee	2	05/08/2002	PRM;

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

COLLECTION:
Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: [Case Load]

FRC ID:
14407

OA Num.:
14202

NARA Num.:
14011

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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

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

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

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B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

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

Records Not Subject to FOIA

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

This Document was withdrawn on 7/2/2018 by erg

Why Brown's Nomination Especially Matters to the D.C. Circuit.

The U.S. Court of Appeals for the District of Columbia Circuit is widely regarded as the second most important court in America, behind only the U.S. Supreme Court. This is due to its location in the nation's capital, where all three branches of government and most federal agencies are located, and because of the national jurisdiction bestowed upon the court by Congress.

The D.C. Circuit is the administrative law court. It is the court that most closely oversees the actions of federal agencies – national safeguards adopted under the Clean Air Act by the Environmental Protection Agency, orders of the Federal Communications Commission, unfair labor practice decisions by the National Labor Relations Board, worker safety protections issued by the Occupational Safety and Health Administration, and much more. And because the U.S. Supreme Court grants review in so few cases, the D.C. Circuit is typically the last word on these important cases.

A review of one month's decisions by the D.C. Circuit reveals the breadth, importance, and impact of the court's work to the lives of millions of Americans.

CSX Transportation, Inc. vs. Anthony A. Williams, Mayor of the District of Columbia, No. 05-5131 (5/03/2005)
Case involved a District of Columbia law that forbid trains carrying toxic substances from traveling within 2.2 miles of the District.

American Library Association vs. FCC, No. 04-1037 (5/06/2005)
The American Library Association challenged FCC's authority to issue a rule that required all receivers of digital television signals to be equipped with anti-redistribution equipment.

Covad Communications Company vs. Bell Atlantic Corporation, No. 02-7057 (5/6/05)
Antitrust lawsuit claiming that Atlantic Bell violated the Sherman Act by refusing to deal with its rivals.

John F. Kreis vs. Secretary of the Air Force, No. 04-5197 (5/06/2005)
Case involved the Air Force's refusal to give a Naval officer a retroactive promotion.

In Re: Madison Guaranty Savings & Loan, No. 94-0001 (5/06/2005)
Request for attorneys' fees under the Independent Counsel laws. The person making the request was a junior White House staffer who helped write a memo terminating several staff in the Travel Office.

Lucy Murray vs. David Gilmore, No. 04-7027 (5/06/2005)
Title VII claim alleging race and sex discrimination.

Wal-Mart Stores Inc. vs. Secretary of the Department of Labor, No. 04-1127 (5/10/2005)
Case involved enforcement of an OSHA safety citation against Wal-Mart over a conveyor belt blocking an emergency exit in an Alabama retail store.

American Chemistry Council vs. Michael Leavitt, Administrator of the EPA, No. 04-5189 (5/10/2005)
Industry challenge to EPA's classification of an ozone-causing chemical as a "toxic chemical."

In Re Cheney, No. 02-5354 (5/10/2005)

Action by the Sierra Club and Judicial Watch seeking disclosure of documents regarding an energy advisory committee chaired by Vice President Cheney. The groups sought to uncover the identity and influence of energy interest groups during the formulation of President Bush's energy policy.

SBC Communication Inc. vs. FCC, No. 03-1147 (5/13/2005)
Lawsuit by SBC challenging a ruling that it violated a term its merger with Ameritech.

Electricity Consumers Resource Council vs. FERC, No. 03-1449 (5/13/2005)
Case concerned the Federal Energy Regulatory Commission's approval of New York's new rate design that was designed to prevent shortages at peak times. The Electricity Consumers Resource Council argued that the plan would adversely affect energy costs for large industrial consumers.

Marian Wagener vs. SBC Pension Benefit Plan, No. 04-7060 (5/17/2005)
Two SBC retirees brought suit under ERISA against the SBC Pension plan to recover retirement benefits that they claimed they were owed.

Diane George vs. Michael Leavitt, Administrator of the EPA, No. 03-5356 (5/17/2005)
Appeal of the dismissal of a Title 7 discrimination claim.

Xcel Energy Services Inc. vs. FERC, No. 04-1182 (5/17/2005)
A Minnesota power utility challenged federal energy regulations regarding renewable energy credits intended to spur clean energy.

Rosita S. Javier vs. Commissioner of Social Security, No. 03-5153 (5/20/2005)

Case involving the Social Security Administration's termination of survivor benefits to a widow and children after a paternity test revealed that the children

were not biologically related to the deceased (although the deceased had formally adopted the children).

Luck Music Library vs. Alberto Gonzales, Attorney General of the U.S., No. 04-5240 (5/24/2005)
Case involved copyright protections for foreign musicians who failed to comply with U.S. copyright formalities.

International Union, United Mine Workers vs. MSHA, No. 04-1164 (5/24/2005)
Challenge by the United Mine Workers Union to mine ventilation regulations issued by the Secretary of Labor that the Union said illegally weakened existing safety protections in mines.

Linda Roebuck vs. Odie Washington, No. 04-7063 (5/24/2005)
Title VII complaint alleging sex discrimination by the DC Department of Corrections.

Government of Rwanda vs. Robert W. Johnson, No. 04-7044 (5/27/2005)
During the Rwandan genocide of 1994, Washington lobbyists agreed that, in exchange for $80,000 from the Rwandan Hutu government, they would portray the Tutsi minority as rebel terrorists in order to gain favorable relations with the U.S. government. Two days after the lobbyists accepted payment, the U.S. government ordered the Rwandan embassy closed down and all diplomatic relations with the Hutu government ceased. After a new Rwandan government gained control, it sued the lobbyists to recover sums that it claimed were not ever put to use.

Lawrence Maxwell vs. John Snow, Secretary of the Department of the Treasury, No. 04-5082 (5/27/2005)
A group of over 500 taxpayers sued the IRS to force production of documents relating to their individual income tax returns.

Venetian Casino vs. EEOC, No. 04-5098 (5/27/2005)
Case involved subpoenas issued by the EEOC to Venetian Casino for the production of documents relating to a discrimination claim. Venetian brought an action challenging EEOC's subpoenas and an alleged EEOC disclosure policy that Venetian feared would expose its trade secrets.

Palace Sports Entertainment vs. NLRB, No. 04-1261 (5/31/2005)
Case involved the enforcement of an NLRB order to reinstate and award back pay to an employee disciplined and fired for supporting a union at his workplace.

AFL-CIO vs. Elaine L. Chao, Secretary of the Department of Labor, No. 04-5057 (5/31/2005)
Union challenge to rules issued by the Secretary of Labor requiring unions to file itemized reports of ordinary receipts and expenditures. The AFL-CIO challenged

the Secretary's authority to issue these new reporting requirements.

In Re: Madison Guaranty Savings & Loan, No. 94-0001 (5/31/2005)
Independent Counsel Kenneth Starr subpoenaed a Navy chief petty officer assigned to the White House during Clinton's presidency. The Independent Counsel then informed the Naval officer that he was under investigation for perjury. The officer hired a lawyer to defend his interests and brought this claim for recovering attorney fees under the Independent Counsel laws.

Program Suppliers vs. Librarian of Congress, No. 04-1070 (5/31/2005)
PBS and others brought a claim alleging bias in the Librarian of Congress' distribution of royalty payments and claiming that the distribution methodology adversely affected public television providers.

Brooklyn Union Gas Company vs. FERC, No. 04-1079 (5/31/2005)
A natural gas company challenged FERC's ruling over a newly merged gas

pipeline company's proposed rate structure.

Spirit of the Sage Council vs. Gale Norton, Secretary of the Department of the Interior, No. 03-5345 (5/31/2005)
Procedural challenge by wildlife protection groups to two rules issued under the Endangered Species Act.

Justice Digest

Alliance for Justice's Justice Digest will keep you updated on all of the latest news and happenings related to judicial nominations.

WEDNESDAY, JULY 05, 2006

The DC Circuit's Eleventh Seat

The US Court of Appeals for the D.C. Circuit technically has 12 seats allotted to it. For years, however, the 11th and 12th seats have remained empty. During the Clinton administration, Senate Republicans adamantly opposed filling them, blocking the nominations of distinguished lawyers Allen Snyder and Elena Kagan (now dean of Harvard Law School) on the grounds that the DC Circuit's relatively light caseload did not warrant it. Although the court's caseload has not increased, President Bush last week nominated Peter Keisler to fill the 11th seat. (Brett Kavanaugh, recently confirmed, took the 10th.) Mr. Keisler's name was floated during President Bush's first term for a Maryland-designated seat on the Fourth Circuit, but Maryland Senators Paul Sarbanes and Barbara Mikulski objected -- successfully -- because Mr. Keisler, currently head of the Justice Department's Civil Division, had never practiced law in Maryland.

It will be interesting to see whether Senate Republicans hum a different tune on the DC Circuit when considering the nomination of Mr. Keisler, one of the founding members of the Federalist Society. W hen the year was 1997 and the nominating President was Clinton, here's what they had to say about -- and against -- filling the 11th seat on the second most important court in the country:

- Senator Grassley (R-IA): "confidently conclude[d] that the D.C. Circuit does not need 12 or even 11 judges . . . At most, the D.C. Circuit is entitled to a maximum of 10 judges."
- Senator Kyl (R-AZ): "I plan to vote against filling [the 11th seat] and, of course, the 12th seat unless there is a significant increase in caseload or some other extraordinary circumstance."
- Senator Sessions (R-AL): "an idle mind is the devil's workshop . . . I think it would be very unwise for us to fill a vacancy if there is any possibility that the caseload will continue to decline."
- Senator Lott (R-MS): the D.C. Circuit "is more than adequately staffed . . . They have more judges than they need."

About Me

Name: Alliance
Location
Washington, DC

Through its Judicial Selec Project, Alliance for Just worked for more than 20 raise public awareness ab importance of the federa at all levels. Alliance for wants to help the Americ and their elected represe understand that the court an expansive range of issu have a real effect on all c lives. The vital role the c in our constitutional dem must command the public attention.

View my complete pro

Previous Posts

- Maybe A Little Context
- Braving the New World
- The Texas Redistricting Mixed (and Mixed Up) E
- Conservative Activists Windmills? Say It Ain't S
- Fair to Meddling
- What We've Got Here is to Communicate
- When It Rains, It Pours

- Senator Thurmond: "I do not feel that this vacancy needs to be filled. . . . The caseload of the D.C. Circuit is considerably lower than any other circuit court in the Nation. . . . Moreover, the caseload of the D.C. Circuit is falling, not rising. Statistics from the Administrative Office show a decline in filings in the D.C. circuit over the past year."
- Senator Ashcroft. "The U.S. Court of Appeals for the District of Columbia Circuit is a judicial circuit which has the lowest caseload of any of the judicial circuits in the country. . . . It appears that filling this vacancy would be an inefficient use of judicial resources. . . . The D.C. circuit is the least populated with work."

posted by Alliance for Justice @ 5:27 PM

<< Home

Come Sail Away
DeWine Woos Conserva
Proving Boyle Bona Fid
Gorsuch Will Get Heari

Power Blogger

	Weinshienk, Zita L.	Senior	4/3/98	Coan, Patricia A.	5/27/99
OK-N					
	Brett, Thomas R.	Senior	10/3/96	McCarthy, Frank H.	4/30/99
OK-W					
	Alley, Wayne E.	Senior	5/16/99	Couch, Valerie K.	9/7/00
	Thompson, Ralph G.	Senior	12/16/99	Hall, Melvin C.	10/3/00
UT					
	Sam, David	Senior	11/1/99		
Eleventh Circuit					
AL-N					
	Pointer, Sam C. Jr.	Senior	11/19/99	Simon, Kenneth O.	6/6/00
AL-S					
	Howard, Alex T. Jr.	Senior	10/21/96		
FL-M					
	PL 106-113	New Position	11/29/99		
FL-S					
	Davis, Edward	Senior	7/1/00		
District of Columbia Circuit					
CCA					
	Buckley, James L.	Senior	8/31/96	Kagan, Elena	6/17/99
	Silberman, Laurence H.	Senior	11/1/00		
	Wald, Patricia M.	Retired	11/16/99	Snyder, Allen R.	9/22/99
DC					
	Harris, Stanley S.	Senior	2/1/96	Klein, James W.	3/25/99
	Sporkin, Stanely	Senior	2/12/99	Fields, Rhonda	11/17/99
Federal Circuit					
CCA					
	Plager, S. Jay	Senior	11/30/00		

Total Vacancies: 67
Total Nominees Pending: 39

As of
Dec 1, 2000
9 active judges, with 2 nominees pendg.

June 11, 2001

UT					
	Sam, David	Senior	11/1/99		
Eleventh Circuit					
CCA					
	Cox, Emmett Ripley	Senior	12/18/00		
AL-N					
	Pointer, Sam C. Jr.	Senior	11/19/99		
AL-S					
	Howard, Alex T. Jr.	Senior	10/21/96		
	Vollmer, Richard W., Jr	Senior	12/31/00		
FL-M					
	PL 106-113	New Position	11/29/99		
FL-S					
	Davis, Edward	Senior	7/1/00		
	PL 106-553	New Position	12/15/00		
GA-M					
	Elliott, J. Robert	Retired	12/31/00		
	Fitzpatrick, Duross	Senior	2/1/01		
District of Columbia Circuit					
CCA					
	Buckley, James L.	Senior	8/31/96	Roberts, John G. Jr.	5/9/01
	Silberman, Laurence H.	Senior	11/1/00		
	Wald, Patricia M.	Retired	11/16/99	Estrada, Miguel A.	5/9/01
DC					
	Harris, Stanley S.	Senior	2/1/96		
	Sporkin, Stanely	Senior	2/12/99		
Federal Circuit					
CCA					
	Plager, S. Jay	Senior	11/30/00	Prost, Sharon	5/21/01
International Trade					
USIT					
	Goldberg, Richard	Senior	4/2/01		

Total Vacancies: 104
Total Nominees Pending: 17

**** Roger L. Gregory holds this position for one year due to a recess appointment by President Clinton at the end of the 106th Congress. President Clinton nominated Mr. Gregory on January 3, 2001 to fill this position permanently. President Bush withdrew Mr. Gregory's nomination on March 13, 2001 and re-nominated him on May 9, 2001.***

9 active judges
2 pending noms.

Dec. 1, 2003

Court	Vacancy Created By	Reason	Vacancy Date	Nominee	Nomination Date
FL-M					
	Nimmons, Ralph W.	Deceased	11/24/2003		
FL-S					
	Ferguson, Wilkie D. Jr.	Deceased	6/9/2003	Cooke, Marcia G.	11/25/200
District of Columbia Circuit					
CCA					
	Silberman, Laurence H.	Senior	11/1/2000	Kavanaugh, Brett M.	7/25/2003
	Wald, Patricia M.	Retired	11/16/1999		
	Williams, Stephen F.	Senior	9/30/2001	Brown, Janice R.	7/25/2003

Total Vacancies:	44
Total Nominees Pending:	38

9 active judges

2 pending noms

Listing of **26** Items containing exact words *"District of Columbia Circuit"* in the **same** order.

1 . Nomination: PN1781-109
Peter D. Keisler, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice John G. Roberts, Jr., elevated.
Received: June 29, 2006
Referred: Senate Judiciary
Latest Action: June 29, 2006 - Received in the Senate and referred to the Committee on the Judiciary.

2 . Nomination: PN1179-109
Brett M. Kavanaugh, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Laurence H. Silberman, retired.
Received: January 25, 2006
Referred: Senate Judiciary
Latest Action: May 26, 2006 - Confirmed by the Senate by Yea-Nay Vote. 57 - 36. Record Vote Number: 159.

3 . Nomination: PN203-109
Brett M. Kavanaugh, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Laurence H. Silberman, retired.
Received: February 14, 2005
Referred: Senate Judiciary
Latest Action: December 22, 2005 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

4 . Nomination: PN202-109
Thomas B. Griffith, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Patricia M. Wald, retired.
Received: February 14, 2005
Referred: Senate Judiciary
Latest Action: June 14, 2005 - Confirmed by the Senate by Yea-Nay Vote. 73 - 24. Record Vote Number: 136.

5 . Nomination: PN201-109
Janice R. Brown, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Stephen F. Williams, retired.
Received: February 14, 2005
Referred: Senate Judiciary
Latest Action: June 08, 2005 - Confirmed by the Senate by Yea-Nay Vote. 56 - 43. Record Vote Number: 131 .

6 . Nomination: PN1603-108
Thomas B. Griffith, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Patricia M. Wald, retired.
Received: May 10, 2004
Referred: Senate Judiciary

Latest Action: December 08, 2004 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate at the sine die adjournment of the 108th Congress.

7 . Nomination: PN840-108
Brett M. Kavanaugh, to be United States Circuit Judge, The Judiciary; vice Laurence H. Silberman, retired.
Received: July 25, 2003
Referred: Senate Judiciary
Latest Action: December 08, 2004 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate at the sine die adjournment of the 108th Congress.

8 . Nomination: PN839-108
Janice R. Brown, to be United States Circuit Judge, The Judiciary; vice Stephen F. Williams, retired.
Received: July 25, 2003
Referred: Senate Judiciary
Latest Action: December 08, 2004 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate at the sine die adjournment of the 108th Congress.

9 . Nomination: PN13-108
John G. Roberts, Jr., to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice James L. Buckley, retired.
Received: January 07, 2003
Referred: Senate Judiciary
Latest Action: May 08, 2003 - Confirmed by the Senate by Voice Vote.

10 . Nomination: PN6-108
Miguel A. Estrada, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Patricia M. Wald, retired.
Received: January 07, 2003
Referred: Senate Judiciary
Latest Action: September 04, 2003 - Received message of withdrawal of nomination from the President.

11 . Nomination: PN896-107
Miguel A. Estrada, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Patricia M. Wald, retired.
Received: September 04, 2001
Referred: Senate Judiciary
Latest Action: November 20, 2002 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

12 . Nomination: PN887-107
John G. Roberts, Jr., to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice James L. Buckley, retired.

Received: September 04, 2001
Referred: Senate Judiciary
Latest Action: November 20, 2002 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

13 . Nomination: PN403-107
John G. Roberts, Jr., to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice James L. Buckley, retired.
Received: May 09, 2001
Referred: Senate Judiciary
Latest Action: August 03, 2001 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

14 . Nomination: PN401-107
Miguel A. Estrada, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Patricia M. Wald, retired.
Received: May 09, 2001
Referred: Senate Judiciary
Latest Action: August 03, 2001 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

15 . Nomination: PN573-106
Allen R. Snyder, to be United States Circuit Judge for the District of Columbia, The Judiciary; vice Patricia M. Wald, retired.
Received: September 22, 1999
Referred: Senate Judiciary
Latest Action: December 15, 2000 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

16 . Nomination: PN366-106
Elena Kagan, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice James L. Buckley, retired.
Received: June 17, 1999
Referred: Senate Judiciary
Latest Action: December 15, 2000 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

17 . Nomination: PN6-105
Merrick B. Garland, to be United States Circuit Judge for the District of Columbia, The Judiciary; vice Abner J. Mikva, retired.
Received: January 07, 1997
Referred: Senate Judiciary
Latest Action: March 19, 1997 - Confirmed by the Senate by Yea-Nay Vote. 76-23. Record Vote No: 34 EX.

18 . Nomination: PN615-104
Merrick B. Garland, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Abner J. Mikva, retired.

Received: September 05, 1995
Referred: Senate Judiciary
Latest Action: October 04, 1996 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

19 . Nomination: PN1503-103
David S. Tatel, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Ruth Bader Ginsburg.
Received: June 20, 1994
Referred: Senate Judiciary
Latest Action: October 07, 1994 - Confirmed by the Senate by Voice Vote.

20 . Nomination: PN879-103
Judith W. Rogers, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Clarence Thomas.
Received: November 17, 1993
Referred: Senate Judiciary
Latest Action: March 10, 1994 - Confirmed by the Senate by Voice Vote.

21 . Nomination: PN857-102
John G. Roberts, Jr., to be United States Circuit Judge, The Judiciary; vice Clarence Thomas, elevated.
Received: January 27, 1992
Referred: Senate Judiciary
Latest Action: October 08, 1992 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

22 . Nomination: PN1240-101
A. Raymond Randolph, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Spottswood W. Robinson III, retired.
Received: May 08, 1990
Referred: Senate Judiciary
Latest Action: July 13, 1990 - Confirmed by the Senate by Unanimous Consent.

23 . Nomination: PN1239-101
Karen LeCraft Henderson, to be United States Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Kenneth W. Starr, resigned.
Received: May 08, 1990
Referred: Senate Judiciary
Latest Action: June 29, 1990 - Confirmed by the Senate by Unanimous Consent.

24 . Nomination: PN838-101
Clarence Thomas, to be United States Circuit for the District of Columbia Circuit, The Judiciary; vice Robert H. Bork, resigned.
Received: October 31, 1989
Referred: Senate Judiciary
Latest Action: March 06, 1990 - Confirmed by the Senate by Voice Vote.

25 . Nomination: PN995-100
Judith Richards Hope, to be U. S. Circuit Judge for the District of Columbia Circuit, The Judiciary; vice Robert H. Bork, resigned.
Received: April 14, 1988
Referred: Senate Judiciary
Latest Action: October 22, 1988 - Failed at the time of sine die adjournment of the 100th Congress; returned to the President.

26 . Nomination: PN98-100
David Bryan Sentelle, to be U. S. Circuit Judge for the District of Columbia, The Judiciary; vice Antonin Scalia, elevated.
Received: February 02, 1987
Referred: Senate Judiciary
Latest Action: September 09, 1987 - Confirmed by the Senate by Yea-Nay Vote. 87-0. Record Vote No: 237.

The court has twelve seats for active judges. The seat that was originally the Chief Justiceship is numbered as Seat 1; the other seats are numbered in order of their creation. If seats were established simultaneously, they are numbered in the order in which they were filled. Judges who retire into senior status remain on the bench but leave their seat vacant. That seat is filled by the next circuit judge appointed by the President.

Seat 1	
Established on February 9, 1893 as Chief Justice by 27 Stat. 434	
Alvey	1893–1905
Shepard	1905–1917
Smyth	1917–1924
Martin	1924–1937
Groner	1937–1948
Stephens	1948–1948
Seat redesignated on June 25, 1948 as Circuit Judge persuant to 62 Stat. 869, 62 Stat. 985, and 68 Stat. 1245	
Stephens	1948–1955
Burger	1956–1969
Wilkey	1970–1984
Williams	1986–2001
Brown	2005–present

Seat 2	
Established on February 9, 1893 as Associate Justice by 27 Stat. 434	
Morris	1893–1905
McComas	1905–1907
Van Orsdel	1907–1937
J. Miller	1937–1945
Prettyman	1945–1948
Redesignated on June 25, 1948 as Circuit Judge by 62 Stat. 869, 985	
Prettyman	1948–1962
Wright	1962–1986
D. Ginsburg	1986–

Seat 3	
Established on February 9, 1893 as Associate Justice by 27 Stat. 434	
Shepard	1893–1905
Duell	1905–1906
C. Robb	1906–1937
Vinson	1938–1943
W. Miller	1945–1948
Redesignated on June 25, 1948 as Circuit Judge by 62 Stat. 869, 985	
W. Miller	1948–1964
Leventhal	1965–1979
R. Ginsburg	1980–1993
Tatel	1994–present

Seat 4	
Established on June 19, 1930 as Associate Justice by 46 Stat. 785	
Hitz	1931–1935
Stephens	1935–1948
Redesignated on June 25, 1948 as Circuit Judge by 62 Stat. 869, 985	
Proctor	1948–1953
Danaher	1953–1969
R. Robb	1969–1982
Scalia	1982–1986
Sentelle	1987–present

Seat 5	
Established on June 19, 1930 as Associate Justice by 46 Stat. 785	
Groner	1931–1937
Edgerton	1937–1948
Redesignated on June 25, 1948 as Circuit Judge by 62 Stat. 869, 985	
Edgerton	1948–1963
McGowan	1963–1981
Bork	1982–1988
Thomas	1990–1991
Rogers	1994–present

Seat 6	
Established on May 31, 1938 as Associate Justice by 52 Stat. 584	
Rutledge	1939–1943
Clark	1945–1948
Redesignated on June 25, 1948 as Circuit Judge by 62 Stat. 869, 985	
Clark	1948–1954
Bastian	1954–1965
Tamm	1965–1985
Buckley	1985–1996
Roberts	2003–2005
(vacant)	2005–present

Seat 7	
Established on August 3, 1949 by 63 Stat. 493	
Bazelon	1949–1979
Edwards	1980–2005
(vacant)	2005–present

Seat 8	
Established on August 3, 1949 by 63 Stat. 493	
Fahy	1949–1967
MacKinnon	1969–1983
Starr	1983–1989
Henderson	1990–present

Seat 9	
Established on August 3, 1949 by 63 Stat. 493	
Washington	1949–1965
Robinson	1966–1989
Randolph	1990–present

Seat 10	
Established on October 20, 1978 by 92 Stat. 1629	
Wald	1979–1999
Griffith	2005–present

Seat 11	
Established on October 20, 1978 by 92 Stat. 1629	
Mikva	1979–1994
Garland	1994–present

Seat 12	
Established on July 10, 1984 by 98 Stat. 333	
Silberman	1985–2000
Kavanaugh	2006–present

died 2000

On Jan 1, 2000, there were 10 active judges, with 2 nominees pending. 10 + 2

On Dec 1, 2000, there were 9 active judges, with 2 nominees pending. (Kagan & Snyder)

On June 11, 2000, there were 9 active judges, with 2 nominees pending. (Roberts & Estrada.)

★ On Dec 1, 2003, there were 9 active judges, with 2 noms pending.

(but only b/c Estrada was withdrawn) (Kavanaugh; Brown)

On Sept 4, 2004, there were 9 active judges, with 3 noms pending.

(Kavanaugh, Griffith, Brown)

As of
On May 9, 2001, there 9 active judges, with 2 noms pending.

Roberts / Estrada (nominated May 9, 2001)

As of Sept. 24, 2004, ★

1st - Circuit - Nothing on website or in handbook;

2nd Circuit - Nothing on website or in handbook

3rd Circuit - make reference to complex cases

4th Circuit - Nothing

5th Circuit - has designation system

6th Circuit - Nothing

7th Circuit - references complex

8th Circuit - references complex

9th Circuit - references complex

10th Circuit - references complex

11th Circuit - Nothing

Fed. Circuit - Nothing

3rd Circuit

any different views reached after subsequent study of the case. The opinion will set forth the reasons supporting the court's decision.

5.5.2 Circulation Within Panel. After the draft opinion has been prepared, the authoring judge circulates it to the other two members of the panel with a request for approval or suggestions they may desire to make with respect to the draft opinion. Answering this request is given the highest priority by the other two judges, who shall communicate in writing their approval or disapproval within eight (8) days of receipt of the opinion. Absent a request for additional time, failure to respond within that time period shall be deemed an approval of the opinion as drafted. Because it is the opinion of the court, other members of the panel are free to make any suggestions relating to the modification of, addition to, or subtraction from the proposed text. Where a textual revision or addition is suggested, the suggesting judge submits his or her modification in specific language capable of being inserted into the opinion. When one of the other two judges approves, it becomes the proposed opinion of the court. Should the other panel members disagree with the author's draft, the opinion is reassigned by either the presiding judge or the ranking judge in active service who is a member of the panel's majority.

5.5.3 Time Schedule for Panel Drafting and Circulating Opinions; Reassignments.

(a) *60-day period for draft opinion writing*. It is the aspirational goal of the court that, except in complex cases, the authoring judge transmit to the panel a draft opinion within sixty (60) days after assignment or after close of any supplemental briefing or other factors suspending the drafting process.

← only references Complex — no system in place

(b) *45-day period to file concurring or dissenting opinion*. If, after a second panel member approves the draft opinion, the third panel member desires to separately concur or dissent, the judge not joining in the opinion notifies the author promptly and transmits his or her separate opinion to the panel within forty-five (45) days after the second judge's approval is received. Panel opinions are not considered to be completed until each member has an opportunity to revise his or her opinion in response to those of other panel members.

5.5.4 To Non-panel Active Judges.

Drafts of unanimous not precedential opinions do not circulate to non-panel judges. Drafts of precedential opinions and not precedential opinions that are not unanimous are circulated to all active judges of the court after the draft

IV
APPOINTMENT OF COUNSEL

1. Counsel furnishing representation under the Plan shall be selected from a panel of attorneys designated or approved by the Court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the Plan. When the Court determines that the appointment of an attorney who is not a member of the panel is in the interest of justice, judicial economy, or continuity of representation, or there is some other exceptional circumstance warranting his or her appointment, the attorney may be admitted to the panel and appointed to represent the individual. Agreeable with the directives of the Judicial Conference of the United States, at least 25% of all such appointments shall be assigned to members of the private bar. Such order of appointment of counsel may be entered by the current motion judge or by any active member of the Court.

2. In all cases on appeal where the defendant was represented in the district court by court appointed counsel, such counsel shall continue to represent the defendant on appeal, unless and until relieved by order of this Court. The Court may, in appropriate cases, designate such counsel to continue on appeal.

3. At the time such appeals are docketed in this Court, the Clerk shall notify defendant's court appointed trial counsel that he shall continue such representation of defendant in this Court unless and until relieved by order of this Court, and shall request such trial counsel to advise the Court whether he desires to continue such representation throughout the appeal.

4. In appeals under the Act involving more than one defendant, if the Court finds the need, because of conflicting interests of certain defendants or where circumstances otherwise warrant, separate counsel may be appointed for any one or more of the defendants as may be required for their adequate representation.

5. The Court may, in its discretion, at any stage of the proceedings on appeal, substitute one appointed attorney for another.

6. If, at any stage of the proceedings on appeal, the Court finds the defendant is financially unable to pay counsel whom he has retained, the Court may appoint counsel as provided in subsection (b) of the Act and authorize payment as provided in subsection (d) of the Act and the *CJA Guidelines*, pursuant to subsection (c) of the Act.

7. More than one attorney may be appointed in any case determined by the Court to be extremely difficult. In a capital case, at least two attorneys should be appointed. Except as provided by section 848(q)(7) of title 21, U.S.C., at least one attorney appointed in a capital case shall meet the experience qualifications required by section 848(q)(6) of title 21, U.S.C. Pursuant to section 848(q)(7), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under section 848(q)(6), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

8. The selection of counsel to represent any person under the Act shall remain the sole and exclusive responsibility of the Court.

8th Circuit

the airline ticket or travel itinerary provided by National Travel Service with their completed CJA voucher at the completion of the appointment.

B. Hotels: Many hotels will offer CJA-appointed attorneys government rates for their travel in connection with their representation under the Act. The clerk's office will supply a list of hotels offering government rates to CJA-appointed attorneys. Attorneys are encouraged to avail themselves of reduced-government rates whenever possible.

C. Submission of Vouchers - CJA Form 20: Vouchers must be submitted to the clerk's office within 45 days after the mandate has been issued at the close of the case. Interim vouchers are rarely allowed. Vouchers submitted after the 45 days should be accompanied with a letter explaining the delay. Time should be reported only in tenths of an hour. Receipts are required for reimbursable expenses and all services provided out of the attorney's office. For example, a receipt is required for copies made at a commercial vendor, whereas a receipt is not required for copies made in-house. See the CJA Form 20 instructions for details. The hourly compensation rate for in-court services is $70 per hour and for out-of-court services is $50 per hour. The statutory maximum compensation for appeals of criminal convictions is $2,500 per representation. The statutory maximum for other criminal matters, including appeals of denials of habeas petitions, and federal motions to vacate (28 U.S.C. § 2255) is $750. These amounts do not include reimbursable expenses and travel expenses. Claims for compensation in excess of the statutory maximum must be accompanied by a statement why the case involved extended or complex representation. The court will use the following criteria for determining whether a case is extended or complex: the responsibilities involved as measured by the magnitude and importance of the case; the manner in which the duties were performed; the knowledge, skill, efficiency, professionalism and judgment used by counsel; the nature of

9th Cir

pursuant to this rule will not participate in the decision on any aspect of the case, except that he or she may vote on whether to take a case en banc.

If a case is selected for a settlement conference, counsel shall be notified, by order entered within 35 days of the docketing of the appeal or petition, of the date and time of the conference and whether the conference will be in-person or by telephone. The initial conference normally shall be held within 56 days of the docketing of the appeal. A case is presumed released from the Conference Program if an order scheduling a settlement conference has not been entered within 56 days of the docketing of the appeal or petition.

Requests by counsel for a settlement conference will be accommodated whenever possible. Parties may request conferences confidentially, either by telephone or by letter directed to the chief circuit court mediator.

The briefing schedule established by the Clerk's office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's office pursuant to Circuit Rule 31-2.2.

Counsel should discuss settlement with their principals prior to a conference scheduled under this rule and attend the conference with authority to settle.

*(b) **Appeal Case Management Conference.** In any case the court may direct either sua sponte or upon request of a party that a telephone or in-person case management conference be held before an appellate commissioner, a senior staff member in the Clerk 's office, or a staff attorney. The purpose of a case manage- ment conference is to manage the appeal effectively and develop a briefing plan for complex appeals. If a case is selected for a case management conference, counsel shall be notified by order of the date and time of the conference. Case management conferences are held only in exceptional circumstances, such as complex cases involving numerous separately represented litigants or extensive district court/agency proceedings? (Rev. 1/97)*

*(c) **Binding Determinations by Appellate Commissioner.** In the context of a settlement or mediation in a civil appeal, the parties may stipulate to having one or more issues in their appeal referred for a binding determination by an Appellate Commissioner. Where the parties enter into such a stipulation, the matter may be handled with abbreviated and accelerated briefing and a guaranteed opportunity for in-person or telephonic oral argument before the Appellate Commissioner. The Appellate Commissioner will issue a determination and, if requested, a written statement of reasons. The determination will have no precedential effect and will be final and nonreviewable. Cases will ordinarily be referred to the Appellate Commissioner through the court' s mediation program. In some instances, the court 's pro se unit may also alert parties to the availability of this program. For further information, please contact the Circuit Mediation Office at (415) 556-9900. (New 7/2001)*

FRAP 34

ORAL ARGUMENT

(a) In General.

(1) Party ' s Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional

10th Cir.

(a) identify the litigation by caption, number, and court;

(b) describe the action taken in the other litigation on a request for continuance or deferment;

(c) state reasons why the other litigation should receive priority over the case in which the motion is filed;

(d) state reasons why other associated counsel cannot prepare the brief for timely filing or relieve movant's counsel of the other litigation; and

(e) recite any other relevant circumstances;

(2) the case is so complex that an adequate brief cannot reasonably be prepared by the due date, in which case the motion must state facts demonstrating the complexity; and

(3) counsel will suffer extreme hardship, in which case the motion must state the nature of the hardship.

(E) **Criminal cases.** A motion to extend time to file a brief in a criminal case must also state the custody status of the defendant.

(F) **Time to file.** A motion to extend time to file a brief must be filed at least 5 days before the brief's due date, unless the reasons for the request did not exist or were unknown earlier.

27.5 **Orders.**

(A) **Panel judge.** When a case has been assigned, a designated panel judge may issue any interlocutory order and act on any motion filed under Fed. R. App. P. 8, 9(b), 22(a), or 22(b).

(B) **Procedural orders.** Orders are entered when the clerk dockets them. The docket entry will:

(1) describe briefly and succinctly the nature of the order; and

(2) either be entered by the clerk or state the name of the judge or judges directing its entry.

Table B-1.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2005

Circuit and Nature of Proceeding	Cases Pending Apr. 1, 2004[1]	Cases Commenced			Cases Terminated								Cases Pending Mar. 31, 2005
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
ALL CIRCUITS	**46,976**	**65,418**	**64,023**	**1,395**	**57,486**	**2,010**	**28,122**	**12,119**	**16,003**	**27,354**	**8,573**	**18,781**	**54,908**
CRIMINAL	10,472	14,319	14,171	148	10,341	531	3,043	968	2,075	6,767	2,186	4,581	14,450
U.S. PRISONER PETITIONS	2,757	5,362	5,153	209	5,029	89	3,491	2,210	1,281	1,449	220	1,229	3,090
OTHER U.S. CIVIL	2,451	3,095	3,021	74	3,016	131	1,127	266	861	1,758	677	1,081	2,530
PRIV. PRISONER PETITIONS	6,424	11,226	10,880	346	11,415	102	8,322	5,084	3,238	2,991	710	2,281	6,235
OTHER PRIVATE CIVIL	10,929	13,092	12,816	276	12,768	796	5,793	1,316	4,477	6,179	3,587	2,592	11,253
BANKRUPTCY	734	881	856	25	797	35	373	69	304	389	223	166	818
ADMINISTRATIVE APPEALS	12,281	12,808	12,544	264	9,790	283	5,081	1,877	3,204	4,426	952	3,474	15,299
ORIGINAL PROCEEDINGS [2]	928	4,635	4,582	53	4,330	43	892	329	563	3,395	18	3,377	1,233
DISTRICT OF COLUMBIA	**1,102**	**1,359**	**1,347**	**12**	**1,148**	**148**	**469**	**117**	**352**	**531**	**262**	**269**	**1,313**
CRIMINAL	127	168	168	-	123	5	63	3	60	55	46	9	172
U.S. PRISONER PETITIONS	88	150	147	3	117	2	57	19	38	58	6	52	121
OTHER U.S. CIVIL	170	317	312	5	243	33	82	16	66	128	50	78	244
PRIV. PRISONER PETITIONS	16	19	18	1	16	-	10	4	6	6	-	6	19
OTHER PRIVATE CIVIL	119	197	195	2	173	8	77	7	70	88	44	44	143
BANKRUPTCY	2	5	5	-	6	-	5	5	-	1	-	1	1
ADMINISTRATIVE APPEALS	547	407	406	1	377	95	145	57	88	137	112	25	577
ORIGINAL PROCEEDINGS [2]	33	96	96	-	93	5	30	6	24	58	4	54	36
FIRST CIRCUIT	**1,541**	**1,725**	**1,719**	**6**	**1,651**	**95**	**769**	**290**	**479**	**787**	**358**	**429**	**1,615**
CRIMINAL	698	555	554	1	516	35	252	91	161	229	96	133	737
U.S. PRISONER PETITIONS	99	140	137	3	113	4	84	53	31	25	9	16	126
OTHER U.S. CIVIL	78	92	92	-	104	8	36	8	28	60	23	37	66
PRIV. PRISONER PETITIONS	93	118	118	-	126	6	79	56	23	41	11	30	85
OTHER PRIVATE CIVIL	377	528	526	2	530	37	236	50	186	257	170	87	375
BANKRUPTCY	32	24	24	-	27	-	12	5	7	15	15	-	29
ADMINISTRATIVE APPEALS	134	190	190	-	161	5	67	26	41	89	32	57	163
ORIGINAL PROCEEDINGS [2]	30	78	78	-	74	-	3	1	2	71	2	69	34

Table B-1. (March 31, 2005—Continued)

Circuit and Nature of Proceeding	Cases Pending Apr. 1, 2004[1]	Cases Commenced			Cases Terminated								Cases Pending Mar. 31, 2005
						Cases Disposed of by Consolidation	Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total		Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
SECOND CIRCUIT	**8,332**	**6,839**	**6,649**	**190**	**5,488**	**259**	**3,473**	**755**	**2,718**	**1,756**	**1,021**	**735**	**9,683**
CRIMINAL	1,103	885	856	29	753	108	222	40	182	423	288	135	1,235
U.S. PRISONER PETITIONS	400	265	244	21	339	4	259	99	160	76	36	40	326
OTHER U.S. CIVIL	274	262	256	6	229	6	132	31	101	91	61	30	307
PRIV. PRISONER PETITIONS	1,259	901	846	55	1,255	1	1,032	432	600	222	97	125	905
OTHER PRIVATE CIVIL	1,549	1,465	1,429	36	1,416	124	732	76	656	560	459	101	1,598
BANKRUPTCY	87	92	88	4	69	1	41	8	33	27	21	6	110
ADMINISTRATIVE APPEALS	3,465	2,647	2,611	36	1,136	14	992	59	933	130	59	71	4,976
ORIGINAL PROCEEDINGS [2]	195	322	319	3	291	1	63	10	53	227	-	227	226
THIRD CIRCUIT	**3,085**	**4,037**	**3,988**	**49**	**3,858**	**44**	**1,752**	**796**	**956**	**2,062**	**517**	**1,545**	**3,264**
CRIMINAL	572	700	699	1	493	4	143	66	77	346	93	253	779
U.S. PRISONER PETITIONS	277	419	409	10	427	1	237	162	75	189	13	176	269
OTHER U.S. CIVIL	196	227	224	3	259	4	79	13	66	176	44	132	164
PRIV. PRISONER PETITIONS	463	717	710	7	766	4	559	385	174	203	37	166	414
OTHER PRIVATE CIVIL	951	1,089	1,074	15	1,069	30	450	90	360	589	234	355	971
BANKRUPTCY	96	79	78	1	92	-	38	4	34	54	32	22	83
ADMINISTRATIVE APPEALS	484	593	582	11	561	1	224	74	150	336	60	276	516
ORIGINAL PROCEEDINGS [2]	46	213	212	1	191	-	22	2	20	169	4	165	68
FOURTH CIRCUIT	**2,610**	**5,196**	**5,167**	**29**	**4,777**	**241**	**2,089**	**1,205**	**884**	**2,447**	**443**	**2,004**	**3,029**
CRIMINAL	723	1,316	1,315	1	712	43	180	44	136	489	103	386	1,327
U.S. PRISONER PETITIONS	392	853	843	10	894	28	617	507	110	249	15	234	351
OTHER U.S. CIVIL	121	192	191	1	214	10	60	13	47	144	35	109	99
PRIV. PRISONER PETITIONS	427	1,060	1,055	5	1,125	37	755	518	237	333	25	308	362
OTHER PRIVATE CIVIL	584	813	806	7	888	78	278	52	226	532	218	314	509
BANKRUPTCY	36	64	64	-	68	7	19	4	15	34	13	21	40
ADMINISTRATIVE APPEALS	256	448	444	4	427	11	154	67	87	262	33	229	277
ORIGINAL PROCEEDINGS [2]	71	450	449	1	457	27	26	-	26	404	1	403	64
FIFTH CIRCUIT	**4,413**	**9,025**	**8,676**	**349**	**7,709**	**149**	**3,939**	**1,596**	**2,343**	**3,621**	**781**	**2,840**	**5,729**
CRIMINAL	1,647	3,050	2,984	66	2,074	51	522	118	404	1,501	169	1,332	2,623
U.S. PRISONER PETITIONS	271	716	663	53	586	1	433	230	203	152	17	135	401
OTHER U.S. CIVIL	172	292	281	11	291	11	111	16	95	169	52	117	173
PRIV. PRISONER PETITIONS	880	2,103	1,988	115	2,025	5	1,630	879	751	390	43	347	958
OTHER PRIVATE CIVIL	968	1,455	1,408	47	1,456	58	660	144	516	738	429	309	967
BANKRUPTCY	60	117	114	3	103	10	43	5	38	50	32	18	74
ADMINISTRATIVE APPEALS	314	580	567	13	520	11	323	204	119	186	39	147	374
ORIGINAL PROCEEDINGS [2]	101	712	671	41	654	2	217	-	217	435	-	435	159

Table B-1. (March 31, 2005—Continued)

Circuit and Nature of Proceeding	Cases Pending Apr. 1, 2004[1]	Cases Commenced			Cases Terminated								Cases Pending Mar. 31, 2005
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
SIXTH CIRCUIT	**4,459**	**4,785**	**4,750**	**35**	**4,761**	**223**	**1,920**	**847**	**1,073**	**2,618**	**1,129**	**1,489**	**4,483**
CRIMINAL	1,027	1,157	1,147	10	898	54	256	76	180	588	287	301	1,286
U.S. PRISONER PETITIONS	249	331	328	3	311	3	222	167	55	86	14	72	269
OTHER U.S. CIVIL	290	228	228	-	303	8	92	26	66	203	93	110	215
PRIV. PRISONER PETITIONS	726	892	880	12	910	11	545	398	147	354	92	262	708
OTHER PRIVATE CIVIL	1,408	1,327	1,323	4	1,457	109	577	113	464	771	545	226	1,278
BANKRUPTCY	77	69	68	1	73	5	28	3	25	40	24	16	73
ADMINISTRATIVE APPEALS	549	371	369	2	469	32	108	50	58	329	73	256	451
ORIGINAL PROCEEDINGS [2]	133	410	407	3	340	1	92	14	78	247	1	246	203
SEVENTH CIRCUIT	**2,272**	**3,482**	**3,445**	**37**	**3,357**	**207**	**1,777**	**651**	**1,126**	**1,373**	**723**	**650**	**2,397**
CRIMINAL	542	607	607	-	430	46	156	33	123	228	144	84	719
U.S. PRISONER PETITIONS	139	485	471	14	442	26	292	145	147	124	16	108	182
OTHER U.S. CIVIL	115	135	134	1	150	5	48	20	28	97	60	37	100
PRIV. PRISONER PETITIONS	350	689	671	18	684	18	498	174	324	168	55	113	355
OTHER PRIVATE CIVIL	771	929	925	4	1,011	82	447	70	377	482	340	142	689
BANKRUPTCY	42	63	63	-	52	3	28	8	20	21	16	5	53
ADMINISTRATIVE APPEALS	290	282	282	-	291	27	154	70	84	110	90	20	281
ORIGINAL PROCEEDINGS [2]	23	292	292	-	297	-	154	131	23	143	2	141	18
EIGHTH CIRCUIT	**1,833**	**3,387**	**3,376**	**11**	**2,893**	**146**	**881**	**447**	**434**	**1,866**	**652**	**1,214**	**2,327**
CRIMINAL	599	1,108	1,105	3	736	64	134	54	80	538	219	319	971
U.S. PRISONER PETITIONS	86	281	279	2	207	-	129	112	17	78	11	67	160
OTHER U.S. CIVIL	152	194	193	1	204	5	45	9	36	154	65	89	142
PRIV. PRISONER PETITIONS	211	523	520	3	492	9	285	183	102	198	32	166	242
OTHER PRIVATE CIVIL	527	724	722	2	690	54	209	52	157	427	256	171	561
BANKRUPTCY	14	27	27	-	21	-	5	1	4	16	10	6	20
ADMINISTRATIVE APPEALS	198	184	184	-	221	10	52	26	26	159	59	100	161
ORIGINAL PROCEEDINGS [2]	46	346	346	-	322	4	22	10	12	296	-	296	70

Table B-1. (March 31, 2005—Continued)

Circuit and Nature of Proceeding	Cases Pending Apr. 1, 2004[1]	Cases Commenced			Cases Terminated								Cases Pending Mar. 31, 2005
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
NINTH CIRCUIT	**12,205**	**15,236**	**14,972**	**264**	**12,572**	**319**	**6,309**	**3,019**	**3,290**	**5,944**	**1,696**	**4,248**	**14,869**
CRIMINAL	1,826	1,996	1,992	4	1,610	78	523	138	385	1,009	422	587	2,212
U.S. PRISONER PETITIONS	342	549	540	9	493	16	323	215	108	154	53	101	398
OTHER U.S. CIVIL	557	668	651	17	519	30	251	60	191	238	128	110	706
PRIV. PRISONER PETITIONS	1,322	2,325	2,287	38	2,205	8	1,564	1,231	333	633	247	386	1,442
OTHER PRIVATE CIVIL	2,167	2,223	2,185	38	1,851	126	1,008	206	802	717	451	266	2,539
BANKRUPTCY	206	220	214	6	160	7	88	10	78	65	36	29	266
ADMINISTRATIVE APPEALS	5,612	6,437	6,285	152	4,983	54	2,519	1,147	1,372	2,410	355	2,055	7,066
ORIGINAL PROCEEDINGS [2]	173	818	818	-	751	-	33	12	21	718	4	714	240
TENTH CIRCUIT	**1,935**	**2,824**	**2,815**	**9**	**2,468**	**39**	**1,093**	**444**	**649**	**1,336**	**410**	**926**	**2,291**
CRIMINAL	478	743	738	5	474	4	127	44	83	343	137	206	747
U.S. PRISONER PETITIONS	159	272	272	-	246	1	137	77	60	108	10	98	185
OTHER U.S. CIVIL	178	184	184	-	191	5	61	13	48	125	34	91	171
PRIV. PRISONER PETITIONS	302	569	567	2	516	1	338	220	118	177	37	140	355
OTHER PRIVATE CIVIL	621	669	668	1	653	28	284	41	243	341	166	175	637
BANKRUPTCY	43	41	40	1	56	-	28	3	25	28	7	21	28
ADMINISTRATIVE APPEALS	125	108	108	-	128	-	50	9	41	78	19	59	105
ORIGINAL PROCEEDINGS [2]	29	238	238	-	204	-	68	37	31	136	-	136	63
ELEVENTH CIRCUIT	**3,189**	**7,523**	**7,119**	**404**	**6,804**	**140**	**3,651**	**1,952**	**1,699**	**3,013**	**581**	**2,432**	**3,908**
CRIMINAL	1,130	2,034	2,006	28	1,522	39	465	261	204	1,018	182	836	1,642
U.S. PRISONER PETITIONS	255	901	820	81	854	3	701	424	277	150	20	130	302
OTHER U.S. CIVIL	148	304	275	29	309	6	130	41	89	173	32	141	143
PRIV. PRISONER PETITIONS	375	1,310	1,220	90	1,295	2	1,027	604	423	266	34	232	390
OTHER PRIVATE CIVIL	887	1,673	1,555	118	1,574	62	835	415	420	677	275	402	986
BANKRUPTCY	39	80	71	9	78	2	38	13	25	38	17	21	41
ADMINISTRATIVE APPEALS	307	561	516	45	516	23	293	88	205	200	21	179	352
ORIGINAL PROCEEDINGS [2]	48	660	656	4	656	3	162	106	56	491	-	491	52

NOTE: THIS TABLE INCLUDES APPEALS REOPENED, REMANDED, AND REINSTATED (AFTER BEING TERMINATED DUE TO PROCEDURAL DEFAULTS) AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

[1] REVISED.

[2] BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.

Table B-7.
U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising From the U.S. District Courts, by Circuit, During the 12-Month Period Ending March 31, 2005

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
TOTAL CASES	**47,094**	**851**	**1,433**	**3,778**	**3,152**	**4,234**	**7,616**	**3,935**	**2,845**	**2,830**	**7,761**	**2,437**	**6,222**
TOTAL CRIMINAL CASES	**14,319**	**168**	**555**	**885**	**700**	**1,316**	**3,050**	**1,157**	**607**	**1,108**	**1,996**	**743**	**2,034**
TOTAL CIVIL CASES	**32,775**	**683**	**878**	**2,893**	**2,452**	**2,918**	**4,566**	**2,778**	**2,238**	**1,722**	**5,765**	**1,694**	**4,188**
U.S. CASES													
TOTAL	**8,457**	**467**	**232**	**527**	**646**	**1,045**	**1,008**	**559**	**620**	**475**	**1,217**	**456**	**1,205**
U.S. PLAINTIFF	**356**	**7**	**11**	**50**	**26**	**24**	**34**	**24**	**19**	**20**	**70**	**24**	**47**
NEGOTIABLE INSTRUMENTS	1	-	-	-	-	-	1	-	-	-	-	-	-
OTHER CONTRACT ACTIONS	20	-	4	4	3	-	1	3	1	-	1	1	2
CONDEMNATION OF LAND	5	-	-	-	-	1	1	-	-	-	3	-	-
OTHER REAL PROP. ACTIONS	16	-	1	1	2	1	3	-	1	2	1	3	1
TORT ACTIONS	8	1	-	-	-	-	3	-	-	1	1	-	2
CIVIL RIGHTS:													
EMPLOYMENT	33	-	-	5	3	5	-	4	3	1	6	2	4
OTHER CIVIL RIGHTS	13	1	-	3	-	-	1	-	-	3	1	1	3
FORFEITURE AND PENALTY	52	2	2	5	2	1	5	9	5	-	13	2	6
FAIR LABOR STAND. ACT	2	-	-	-	-	1	-	-	-	-	1	-	-
OTHER LABOR	10	1	-	4	-	-	-	-	2	-	2	-	1
SECUR., COMMOD., & EXCHG.	51	-	1	16	1	1	4	1	2	-	7	5	13
TAX SUITS	40	-	-	2	5	4	5	2	-	5	11	3	3
ALL OTHER	105	2	3	10	10	10	10	5	5	8	23	7	12
U.S. DEFENDANT	**8,101**	**460**	**221**	**477**	**620**	**1,021**	**974**	**535**	**601**	**455**	**1,147**	**432**	**1,158**
CONTRACT ACTIONS	66	5	1	6	3	8	7	5	5	6	9	2	9
REAL PROPERTY ACTIONS	40	-	2	-	2	1	4	1	1	6	12	11	-
TORT ACTIONS	227	15	15	13	18	9	27	18	17	12	53	11	19
CIVIL RIGHTS:													
EMPLOYMENT	383	58	12	20	14	56	42	23	18	18	44	22	56
OTHER CIVIL RIGHTS	460	63	21	58	38	17	47	31	14	21	100	15	35

Table B-7. (March 31, 2005—Continued)

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
U.S. DEFENDANT (CONTINUED)													
PRISONER PETITIONS:													
MOTIONS TO VACATE SEN.	2,969	21	96	167	124	438	460	231	288	170	197	138	639
HABEAS CORPUS—GEN.	1,337	51	33	73	230	21	181	70	107	57	313	70	131
HABEAS CORPUS—DEATH	5	-	-	-	4	-	-	1	-	-	-	-	-
PRISONER CIVIL RIGHTS	421	71	9	17	52	2	58	18	-	31	27	49	87
PRISON CONDITION*	159	2	-	2	6	55	12	4	32	9	-	1	36
OTHER PRIS. PETITIONS	471	5	2	6	3	337	5	7	58	14	12	14	8
LABOR SUITS	32	3	1	2	2	1	6	2	1	-	12	-	2
SOCIAL SECURITY LAWS	690	5	16	37	71	33	75	71	33	63	147	52	87
TAX SUITS	158	4	6	14	14	8	14	19	1	7	57	7	7
ENVIRONMENTAL MATTERS	138	20	1	5	2	3	7	3	-	17	61	12	7
FREEDOM OF INFOR. ACT	77	34	1	8	4	1	4	3	4	3	9	5	1
ALL OTHER	468	103	5	49	33	31	25	28	22	21	94	23	34
PRIVATE CASES													
TOTAL	**24,318**	**216**	**646**	**2,366**	**1,806**	**1,873**	**3,558**	**2,219**	**1,618**	**1,247**	**4,548**	**1,238**	**2,983**
FEDERAL QUESTION	**21,341**	**183**	**519**	**2,080**	**1,516**	**1,653**	**3,149**	**1,934**	**1,485**	**1,103**	**4,039**	**1,093**	**2,587**
MARINE CONTRACT	72	-	5	12	5	-	13	2	2	-	15	2	16
OTHER CONTRACT ACTIONS	390	3	9	64	26	21	67	33	8	23	68	31	37
FEDERAL EMPLOYERS													
LIABILITY ACT	24	-	-	3	4	-	-	1	6	1	6	3	-
MARINE INJURY	83	-	-	6	3	1	46	4	-	-	16	-	7
OTHER TORT ACTIONS	481	14	14	32	17	37	48	29	76	32	108	16	58
ANTITRUST	105	4	6	17	11	12	11	9	2	4	17	6	6
CIVIL RIGHTS:													
EMPLOYMENT	2,373	28	69	249	151	163	271	247	250	155	271	132	387
OTHER CIVIL RIGHTS	3,554	63	166	361	334	191	326	400	237	212	596	208	460
PRISONER PETITIONS:													
HABEAS CORPUS—GEN.	6,404	7	70	529	371	525	1,224	503	345	239	1,598	292	701
HABEAS CORPUS—DEATH	173	-	-	-	13	14	62	27	3	8	14	8	24
PRISONER CIVIL RIGHTS	2,651	10	45	338	188	13	607	209	7	142	543	263	286
PRISON CONDITION*	1,918	1	3	32	142	500	193	149	331	108	163	1	295
OTHER PRIS. PETITIONS	80	1	-	2	3	8	17	4	3	26	7	5	4
LABOR MGMT. RELAT. ACT	161	-	5	28	14	9	7	25	20	12	28	1	12
OTHER LABOR	857	13	42	73	75	52	100	126	66	49	126	35	100
COPYRIGHT, PATENT, AND TRADEMARK	453	4	15	70	30	19	39	48	19	19	137	19	34

Table B-7. (March 31, 2005—Continued)

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
PRIVATE CASES (CONTINUED)													
SECUR., COMMOD., & EXCHG.	174	4	5	50	18	11	12	9	8	8	27	4	18
CONST. OF STATE STATS.	118	3	4	14	2	8	11	7	6	13	30	4	16
ALL OTHER	1,270	28	61	200	109	69	95	102	96	52	269	63	126
DIVERSITY OF CITIZENSHIP	**2,975**	**33**	**127**	**286**	**288**	**220**	**409**	**285**	**133**	**144**	**509**	**145**	**396**
INSURANCE	687	1	24	42	79	46	106	76	38	20	130	37	88
OTHER CONTRACT ACTIONS	1,171	12	51	127	119	94	129	104	88	68	176	62	141
REAL PROPERTY ACTIONS	79	1	6	4	6	10	13	7	5	2	7	3	15
PERSONAL INJURY/PRODUCT LIABILITY	246	1	11	19	30	13	35	28	-	8	71	4	26
OTHER PERSONAL INJURY	507	18	24	59	29	43	93	42	1	39	82	21	56
PERSONAL PROP. DAMAGE	239	-	7	29	24	13	21	27	1	7	36	16	58
ALL OTHER	46	-	4	6	1	1	12	1	-	-	7	2	12
GENERAL LOCAL JURISDICTION	**2**	**-**	**-**	**-**	**2**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
CONTRACT ACTIONS	-	-	-	-	-	-	-	-	-	-	-	-	-
REAL PROPERTY ACTIONS	2	-	-	-	2	-	-	-	-	-	-	-	-
TORT ACTIONS	-	-	-	-	-	-	-	-	-	-	-	-	-
PRISONER PETITIONS	-	-	-	-	-	-	-	-	-	-	-	-	-
ALL OTHER	-	-	-	-	-	-	-	-	-	-	-	-	-
CRIMINAL CASES													
TOTAL	**14,319**	**168**	**555**	**885**	**700**	**1,316**	**3,050**	**1,157**	**607**	**1,108**	**1,996**	**743**	**2,034**
GENERAL OFFENSES													
HOMICIDE, TOTAL	**87**	**8**	**1**	**6**	**7**	**3**	**4**	**3**	**9**	**11**	**17**	**10**	**8**
MURDER, FIRST DEGREE	78	8	1	6	5	3	3	3	9	10	15	7	8
OTHER HOMICIDE	9	-	-	-	2	-	1	-	-	1	2	3	-
ROBBERY, TOTAL	**372**	**-**	**12**	**16**	**35**	**64**	**34**	**48**	**20**	**21**	**42**	**17**	**63**
BANK	365	-	12	14	32	63	34	48	20	21	42	17	62
OTHER ROBBERY	7	-	-	2	3	1	-	-	-	-	-	-	1

Table B-7. (March 31, 2005—Continued)

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
GENERAL OFFENSES (CONTINUED)													
ASSAULT	**100**	**-**	**4**	**7**	**3**	**6**	**11**	**3**	**4**	**23**	**24**	**7**	**8**
BURGLARY	**9**	**-**	**-**	**-**	**1**	**-**	**-**	**-**	**-**	**1**	**5**	**1**	**1**
LARCENY AND THEFT, TOTAL	**259**	**-**	**11**	**24**	**24**	**15**	**31**	**19**	**11**	**11**	**49**	**7**	**57**
INTERSTATE COMMERCE	84	-	4	7	17	-	4	6	5	1	7	-	33
TRANSPORTATION, ETC. OF STOLEN PROPERTY	38	-	-	8	2	6	3	3	2	2	2	1	9
POSTAL	67	-	5	1	4	5	17	3	1	3	22	2	4
OTHER LARCENY AND THEFT	70	-	2	8	1	4	7	7	3	5	18	4	11
EMBEZZLEMENT	**79**	**1**	**-**	**5**	**6**	**7**	**10**	**13**	**6**	**4**	**11**	**7**	**9**
FRAUD, TOTAL	**1,471**	**14**	**61**	**187**	**98**	**124**	**182**	**113**	**86**	**77**	**218**	**57**	**254**
INCOME TAX	102	-	7	11	7	4	11	15	-	5	15	8	19
POSTAL AND INTERSTATE WIRE, RADIO, ETC.	297	3	12	33	17	23	40	13	27	16	46	5	62
LENDING AND CREDIT	235	2	18	21	15	29	22	29	10	10	32	19	28
FALSE CLAIMS & STATEMENTS	165	4	4	23	16	14	23	10	11	7	28	2	23
OTHER FRAUD	672	5	20	99	43	54	86	46	38	39	97	23	122
AUTO THEFT	**59**	**1**	**5**	**2**	**3**	**8**	**11**	**6**	**-**	**3**	**-**	**3**	**17**
FORGERY AND COUNTERFEITING	**187**	**-**	**5**	**8**	**21**	**18**	**29**	**20**	**3**	**10**	**21**	**11**	**41**
SEX OFFENSES	**296**	**-**	**7**	**19**	**16**	**20**	**39**	**29**	**11**	**35**	**53**	**26**	**41**
DRUGS	**5,387**	**66**	**260**	**308**	**251**	**520**	**961**	**462**	**245**	**530**	**608**	**254**	**922**
MISC. GENERAL OFFENSES TOTAL	**2,834**	**62**	**107**	**176**	**164**	**413**	**375**	**342**	**121**	**263**	**289**	**187**	**335**
BRIBERY	24	4	-	2	1	3	3	-	-	-	3	-	8
EXTORTION, RACKETEERING, AND THREATS	149	-	7	16	15	20	22	11	5	12	20	9	12
GAMBLING, LOTTERY	1	-	-	-	-	-	-	-	-	1	-	-	-
KIDNAPPING	76	-	1	1	1	6	27	12	2	6	13	2	5

Table B-7. (March 31, 2005—Continued)

Nature of Suit or Offense	Total	Circuit											
		D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
MISC. GENERAL OFFENSES (CONTINUED)													
FIREARMS, WEAPONS	2,352	57	89	116	138	364	292	306	102	229	214	161	284
ESCAPE	71	-	1	6	3	7	18	4	2	4	12	6	8
PERJURY	15	-	1	1	2	3	2	-	1	3	1	-	1
DRUNK DRIVING/TRAFFIC	10	-	-	-	-	4	1	-	-	-	3	-	2
OTHER MISCELLANEOUS GENERAL OFFENSES	136	1	8	34	4	6	10	9	9	8	23	9	15
SPECIAL OFFENSES													
IMMIGRATION LAWS	**2,376**	**3**	**50**	**69**	**30**	**42**	**1,275**	**47**	**49**	**47**	**530**	**114**	**120**
FEDERAL STATUTES, TOTAL	**803**	**13**	**32**	**58**	**41**	**76**	**88**	**52**	**42**	**72**	**129**	**42**	**158**
AGRICULTURAL ACTS	5	-	-	-	-	-	-	-	2	-	1	1	1
ANTITRUST VIOLATIONS	2	-	-	-	-	-	2	-	-	-	-	-	-
NATIONAL DEFENSE LAWS	7	1	-	-	-	-	1	-	2	-	3	-	-
CIVIL RIGHTS	16	-	1	-	-	-	4	1	1	1	1	2	5
WITNESS INTIMIDATION	55	-	4	7	3	7	2	3	4	1	5	1	18
EXPLOSIVES/NONVESSEL	49	2	3	5	3	5	3	4	6	3	6	3	6
OTHER	669	10	24	46	35	64	76	44	27	67	113	35	128

NOTE: THIS TABLE INCLUDES APPEALS REOPENED, REMANDED, AND REINSTATED (AFTER BEING TERMINATED DUE TO PROCEDURAL DEFAULTS) AS WELL AS ORIGINAL APPEALS.
THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

* COLLECTION OF DATA FOR THIS CATEGORY BEGAN ON JANUARY 1, 1997.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2001 Through 2005

Source	2001	2002	2003	2004	2005
TOTAL APPEALS	**57,464**	**57,555**	**60,847**	**62,762**	**68,473**
US DISTRICT COURTS	47,327	47,068	46,358	45,581	48,878
BANKRUPTCY	961	843	902	862	865
ADMINISTRATIVE AGENCIES, TOTAL	3,300	5,789	9,988	12,255	13,713
IRS	222	205	173	192	210
LABOR	28	7	21	24	28
FCC	135	125	103	126	81
FERC	160	200	141	267	255
FTC	0	0	3	3	3
NLRB	364	291	235	285	341
EPA	130	120	148	138	136
ICC	0	0	1	0	0
BIA	1,760	4,449	8,833	10,812	12,349
OTHER ADMIN. AGENCIES	501	392	330	408	310
ORIGINAL PROCEEDINGS	5,876	3,855	3,599	4,064	5,017
DC CIRCUIT	**1,401**	**1,126**	**1,121**	**1,390**	**1,379**
U.S. DISTRICT COURTS	740	659	647	824	801
BANKRUPTCY	3	4	3	7	3
IRS	8	7	8	10	15
NLRB	55	53	39	41	72
ADMINISTRATIVE AGENCIES	480	340	344	423	381
ORIGINAL PROCEEDINGS	115	63	80	85	107
1ST CIRCUIT	**1,762**	**1,667**	**1,844**	**1,723**	**1,912**
ME	164	115	141	143	171
MA	659	621	635	578	602
NH	112	96	117	121	118
RI	150	134	122	116	131
PR	498	524	574	510	506
BANKRUPTCY	24	35	36	19	31
IRS	3	3	5	4	5
NLRB	5	10	3	4	11
ADMINISTRATIVE AGENCIES	55	69	145	156	244
ORIGINAL PROCEEDINGS	92	60	66	72	93

Table B-3. (September 30, 2005—Continued)

Source	2001	2002	2003	2004	2005
2ND CIRCUIT	**4,519**	**4,870**	**6,359**	**7,008**	**7,035**
CT	357	374	358	294	354
NY,N	395	401	361	426	409
NY,E	1,034	1,139	1,078	1,187	1,127
NY,S	1,684	1,571	1,688	1,630	1,633
NY,W	283	358	314	267	368
VT	57	59	48	58	51
BANKRUPTCY	93	76	85	81	100
IRS	27	10	11	12	10
NLRB	51	31	37	24	38
ADMINISTRATIVE AGENCIES	184	562	2,118	2,711	2,578
ORIGINAL PROCEEDINGS	354	289	261	318	367
3RD CIRCUIT	**3,860**	**3,643**	**3,957**	**3,871**	**4,498**
DE	134	144	138	139	145
NJ	816	735	741	731	757
PA,E	1,275	1,081	1,060	1,022	1,166
PA,M	470	494	549	519	629
PA,W	520	489	520	532	619
VI	67	91	113	65	57
BANKRUPTCY	78	89	87	90	97
IRS	11	8	20	9	10
NLRB	28	33	27	35	26
ADMINISTRATIVE AGENCIES	139	233	505	542	728
ORIGINAL PROCEEDINGS	322	246	197	187	264
4TH CIR	**5,303**	**4,658**	**4,887**	**4,957**	**5,307**
MD	722	679	619	608	582
NC,E	487	417	462	408	542
NC,M	299	314	257	311	331
NC,W	380	327	282	250	313
SC	620	596	631	732	709
VA,E	1,147	1,111	1,077	1,114	1,084
VA,W	358	301	443	347	360
WV,N	135	111	109	110	139
WV,S	225	200	210	206	207
BANKRUPTCY	83	66	65	58	67
IRS	14	8	9	8	10
NLRB	29	27	24	31	24
ADMINISTRATIVE AGENCIES	119	177	346	404	399
ORIGINAL PROCEEDINGS	685	324	353	370	540

Table B-3. (September 30, 2005—Continued)

Source	2001	2002	2003	2004	2005
5TH CIRCUIT	**8,642**	**8,784**	**8,613**	**8,509**	**9,052**
LA,E	625	582	531	537	466
LA,M	210	183	164	179	195
LA,W	482	454	444	463	459
MS,N	224	256	213	240	202
MS,S	385	363	388	302	314
TX,N	1,438	1,363	1,234	1,400	1,369
TX,E	705	843	782	680	593
TX,S	1,897	2,162	2,159	1,999	2,274
TX,W	1,254	1,367	1,459	1,352	1,740
BANKRUPTCY	139	142	109	116	110
IRS	25	19	27	22	20
NLRB	15	28	9	18	7
ADMINISTRATIVE AGENCIES	302	341	449	537	623
ORIGINAL PROCEEDINGS	941	681	645	664	680
6TH CIRCUIT	**4,853**	**4,619**	**4,964**	**4,841**	**5,211**
KY,E	277	250	315	340	307
KY,W	267	236	244	239	213
MI,E	1,016	1,059	952	881	912
MI,W	343	382	486	483	530
OH,N	704	644	659	662	605
OH,S	486	477	507	456	509
TN,E	318	308	304	290	395
TN,M	245	306	330	265	377
TN,W	315	325	337	356	365
BANKRUPTCY	87	62	73	81	62
IRS	14	8	10	10	20
NLRB	68	31	26	38	63
ADMINISTRATIVE AGENCIES	110	173	387	373	355
ORIGINAL PROCEEDINGS	603	358	334	367	498

Table B-3. (September 30, 2005—Continued)

Source	2001	2002	2003	2004	2005
7TH CIRCUIT	**3,455**	**3,418**	**3,517**	**3,377**	**3,789**
IL,N	1,128	1,191	1,146	1,106	1,097
IL,C	337	311	291	291	354
IL,S	239	263	260	224	285
IN,N	311	315	334	310	298
IN,S	369	358	411	330	412
WI,E	316	349	299	265	314
WI,W	260	238	245	261	355
BANKRUPTCY	41	46	66	48	57
IRS	21	16	5	9	23
NLRB	31	29	28	26	30
ADMINISTRATIVE AGENCIES	88	113	260	279	272
ORIGINAL PROCEEDINGS	314	189	172	228	292
8TH CIRCUIT	**3,034**	**3,216**	**3,190**	**3,101**	**3,611**
AR,E	373	378	346	341	419
AR,W	130	145	137	100	111
IA,N	154	165	189	207	187
IA,S	166	198	216	206	242
MN	354	410	410	377	498
MO,E	462	513	442	432	496
MO,W	460	535	519	497	558
NE	198	203	211	245	333
ND	42	53	77	53	53
SD	113	136	131	111	160
BANKRUPTCY	50	40	36	24	29
IRS	17	10	15	11	12
NLRB	16	11	14	17	10
ADMINISTRATIVE AGENCIES	44	125	233	176	147
ORIGINAL PROCEEDINGS	455	294	214	304	356

Table B-3. (September 30, 2005—Continued)

Source	2001	2002	2003	2004	2005
9TH CIRCUIT	**10,342**	**11,421**	**12,872**	**14,274**	**16,037**
AK	135	106	110	103	137
AZ	791	781	870	814	833
CA,N	852	820	770	819	909
CA,E	934	893	813	758	771
CA,C	2,365	2,294	2,345	2,322	2,278
CA,S	621	577	540	488	637
HI	190	187	146	164	190
ID	113	119	159	158	118
MT	165	232	242	299	302
NV	571	466	542	633	589
OR	466	508	479	432	535
WA,E	232	168	202	236	241
WA,W	529	488	430	453	575
GUAM	17	22	20	22	28
NMI	18	16	23	15	9
BANKRUPTCY	260	174	221	217	196
IRS	53	59	49	60	60
NLRB	34	18	21	20	36
ADMINISTRATIVE AGENCIES	1,063	2,822	4,291	5,575	6,737
ORIGINAL PROCEEDINGS	933	671	599	686	856
10TH CIRCUIT	**2,758**	**2,661**	**2,540**	**2,646**	**2,911**
CO	545	552	531	485	565
KS	342	397	331	396	462
NM	411	338	298	339	363
OK,N	179	178	198	165	198
OK,E	147	141	126	129	127
OK,W	410	361	349	368	346
UT	230	233	261	272	315
WY	89	111	104	120	112
BANKRUPTCY	33	38	44	42	31
IRS	13	22	4	11	10
NLRB	11	4	5	14	10
ADMINISTRATIVE AGENCIES	36	76	119	107	93
ORIGINAL PROCEEDINGS	312	210	170	198	279

Table B-3. (September 30, 2005—Continued)

Source	2001	2002	2003	2004	2005
11TH CIRCUIT	**7,535**	**7,472**	**6,983**	**7,065**	**7,731**
AL,N	500	501	440	460	423
AL,M	270	273	280	212	223
AL,S	213	229	255	209	249
FL,N	576	506	398	415	433
FL,M	1,531	1,533	1,479	1,503	1,638
FL,S	1,900	1,967	1,662	1,570	1,827
GA,N	888	898	876	849	956
GA,M	347	353	295	336	275
GA,S	359	358	318	309	306
BANKRUPTCY	70	71	77	79	82
IRS	16	35	10	26	15
NLRB	21	16	2	17	14
ADMINISTRATIVE AGENCIES	94	262	383	495	605
ORIGINAL PROCEEDINGS	750	470	508	585	685

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, For the Twelve-Month Periods Ended September 30, 1993 Through 1997

Source	1993	1994	1995	1996	1997
TOTAL APPEALS	**50,224**	**48,322**	**50,072**	**51,991**	**52,319**
U.S. DISTRICT COURTS	44,236	42,983	44,365	47,026	45,935
BANKRUPTCY	1,388	1,382	1,667	1,434	1,158
ADMIN. AGENCIES, TOTAL	3,928	3,369	3,295	2,827	4,412
U.S. TAX CT.	524	397	390	332	323
LABR	20	39	41	26	43
FCC	318	175	157	128	274
FERC	449	458	222	145	230
FTC	3	4	5	2	1
NLRB	600	481	533	446	443
EPA	131	125	133	87	216
ICC	31	31	29	23	3
INS	1,114	983	1,180	1,063	1,921
OTHER ADMIN. AGENCIES	738	676	605	575	958
ORIGINAL PROCEEDINGS	672	588	745	704	814
DC CIRCUIT	**1,791**	**1,770**	**1,625**	**1,347**	**1,531**
U.S. DISTRICT COURTS	896	850	923	817	767
BANKRUPTCY	9	13	11	8	5
U.S. TAX COURT	7	5	9	12	11
NLRB	32	29	43	42	46
ADMIN. AGENCIES	799	810	565	420	670
ORIGINAL PROCEEDINGS	48	63	74	48	32
1ST CIRCUIT	**1,417**	**1,370**	**1,339**	**1,367**	**1,449**
ME	145	109	149	144	168
MA	568	559	582	554	599
NH	150	126	95	99	133
RI	165	133	158	175	111
PR	258	334	236	291	312
BANKRUPTCY	21	26	31	41	36
U.S. TAX COURT	11	1	4	7	5
NLRB	31	19	22	10	12
ADMIN. AGENCIES	51	51	54	32	61
ORIGINAL PROCEEDINGS	17	12	8	14	12

Table B-3. (Continued)

Source	1993	1994	1995	1996	1997
2ND CIRCUIT	**4,321**	**3,986**	**3,987**	**4,562**	**4,816**
CT	359	394	365	386	424
NY,N	406	328	396	404	407
NY,E	1,048	833	947	998	1,135
NY,S	1,575	1,613	1,488	1,811	1,886
NY,W	305	290	278	362	277
VT	110	110	102	87	96
BANKRUPTCY	147	113	109	168	110
U.S. TAX COURT	41	49	35	58	57
NLRB	92	87	81	67	57
ADMIN. AGENCIES	162	128	131	136	262
ORIGINAL PROCEEDINGS	76	41	55	85	105
3RD CIRCUIT	**3,599**	**3,675**	**3,485**	**3,604**	**3,458**
DE	185	143	106	133	120
NJ	763	788	849	816	831
PA,E	1,220	1,285	1,105	1,131	1,078
PA,M	474	461	446	521	444
PA,W	506	564	560	633	559
VI	125	147	87	82	97
BANKRUPTCY	102	92	84	98	111
U.S. TAX COURT	26	20	40	19	13
NLRB	66	60	68	36	35
ADMIN. AGENCIES	100	73	97	79	107
ORIGINAL PROCEEDINGS	32	42	43	56	63
4TH CIRCUIT	**4,390**	**3,994**	**5,193**	**4,914**	**4,754**
MD	937	652	757	718	863
NC,E	381	433	506	530	503
NC,M	230	198	285	266	215
NC,W	235	192	262	307	280
SC	432	451	595	670	690
VA,E	979	998	1,161	1,183	1,062
VA,W	322	413	493	499	395
WV,N	151	108	169	157	136
WV,S	237	188	164	221	187
BANKRUPTCY	144	106	544	137	81
U.S. TAX COURT	38	26	25	19	23
NLRB	66	43	49	46	31
ADMIN. AGENCIES	223	172	166	144	262
ORIGINAL PROCEEDINGS	15	14	17	17	26

Table B-3. (Continued)

Source	1993	1994	1995	1996	1997
5TH CIRCUIT	**6,657**	**6,264**	**6,513**	**7,546**	**7,573**
LA,E	723	603	604	686	612
LA,M	189	150	185	226	218
LA,W	397	407	475	442	433
MS,N	146	159	199	291	213
MS,S	305	343	345	341	336
TX,N	1,143	1,191	1,179	1,528	1,494
TX,E	883	564	635	732	901
TX,S	1,240	1,320	1,467	1,769	1,608
TX,W	945	932	910	979	1,045
BANKRUPTCY	211	167	162	229	179
U.S. TAX COURT	35	40	31	35	35
NLRB	37	16	15	27	14
ADMIN. AGENCIES	299	297	223	187	388
ORIGINAL PROCEEDINGS	104	75	83	74	97
6TH CIRCUIT	**4,826**	**4,438**	**4,631**	**4,606**	**4,622**
KY,E	306	306	375	353	285
KY,W	304	258	272	279	283
MI,E	1,098	943	1,014	1,026	1,002
MI,W	438	458	433	467	404
OH,N	648	636	728	697	773
OH,S	595	555	500	516	522
TN,E	277	273	284	326	337
TN,M	265	266	270	286	268
TN,W	449	385	399	329	367
BANKRUPTCY	96	105	87	87	87
U.S. TAX COURT	34	21	20	20	22
NLRB	111	78	99	82	102
ADMIN. AGENCIES	167	121	111	106	122
ORIGINAL PROCEEDINGS	38	33	39	32	48

Table B-3. (Continued)

Source	1993	1994	1995	1996	1997
7TH CIRCUIT	**3,235**	**3,096**	**3,112**	**3,248**	**3,350**
IL,N	1,191	1,117	1,128	1,084	1,165
IL,C	312	345	262	339	336
IL,S	258	255	281	275	276
IN,N	305	306	333	366	292
IN,S	350	289	330	380	422
WI,E	309	312	329	292	344
WI,W	266	238	218	263	241
BANKRUPTCY	82	70	67	94	56
U.S. TAX COURT	24	18	14	12	18
NLRB	42	38	44	29	62
ADMIN. AGENCIES	77	85	73	83	108
ORIGINAL PROCEEDINGS	19	23	33	31	30
8TH CIRCUIT	**3,178**	**3,193**	**3,205**	**3,384**	**3,335**
AR,E	433	419	417	405	427
AR,W	135	171	147	190	163
IA,N	110	114	115	151	153
IA,S	233	235	272	244	243
MN	425	437	433	438	500
MO,E	611	641	654	682	631
MO,W	533	541	559	548	587
NE	225	200	192	229	210
ND	100	82	70	72	55
SD	176	151	145	202	151
BANKRUPTCY	61	76	63	89	51
U.S. TAX COURT	14	20	13	17	7
NLRB	36	30	30	27	24
ADMIN. AGENCIES	58	45	43	51	98
ORIGINAL PROCEEDINGS	28	31	52	39	35

Table B-3. (Continued)

Source	1993	1994	1995	1996	1997
9TH CIRCUIT	**8,514**	**8,092**	**8,415**	**8,502**	**8,692**
AK	182	170	183	161	142
AZ	768	720	684	767	680
CA,N	916	910	796	866	964
CA,E	510	529	707	663	663
CA,C	2,033	1,883	1,871	1,970	1,848
CA,S	554	421	538	541	521
HI	214	207	210	179	191
ID	85	137	142	119	90
MT	137	189	184	151	163
NV	525	427	484	430	426
OR	586	554	517	534	567
WA,E	186	199	185	196	156
WA,W	447	429	436	554	453
GUAM	48	56	32	51	61
NMI	16	13	16	21	12
BANKRUPTCY	314	334	298	286	293
U.S. TAX COURT	223	145	149	89	83
NLRB	59	63	63	58	40
ADMIN. AGENCIES	528	530	709	673	1,177
ORIGINAL PROCEEDINGS	183	176	211	193	162
10TH CIRCUIT	**2,657**	**2,714**	**2,619**	**2,582**	**2,629**
CO	453	555	528	537	477
KS	431	407	426	403	408
NM	366	275	287	293	414
OK,N	266	249	267	293	243
OK,E	137	158	190	139	139
OK,W	401	457	447	444	411
UT	232	251	210	186	207
WY	118	123	77	122	130
BANKRUPTCY	101	99	68	62	39
U.S. TAX COURT	29	25	25	17	33
NLRB	13	10	12	4	5
ADMIN. AGENCIES	83	78	56	44	77
ORIGINAL PROCEEDINGS	27	27	26	38	46

Table B-3. (Continued)

Source	1993	1994	1995	1996	1997
11TH CIRCUIT	**5,639**	**5,730**	**5,948**	**6,329**	**6,110**
AL,N	425	520	466	547	417
AL,M	329	347	357	358	300
AL,S	276	289	268	310	240
FL,N	356	377	433	422	434
FL,M	1,104	1,158	1,138	1,311	1,080
FL,S	1,267	1,234	1,381	1,525	1,637
GA,N	840	882	962	920	778
GA,M	260	284	270	257	250
GA,S	283	271	250	328	361
BANKRUPTCY	100	181	143	135	110
U.S. TAX COURT	42	27	25	27	16
NLRB	15	8	7	18	15
ADMIN. AGENCIES	257	101	144	94	314
ORIGINAL PROCEEDINGS	85	51	104	77	158

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit
For the Twelve-Month Periods Ended September 30, 1994 Through 1998

Source	1994	1995	1996	1997	1998
TOTAL APPEALS	**48,322**	**50,072**	**51,991**	**52,319**	**53,805**
U.S. DISTRICT COURTS	42,983	44,365	47,026	45,935	48,057
BANKRUPTCY	1,382	1,667	1,434	1,158	1,203
ADMIN. AGENCIES, TOTAL	3,369	3,295	2,827	4,412	3,793
U.S. TAX COURT	397	390	332	323	368
LABR	39	41	26	43	23
FCC	175	157	128	274	182
FERC	458	222	145	230	284
FTC	4	5	2	1	1
NLRB	481	533	446	443	354
EPA	125	133	87	216	97
ICC	31	29	23	3	2
INS	983	1,180	1,063	1,921	1,936
OTHER ADMIN. AGENCIES	676	605	575	958	546
ORIGINAL PROCEEDINGS	588	745	704	814	752
DC CIRCUIT	**1,770**	**1,625**	**1,347**	**1,531**	**1,627**
U.S. DISTRICT COURTS	850	923	817	767	1,012
BANKRUPTCY	13	11	8	5	8
U.S. TAX COURT	5	9	12	11	11
NLRB	29	43	42	46	37
ADMIN. AGENCIES	810	565	420	670	521
ORIGINAL PROCEEDINGS	63	74	48	32	38
1ST CIRCUIT	**1,370**	**1,339**	**1,367**	**1,449**	**1,437**
ME	109	149	144	168	134
MA	559	582	554	599	556
NH	126	95	99	133	119
RI	133	158	175	111	130
PR	334	236	291	312	331
BANKRUPTCY	26	31	41	36	34
U.S. TAX COURT	1	4	7	5	10
NLRB	19	22	10	12	11
ADMIN. AGENCIES	51	54	32	61	58
ORIGINAL PROCEEDINGS	12	8	14	12	54

Table B-3. (September 30, 1998—Continued)

Source	1994	1995	1996	1997	1998
2ND CIRCUIT	**3,986**	**3,987**	**4,562**	**4,816**	**4,796**
CT	394	365	386	424	360
NY,N	328	396	404	407	424
NY,E	833	947	998	1,135	1,116
NY,S	1,613	1,488	1,811	1,886	1,844
NY,W	290	278	362	277	376
VT	110	102	87	96	94
BANKRUPTCY	113	109	168	110	91
U.S. TAX COURT	49	35	58	57	35
NLRB	87	81	67	57	50
ADMIN. AGENCIES	128	131	136	262	365
ORIGINAL PROCEEDINGS	41	55	85	105	41
3RD CIRCUIT	**3,675**	**3,485**	**3,604**	**3,458**	**3,613**
DE	143	106	133	120	142
NJ	788	849	816	831	847
PA,E	1,285	1,105	1,131	1,078	1,145
PA,M	461	446	521	444	454
PA,W	564	560	633	559	572
VI	147	87	82	97	69
BANKRUPTCY	92	84	98	111	77
U.S. TAX COURT	20	40	19	13	35
NLRB	60	68	36	35	49
ADMIN. AGENCIES	73	97	79	107	122
ORIGINAL PROCEEDINGS	42	43	56	63	101
4TH CIRCUIT	**3,994**	**5,193**	**4,914**	**4,754**	**4,897**
MD	652	757	718	863	859
NC,E	433	506	530	503	428
NC,M	198	285	266	215	268
NC,W	192	262	307	280	269
SC	451	595	670	690	708
VA,E	998	1,161	1,183	1,062	1,145
VA,W	413	493	499	395	492
WV,N	108	169	157	136	127
WV,S	188	164	221	187	175
BANKRUPTCY	106	544	137	81	125
U.S. TAX COURT	26	25	19	23	17
NLRB	43	49	46	31	32
ADMIN. AGENCIES	172	166	144	262	219
ORIGINAL PROCEEDINGS	14	17	17	26	33

Table B-3. (September 30, 1998—Continued)

Source	1994	1995	1996	1997	1998
5TH CIRCUIT	**6,264**	**6,513**	**7,546**	**7,573**	**8,096**
LA,E	603	604	686	612	711
LA,M	150	185	226	218	201
LA,W	407	475	442	433	530
MS,N	159	199	291	213	209
MS,S	343	345	341	336	347
TX,N	1,191	1,179	1,528	1,494	1,478
TX,E	564	635	732	901	915
TX,S	1,320	1,467	1,769	1,608	1,848
TX,W	932	910	979	1,045	1,303
BANKRUPTCY	167	162	229	179	195
U.S. TAX COURT	40	31	35	35	29
NLRB	16	15	27	14	13
ADMIN. AGENCIES	297	223	187	388	219
ORIGINAL PROCEEDINGS	75	83	74	97	98
6TH CIRCUIT	**4,438**	**4,631**	**4,606**	**4,622**	**4,704**
KY,E	306	375	353	285	360
KY,W	258	272	279	283	266
MI,E	943	1,014	1,026	1,002	981
MI,W	458	433	467	404	406
OH,N	636	728	697	773	828
OH,S	555	500	516	522	608
TN,E	273	284	326	337	288
TN,M	266	270	286	268	258
TN,W	385	399	329	367	410
BANKRUPTCY	105	87	87	87	73
U.S. TAX COURT	21	20	20	22	32
NLRB	78	99	82	102	51
ADMIN. AGENCIES	121	111	106	122	103
ORIGINAL PROCEEDINGS	33	39	32	48	40

Table B-3 . (September 30, 1998—Continued)

Source	1994	1995	1996	1997	1998
7TH CIRCUIT	**3,096**	**3,112**	**3,248**	**3,350**	**3,297**
IL,N	1,117	1,128	1,084	1,165	1,285
IL,C	345	262	339	336	270
IL,S	255	281	275	276	299
IN,N	306	333	366	292	262
IN,S	289	330	380	422	410
WI,E	312	329	292	344	303
WI,W	238	218	263	241	254
BANKRUPTCY	70	67	94	56	48
U.S. TAX COURT	18	14	12	18	15
NLRB	38	44	29	62	28
ADMIN. AGENCIES	85	73	83	108	85
ORIGINAL PROCEEDINGS	23	33	31	30	38
8TH CIRCUIT	**3,193**	**3,205**	**3,384**	**3,335**	**3,330**
AR,E	419	417	405	427	443
AR,W	171	147	190	163	161
IA,N	114	115	151	153	129
IA,S	235	272	244	243	171
MN	437	433	438	500	474
MO,E	641	654	682	631	617
MO,W	541	559	548	587	679
NE	200	192	229	210	257
ND	82	70	72	55	61
SD	151	145	202	151	166
BANKRUPTCY	76	63	89	51	48
U.S. TAX COURT	20	13	17	7	18
NLRB	30	30	27	24	12
ADMIN. AGENCIES	45	43	51	98	64
ORIGINAL PROCEEDINGS	31	52	39	35	30

Table B-3. (September 30, 1998—Continued)

Source	1994	1995	1996	1997	1998
9TH CIRCUIT	**8,092**	**8,415**	**8,502**	**8,692**	**9,070**
AK	170	183	161	142	159
AZ	720	684	767	680	654
CA,N	910	796	866	964	927
CA,E	529	707	663	663	705
CA,C	1,883	1,871	1,970	1,848	2,133
CA,S	421	538	541	521	634
HI	207	210	179	191	171
ID	137	142	119	90	139
MT	189	184	151	163	167
NV	427	484	430	426	422
OR	554	517	534	567	466
WA,E	199	185	196	156	140
WA,W	429	436	554	453	528
GUAM	56	32	51	61	46
NMI	13	16	21	12	12
BANKRUPTCY	334	298	286	293	323
U.S. TAX COURT	145	149	89	83	87
NLRB	63	63	58	40	40
ADMIN. AGENCIES	530	709	673	1,177	1,173
ORIGINAL PROCEEDINGS	176	211	193	162	144
10TH CIRCUIT	**2,714**	**2,619**	**2,582**	**2,629**	**2,582**
CO	555	528	537	477	470
KS	407	426	403	408	358
NM	275	287	293	414	353
OK,N	249	267	293	243	237
OK,E	158	190	139	139	169
OK,W	457	447	444	411	496
UT	251	210	186	207	208
WY	123	77	122	130	107
BANKRUPTCY	99	68	62	39	47
U.S. TAX COURT	25	25	17	33	50
NLRB	10	12	4	5	8
ADMIN. AGENCIES	78	56	44	77	43
ORIGINAL PROCEEDINGS	27	26	38	46	36

Table B-3. (September 30, 1998—Continued)

Source	1994	1995	1996	1997	1998
11TH CIRCUIT	**5,730**	**5,948**	**6,329**	**6,110**	**6,356**
AL,N	520	466	547	417	379
AL,M	347	357	358	300	316
AL,S	289	268	310	240	229
FL,N	377	433	422	434	480
FL,M	1,158	1,138	1,311	1,080	1,222
FL,S	1,234	1,381	1,525	1,637	1,836
GA,N	882	962	920	778	766
GA,M	284	270	257	250	372
GA,S	271	250	328	361	372
BANKRUPTCY	181	143	135	110	134
U.S. TAX COURT	27	25	27	16	29
NLRB	8	7	18	15	23
ADMIN. AGENCIES	101	144	94	314	99
ORIGINAL PROCEEDINGS	51	104	77	158	99

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, For the 12-Month Periods Ending September 30, 1995 Through 1999

Source	1995	1996	1997	1998	1999
TOTAL APPEALS	**50,072**	**51,991**	**52,319**	**53,805**	**54,693**
U.S. DISTRICT COURTS	44,365	47,026	45,935	48,057	46,931
BANKRUPTCY	1,667	1,434	1,158	1,203	1,109
ADMIN. AGENCIES, TOTAL	3,295	2,827	4,412	3,793	3,280
U.S. TAX COURT	390	332	323	368	240
LABOR	41	26	43	23	15
FCC	157	128	274	182	157
FERC	222	145	230	284	153
FTC	5	2	1	1	2
NLRB	533	446	443	354	341
EPA	133	87	216	97	176
ICC	29	23	3	2	1
INS	1,180	1,063	1,921	1,936	1,731
OTHER ADMIN. AGENCIES	605	575	958	546	464
ORIGINAL PROCEEDINGS*	745	704	814	752	3,373
DC CIRCUIT	**1,625**	**1,347**	**1,531**	**1,627**	**1,438**
U.S. DISTRICT COURTS	923	817	767	1,012	774
BANKRUPTCY	11	8	5	8	3
U.S. TAX COURT	9	12	11	11	10
NLRB	43	42	46	37	54
OTHER ADMIN. AGENCIES	565	420	670	521	486
ORIGINAL PROCEEDINGS*	74	48	32	38	111
1ST CIRCUIT	**1,339**	**1,367**	**1,449**	**1,437**	**1,454**
ME	149	144	168	134	139
MA	582	554	599	556	538
NH	95	99	133	119	126
RI	158	175	111	130	134
PR	236	291	312	331	338
BANKRUPTCY	31	41	36	34	40
U.S. TAX COURT	4	7	5	10	1
NLRB	22	10	12	11	5
OTHER ADMIN. AGENCIES	54	32	61	58	67
ORIGINAL PROCEEDINGS*	8	14	12	54	66

Table B-3. (September 30, 1999—Continued)

Source	1995	1996	1997	1998	1999
2ND CIRCUIT	**3,987**	**4,562**	**4,816**	**4,796**	**4,630**
CT	365	386	424	360	378
NY,N	396	404	407	424	403
NY,E	947	998	1,135	1,116	1,134
NY,S	1,488	1,811	1,886	1,844	1,723
NY,W	278	362	277	376	270
VT	102	87	96	94	63
BANKRUPTCY	109	168	110	91	93
U.S. TAX COURT	35	58	57	35	20
NLRB	81	67	57	50	36
OTHER ADMIN. AGENCIES	131	136	262	365	299
ORIGINAL PROCEEDINGS*	55	85	105	41	211
3RD CIRCUIT	**3,485**	**3,604**	**3,458**	**3,613**	**3,384**
DE	106	133	120	142	105
NJ	849	816	831	847	798
PA,E	1,105	1,131	1,078	1,145	1,018
PA,M	446	521	444	454	443
PA,W	560	633	559	572	485
VI	87	82	97	69	79
BANKRUPTCY	84	98	111	77	81
U.S. TAX COURT	40	19	13	35	8
NLRB	68	36	35	49	32
OTHER ADMIN. AGENCIES	97	79	107	122	108
ORIGINAL PROCEEDINGS*	43	56	63	101	227
4TH CIRCUIT	**5,193**	**4,914**	**4,754**	**4,897**	**4,627**
MD	757	718	863	859	780
NC,E	506	530	503	428	415
NC,M	285	266	215	268	273
NC,W	262	307	280	269	272
SC	595	670	690	708	581
VA,E	1,161	1,183	1,062	1,145	1,116
VA,W	493	499	395	492	361
WV,N	169	157	136	127	137
WV,S	164	221	187	175	161
BANKRUPTCY	544	137	81	125	87
U.S. TAX COURT	25	19	23	17	13
NLRB	49	46	31	32	36
OTHER ADMIN. AGENCIES	166	144	262	219	146
ORIGINAL PROCEEDINGS*	17	17	26	33	249

Table B-3. (September 30, 1999—Continued)

Source	1995	1996	1997	1998	1999
5TH CIRCUIT	**6,513**	**7,546**	**7,573**	**8,096**	**8,275**
LA,E	604	686	612	711	682
LA,M	185	226	218	201	173
LA,W	475	442	433	530	485
MS,N	199	291	213	209	260
MS,S	345	341	336	347	316
TX,N	1,179	1,528	1,494	1,478	1,395
TX,E	635	732	901	915	865
TX,S	1,467	1,769	1,608	1,848	1,890
TX,W	910	979	1,045	1,303	1,189
BANKRUPTCY	162	229	179	195	165
U.S. TAX COURT	31	35	35	29	11
NLRB	15	27	14	13	16
OTHER ADMIN. AGENCIES	223	187	388	219	239
ORIGINAL PROCEEDINGS*	83	74	97	98	589
6TH CIRCUIT	**4,631**	**4,606**	**4,622**	**4,704**	**4,884**
KY,E	375	353	285	360	371
KY,W	272	279	283	266	290
MI,E	1,014	1,026	1,002	981	879
MI,W	433	467	404	406	439
OH,N	728	697	773	828	738
OH,S	500	516	522	608	642
TN,E	284	326	337	288	320
TN,M	270	286	268	258	228
TN,W	399	329	367	410	405
BANKRUPTCY	87	87	87	73	90
U.S. TAX COURT	20	20	22	32	20
NLRB	99	82	102	51	60
OTHER ADMIN. AGENCIES	111	106	122	103	72
ORIGINAL PROCEEDINGS*	39	32	48	40	330

Table B-3 . (September 30, 1999—Continued)

Source	1995	1996	1997	1998	1999
7TH CIRCUIT	**3,112**	**3,248**	**3,350**	**3,297**	**3,431**
IL,N	1,128	1,084	1,165	1,285	1,186
IL,C	262	339	336	270	288
IL,S	281	275	276	299	283
IN,N	333	366	292	262	325
IN,S	330	380	422	410	332
WI,E	329	292	344	303	408
WI,W	218	263	241	254	237
BANKRUPTCY	67	94	56	48	39
U.S. TAX COURT	14	12	18	15	13
NLRB	44	29	62	28	39
OTHER ADMIN. AGENCIES	73	83	108	85	80
ORIGINAL PROCEEDINGS*	33	31	30	38	201
8TH CIRCUIT	**3,205**	**3,384**	**3,335**	**3,330**	**3,353**
AR,E	417	405	427	443	424
AR,W	147	190	163	161	138
IA,N	115	151	153	129	147
IA,S	272	244	243	171	210
MN	433	438	500	474	462
MO,E	654	682	631	617	537
MO,W	559	548	587	679	540
NE	192	229	210	257	249
ND	70	72	55	61	73
SD	145	202	151	166	197
BANKRUPTCY	63	89	51	48	36
U.S. TAX COURT	13	17	7	18	8
NLRB	30	27	24	12	14
OTHER ADMIN. AGENCIES	43	51	98	64	81
ORIGINAL PROCEEDINGS*	52	39	35	30	237

Table B-3. (September 30, 1999—Continued)

Source	1995	1996	1997	1998	1999
9TH CIRCUIT	**8,415**	**8,502**	**8,692**	**9,070**	**9,383**
AK	183	161	142	159	130
AZ	684	767	680	654	617
CA,N	796	866	964	927	911
CA,E	707	663	663	705	775
CA,C	1,871	1,970	1,848	2,133	2,027
CA,S	538	541	521	634	582
HI	210	179	191	171	382
ID	142	119	90	139	128
MT	184	151	163	167	192
NV	484	430	426	422	451
OR	517	534	567	466	484
WA,E	185	196	156	140	139
WA,W	436	554	453	528	557
GUAM	32	51	61	46	42
NMI	16	21	12	12	13
BANKRUPTCY	298	286	293	323	310
U.S. TAX COURT	149	89	83	87	68
NLRB	63	58	40	40	32
OTHER ADMIN. AGENCIES	709	673	1,177	1,173	1,009
ORIGINAL PROCEEDINGS*	211	193	162	144	534
10TH CIRCUIT	**2,619**	**2,582**	**2,629**	**2,582**	**2,800**
CO	528	537	477	470	527
KS	426	403	408	358	365
NM	287	293	414	353	357
OK,N	267	293	243	237	259
OK,E	190	139	139	169	162
OK,W	447	444	411	496	429
UT	210	186	207	208	254
WY	77	122	130	107	114
BANKRUPTCY	68	62	39	47	42
U.S. TAX COURT	25	17	33	50	39
NLRB	12	4	5	8	6
OTHER ADMIN. AGENCIES	56	44	77	43	45
ORIGINAL PROCEEDINGS*	26	38	46	36	201

Table B-3. (September 30, 1999—Continued)

Source	1995	1996	1997	1998	1999
11TH CIRCUIT	**5,948**	**6,329**	**6,110**	**6,356**	**7,034**
AL,N	466	547	417	379	498
AL,M	357	358	300	316	264
AL,S	268	310	240	229	323
FL,N	433	422	434	480	527
FL,M	1,138	1,311	1,080	1,222	1,457
FL,S	1,381	1,525	1,637	1,836	1,767
GA,N	962	920	778	766	879
GA,M	270	257	250	372	272
GA,S	250	328	361	372	400
BANKRUPTCY	143	135	110	134	123
U.S. TAX COURT	25	27	16	29	29
NLRB	7	18	15	23	11
OTHER ADMIN. AGENCIES	144	94	314	99	67
ORIGINAL PROCEEDINGS*	104	77	158	99	417

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

*BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT INCLUDED IN THIS TABLE.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit
For the 12-Month Periods Ending September 30, 1996 Through 2000

Source	1996	1997	1998	1999	2000
TOTAL APPEALS	**51,991**	**52,319**	**53,805**	**54,693**	**54,697**
U.S. DISTRICT COURTS	47,026	45,935	48,057	46,931	46,487
BANKRUPTCY	1,434	1,158	1,203	1,109	1,007
ADMIN. AGENCIES, TOTAL	2,827	4,412	3,793	3,280	3,237
U.S. TAX COURT	332	323	368	240	274
LABOR	26	43	23	15	13
FCC	128	274	182	157	166
FERC	145	230	284	153	147
FTC	2	1	1	2	2
NLRB	446	443	354	341	323
EPA	87	216	97	176	162
ICC	23	3	2	1	-
INS	1,063	1,921	1,936	1,731	1,723
OTHER ADMIN. AGENCIES	575	958	546	464	427
ORIGINAL PROCEEDINGS*	704	814	752	3,373	3,966
DC CIRCUIT	**1,347**	**1,531**	**1,627**	**1,438**	**1,506**
U.S. DISTRICT COURTS	817	767	1,012	774	842
BANKRUPTCY	8	5	8	3	2
U.S. TAX COURT	12	11	11	10	9
NLRB	42	46	37	54	58
ADMIN. AGENCIES	420	670	521	486	500
ORIGINAL PROCEEDINGS*	48	32	38	111	95
1ST CIRCUIT	**1,367**	**1,449**	**1,437**	**1,454**	**1,463**
ME	144	168	134	139	128
MA	554	599	556	538	537
NH	99	133	119	126	105
RI	175	111	130	134	156
PR	291	312	331	338	358
BANKRUPTCY	41	36	34	40	32
U.S. TAX COURT	7	5	10	1	5
NLRB	10	12	11	5	7
ADMIN. AGENCIES	32	61	58	67	54
ORIGINAL PROCEEDINGS*	14	12	54	66	81

Table B-3. (September 30, 2000—Continued)

Source	1996	1997	1998	1999	2000
2ND CIRCUIT	**4,562**	**4,816**	**4,796**	**4,630**	**4,892**
CT	386	424	360	378	367
NY,N	404	407	424	403	484
NY,E	998	1,135	1,116	1,134	1,245
NY,S	1,811	1,886	1,844	1,723	1,820
NY,W	362	277	376	270	298
VT	87	96	94	63	75
BANKRUPTCY	168	110	91	93	75
U.S. TAX COURT	58	57	35	20	18
NLRB	67	57	50	36	47
ADMIN. AGENCIES	136	262	365	299	214
ORIGINAL PROCEEDINGS*	85	105	41	211	249
3RD CIRCUIT	**3,604**	**3,458**	**3,613**	**3,384**	**3,482**
DE	133	120	142	105	124
NJ	816	831	847	798	787
PA,E	1,131	1,078	1,145	1,018	1,012
PA,M	521	444	454	443	457
PA,W	633	559	572	485	504
VI	82	97	69	79	75
BANKRUPTCY	98	111	77	81	93
U.S. TAX COURT	19	13	35	8	12
NLRB	36	35	49	32	25
ADMIN. AGENCIES	79	107	122	108	131
ORIGINAL PROCEEDINGS*	56	63	101	227	262
4TH CIRCUIT	**4,914**	**4,754**	**4,897**	**4,627**	**4,689**
MD	718	863	859	780	801
NC,E	530	503	428	415	413
NC,M	266	215	268	273	237
NC,W	307	280	269	272	285
SC	670	690	708	581	646
VA,E	1,183	1,062	1,145	1,116	1,048
VA,W	499	395	492	361	344
WV,N	157	136	127	137	113
WV,S	221	187	175	161	211
BANKRUPTCY	137	81	125	87	68
U.S. TAX COURT	19	23	17	13	19
NLRB	46	31	32	36	25
ADMIN. AGENCIES	144	262	219	146	140
ORIGINAL PROCEEDINGS*	17	26	33	249	339

Table B-3. (September 30, 2000—Continued)

Source	1996	1997	1998	1999	2000
5TH CIRCUIT	**7,546**	**7,573**	**8,096**	**8,275**	**8,253**
LA,E	686	612	711	682	653
LA,M	226	218	201	173	231
LA,W	442	433	530	485	532
MS,N	291	213	209	260	289
MS,S	341	336	347	316	337
TX,N	1,528	1,494	1,478	1,395	1,280
TX,E	732	901	915	865	735
TX,S	1,769	1,608	1,848	1,890	1,785
TX,W	979	1,045	1,303	1,189	1,192
BANKRUPTCY	229	179	195	165	166
U.S. TAX COURT	35	35	29	11	16
NLRB	27	14	13	16	17
ADMIN. AGENCIES	187	388	219	239	279
ORIGINAL PROCEEDINGS*	74	97	98	589	741
6TH CIRCUIT	**4,606**	**4,622**	**4,704**	**4,884**	**4,916**
KY,E	353	285	360	371	319
KY,W	279	283	266	290	288
MI,E	1,026	1,002	981	879	994
MI,W	467	404	406	439	386
OH,N	697	773	828	738	765
OH,S	516	522	608	642	604
TN,E	326	337	288	320	302
TN,M	286	268	258	228	247
TN,W	329	367	410	405	387
BANKRUPTCY	87	87	73	90	72
U.S. TAX COURT	20	22	32	20	12
NLRB	82	102	51	60	39
ADMIN. AGENCIES	106	122	103	72	73
ORIGINAL PROCEEDINGS*	32	48	40	330	428

Table B-3. (September 30, 2000—Continued)

Source	1996	1997	1998	1999	2000
7TH CIRCUIT	**3,248**	**3,350**	**3,297**	**3,431**	**3,461**
IL,N	1,084	1,165	1,285	1,186	1,180
IL,C	339	336	270	288	320
IL,S	275	276	299	283	305
IN,N	366	292	262	325	294
IN,S	380	422	410	332	358
WI,E	292	344	303	408	316
WI,W	263	241	254	237	265
BANKRUPTCY	94	56	48	39	40
U.S. TAX COURT	12	18	15	13	13
NLRB	29	62	28	39	34
ADMIN. AGENCIES	83	108	85	80	78
ORIGINAL PROCEEDINGS*	31	30	38	201	258
8TH CIRCUIT	**3,384**	**3,335**	**3,330**	**3,353**	**3,165**
AR,E	405	427	443	424	463
AR,W	190	163	161	138	131
IA,N	151	153	129	147	132
IA,S	244	243	171	210	192
MN	438	500	474	462	392
MO,E	682	631	617	537	504
MO,W	548	587	679	540	483
NE	229	210	257	249	270
ND	72	55	61	73	48
SD	202	151	166	197	136
BANKRUPTCY	89	51	48	36	30
U.S. TAX COURT	17	7	18	8	19
NLRB	27	24	12	14	14
ADMIN. AGENCIES	51	98	64	81	49
ORIGINAL PROCEEDINGS*	39	35	30	237	302

Table B-3. (September 30, 2000—Continued)

Source	1996	1997	1998	1999	2000
9TH CIRCUIT	**8,502**	**8,692**	**9,070**	**9,383**	**9,147**
AK	161	142	159	130	113
AZ	767	680	654	617	637
CA,N	866	964	927	911	866
CA,E	663	663	705	775	735
CA,C	1,970	1,848	2,133	2,027	2,219
CA,S	541	521	634	582	586
HI	179	191	171	382	163
ID	119	90	139	128	106
MT	151	163	167	192	136
NV	430	426	422	451	469
OR	534	567	466	484	418
WA,E	196	156	140	139	142
WA,W	554	453	528	557	571
GUAM	51	61	46	42	36
NMI	21	12	12	13	22
BANKRUPTCY	286	293	323	310	290
U.S. TAX COURT	89	83	87	68	89
NLRB	58	40	40	32	29
ADMIN. AGENCIES	673	1,177	1,173	1,009	984
ORIGINAL PROCEEDINGS*	193	162	144	534	536
10TH CIRCUIT	**2,582**	**2,629**	**2,582**	**2,800**	**2,656**
CO	537	477	470	527	521
KS	403	408	358	365	373
NM	293	414	353	357	435
OK,N	293	243	237	259	208
OK,E	139	139	169	162	142
OK,W	444	411	496	429	385
UT	186	207	208	254	201
WY	122	130	107	114	77
BANKRUPTCY	62	39	47	42	33
U.S. TAX COURT	17	33	50	39	41
NLRB	4	5	8	6	11
ADMIN. AGENCIES	44	77	43	45	37
ORIGINAL PROCEEDINGS*	38	46	36	201	192

Table B-3. (September 30, 2000—Continued)

Source	1996	1997	1998	1999	2000
11TH CIRCUIT	**6,329**	**6,110**	**6,356**	**7,034**	**7,067**
AL,N	547	417	379	498	540
AL,M	358	300	316	264	228
AL,S	310	240	229	323	266
FL,N	422	434	480	527	488
FL,M	1,311	1,080	1,222	1,457	1,473
FL,S	1,525	1,637	1,836	1,767	1,801
GA,N	920	778	766	879	947
GA,M	257	250	372	272	339
GA,S	328	361	372	400	257
BANKRUPTCY	135	110	134	123	106
U.S. TAX COURT	27	16	29	29	21
NLRB	18	15	23	11	17
ADMIN. AGENCIES	94	314	99	67	101
ORIGINAL PROCEEDINGS*	77	158	99	417	483

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

*BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 1997 Through 2001

Source	1997	1998	1999	2000	2001
TOTAL APPEALS	**52,319**	**53,805**	**54,693**	**54,697**	**57,464**
U.S. DISTRICT COURTS	45,935	48,057	46,931	46,487	47,327
BANKRUPTCY	1,158	1,203	1,109	1,007	961
ADMINISTRATIVE AGENCIES, TOTAL	4,412	3,793	3,280	3,237	3,300
U.S. TAX COURT	323	368	240	274	222
LABOR	43	23	15	13	28
FCC	274	182	157	166	135
FERC	230	284	153	147	160
FTC	1	1	2	2	-
NLRB	443	354	341	323	364
EPA	216	97	176	162	130
ICC	3	2	1	-	-
INS	1,921	1,936	1,731	1,723	1,760
OTHER ADMIN. AGENCIES	958	546	464	427	501
ORIGINAL PROCEEDINGS*	814	752	3,373	3,966	5,876
DC CIRCUIT	**1,531**	**1,627**	**1,438**	**1,506**	**1,401**
U.S. DISTRICT COURTS	767	1,012	774	842	740
BANKRUPTCY	5	8	3	2	3
U.S. TAX COURT	11	11	10	9	8
NLRB	46	37	54	58	55
ADMINISTRATIVE AGENCIES	670	521	486	500	480
ORIGINAL PROCEEDINGS*	32	38	111	95	115
1ST CIRCUIT	**1,449**	**1,437**	**1,454**	**1,463**	**1,762**
ME	168	134	139	128	164
MA	599	556	538	537	659
NH	133	119	126	105	112
RI	111	130	134	156	150
PR	312	331	338	358	498
BANKRUPTCY	36	34	40	32	24
U.S. TAX COURT	5	10	1	5	3
NLRB	12	11	5	7	5
ADMINISTRATIVE AGENCIES	61	58	67	54	55
ORIGINAL PROCEEDINGS*	12	54	66	81	92

Table B-3. (September 30, 2001—Continued)

Source	1997	1998	1999	2000	2001
2ND CIRCUIT	**4,816**	**4,796**	**4,630**	**4,892**	**4,519**
CT	424	360	378	367	357
NY,N	407	424	403	484	395
NY,E	1,135	1,116	1,134	1,245	1,034
NY,S	1,886	1,844	1,723	1,820	1,684
NY,W	277	376	270	298	283
VT	96	94	63	75	57
BANKRUPTCY	110	91	93	75	93
U.S. TAX COURT	57	35	20	18	27
NLRB	57	50	36	47	51
ADMINISTRATIVE AGENCIES	262	365	299	214	184
ORIGINAL PROCEEDINGS*	105	41	211	249	354
3RD CIRCUIT	**3,458**	**3,613**	**3,384**	**3,482**	**3,860**
DE	120	142	105	124	134
NJ	831	847	798	787	816
PA,E	1,078	1,145	1,018	1,012	1,275
PA,M	444	454	443	457	470
PA,W	559	572	485	504	520
VI	97	69	79	75	67
BANKRUPTCY	111	77	81	93	78
U.S. TAX COURT	13	35	8	12	11
NLRB	35	49	32	25	28
ADMINISTRATIVE AGENCIES	107	122	108	131	139
ORIGINAL PROCEEDINGS*	63	101	227	262	322
4TH CIRCUIT	**4,754**	**4,897**	**4,627**	**4,689**	**5,303**
MD	863	859	780	801	722
NC,E	503	428	415	413	487
NC,M	215	268	273	237	299
NC,W	280	269	272	285	380
SC	690	708	581	646	620
VA,E	1,062	1,145	1,116	1,048	1,147
VA,W	395	492	361	344	358
WV,N	136	127	137	113	135
WV,S	187	175	161	211	225
BANKRUPTCY	81	125	87	68	83
U.S. TAX COURT	23	17	13	19	14
NLRB	31	32	36	25	29
ADMINISTRATIVE AGENCIES	262	219	146	140	119
ORIGINAL PROCEEDINGS*	26	33	249	339	685

Table B-3. (September 30, 2001—Continued)

Source	1997	1998	1999	2000	2001
5TH CIRCUIT	**7,573**	**8,096**	**8,275**	**8,253**	**8,642**
LA,E	612	711	682	653	625
LA,M	218	201	173	231	210
LA,W	433	530	485	532	482
MS,N	213	209	260	289	224
MS,S	336	347	316	337	385
TX,N	1,494	1,478	1,395	1,280	1,438
TX,E	901	915	865	735	705
TX,S	1,608	1,848	1,890	1,785	1,897
TX,W	1,045	1,303	1,189	1,192	1,254
BANKRUPTCY	179	195	165	166	139
U.S. TAX COURT	35	29	11	16	25
NLRB	14	13	16	17	15
ADMINISTRATIVE AGENCIES	388	219	239	279	302
ORIGINAL PROCEEDINGS*	97	98	589	741	941
6TH CIRCUIT	**4,622**	**4,704**	**4,884**	**4,916**	**4,853**
KY,E	285	360	371	319	277
KY,W	283	266	290	288	267
MI,E	1,002	981	879	994	1,016
MI,W	404	406	439	386	343
OH,N	773	828	738	765	704
OH,S	522	608	642	604	486
TN,E	337	288	320	302	318
TN,M	268	258	228	247	245
TN,W	367	410	405	387	315
BANKRUPTCY	87	73	90	72	87
U.S. TAX COURT	22	32	20	12	14
NLRB	102	51	60	39	68
ADMINISTRATIVE AGENCIES	122	103	72	73	110
ORIGINAL PROCEEDINGS*	48	40	330	428	603

Table B-3. (September 30, 2001—Continued)

Source	1997	1998	1999	2000	2001
7TH CIRCUIT	**3,350**	**3,297**	**3,431**	**3,461**	**3,455**
IL,N	1,165	1,285	1,186	1,180	1,128
IL,C	336	270	288	320	337
IL,S	276	299	283	305	239
IN,N	292	262	325	294	311
IN,S	422	410	332	358	369
WI,E	344	303	408	316	316
WI,W	241	254	237	265	260
BANKRUPTCY	56	48	39	40	41
U.S. TAX COURT	18	15	13	13	21
NLRB	62	28	39	34	31
ADMINISTRATIVE AGENCIES	108	85	80	78	88
ORIGINAL PROCEEDINGS*	30	38	201	258	314
8TH CIRCUIT	**3,335**	**3,330**	**3,353**	**3,165**	**3,034**
AR,E	427	443	424	463	373
AR,W	163	161	138	131	130
IA,N	153	129	147	132	154
IA,S	243	171	210	192	166
MN	500	474	462	392	354
MO,E	631	617	537	504	462
MO,W	587	679	540	483	460
NE	210	257	249	270	198
ND	55	61	73	48	42
SD	151	166	197	136	113
BANKRUPTCY	51	48	36	30	50
U.S. TAX COURT	7	18	8	19	17
NLRB	24	12	14	14	16
ADMINISTRATIVE AGENCIES	98	64	81	49	44
ORIGINAL PROCEEDINGS*	35	30	237	302	455

Table B-3. (September 30, 2001—Continued)

Source	1997	1998	1999	2000	2001
9TH CIRCUIT	**8,692**	**9,070**	**9,383**	**9,147**	**10,342**
AK	142	159	130	113	135
AZ	680	654	617	637	791
CA,N	964	927	911	866	852
CA,E	663	705	775	735	934
CA,C	1,848	2,133	2,027	2,219	2,365
CA,S	521	634	582	586	621
HI	191	171	382	163	190
ID	90	139	128	106	113
MT	163	167	192	136	165
NV	426	422	451	469	571
OR	567	466	484	418	466
WA,E	156	140	139	142	232
WA,W	453	528	557	571	529
GUAM	61	46	42	36	17
NMI	12	12	13	22	18
BANKRUPTCY	293	323	310	290	260
U.S. TAX COURT	83	87	68	89	53
NLRB	40	40	32	29	34
ADMINISTRATIVE AGENCIES	1,177	1,173	1,009	984	1,063
ORIGINAL PROCEEDINGS*	162	144	534	536	933
10TH CIRCUIT	**2,629**	**2,582**	**2,800**	**2,656**	**2,758**
CO	477	470	527	521	545
KS	408	358	365	373	342
NM	414	353	357	435	411
OK,N	243	237	259	208	179
OK,E	139	169	162	142	147
OK,W	411	496	429	385	410
UT	207	208	254	201	230
WY	130	107	114	77	89
BANKRUPTCY	39	47	42	33	33
U.S. TAX COURT	33	50	39	41	13
NLRB	5	8	6	11	11
ADMINISTRATIVE AGENCIES	77	43	45	37	36
ORIGINAL PROCEEDINGS*	46	36	201	192	312

Table B-3. (September 30, 2001—Continued)

Source	1997	1998	1999	2000	2001
11TH CIRCUIT	**6,110**	**6,356**	**7,034**	**7,067**	**7,535**
AL,N	417	379	498	540	500
AL,M	300	316	264	228	270
AL,S	240	229	323	266	213
FL,N	434	480	527	488	576
FL,M	1,080	1,222	1,457	1,473	1,531
FL,S	1,637	1,836	1,767	1,801	1,900
GA,N	778	766	879	947	888
GA,M	250	372	272	339	347
GA,S	361	372	400	257	359
BANKRUPTCY	110	134	123	106	70
U.S. TAX COURT	16	29	29	21	16
NLRB	15	23	11	17	21
ADMINISTRATIVE AGENCIES	314	99	67	101	94
ORIGINAL PROCEEDINGS*	158	99	417	483	750

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

* BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 1998 Through 2002

Source	1998	1999	2000	2001	2002
TOTAL APPEALS	**53,805**	**54,693**	**54,697**	**57,464**	**57,555**
U.S. DISTRICT COURTS	48,057	46,931	46,487	47,327	47,068
BANKRUPTCY	1,203	1,109	1,007	961	843
ADMINISTRATIVE AGENCIES, TOTAL	3,793	3,280	3,237	3,300	5,789
U.S. TAX COURT	368	240	274	222	205
LABOR	23	15	13	28	7
FCC	182	157	166	135	125
FERC	284	153	147	160	200
FTC	1	2	2	-	-
NLRB	354	341	323	364	291
EPA	97	176	162	130	120
ICC	2	1	-	-	-
INS	1,936	1,731	1,723	1,760	4,449
OTHER ADMIN. AGENCIES	546	464	427	501	392
ORIGINAL PROCEEDINGS*	752	3,373	3,966	5,876	3,855
DC CIRCUIT	**1,627**	**1,438**	**1,506**	**1,401**	**1,126**
U.S. DISTRICT COURTS	1,012	774	842	740	659
BANKRUPTCY	8	3	2	3	4
U.S. TAX COURT	11	10	9	8	7
NLRB	37	54	58	55	53
ADMINISTRATIVE AGENCIES	521	486	500	480	340
ORIGINAL PROCEEDINGS*	38	111	95	115	63
1ST CIRCUIT	**1,437**	**1,454**	**1,463**	**1,762**	**1,667**
ME	134	139	128	164	115
MA	556	538	537	659	621
NH	119	126	105	112	96
RI	130	134	156	150	134
PR	331	338	358	498	524
BANKRUPTCY	34	40	32	24	35
U.S. TAX COURT	10	1	5	3	3
NLRB	11	5	7	5	10
ADMINISTRATIVE AGENCIES	58	67	54	55	69
ORIGINAL PROCEEDINGS*	54	66	81	92	60

Table B-3. (September 30, 2002—Continued)

Source	1998	1999	2000	2001	2002
2ND CIRCUIT	**4,796**	**4,630**	**4,892**	**4,519**	**4,870**
CT	360	378	367	357	374
NY,N	424	403	484	395	401
NY,E	1,116	1,134	1,245	1,034	1,139
NY,S	1,844	1,723	1,820	1,684	1,571
NY,W	376	270	298	283	358
VT	94	63	75	57	59
BANKRUPTCY	91	93	75	93	76
U.S. TAX COURT	35	20	18	27	10
NLRB	50	36	47	51	31
ADMINISTRATIVE AGENCIES	365	299	214	184	562
ORIGINAL PROCEEDINGS*	41	211	249	354	289
3RD CIRCUIT	**3,613**	**3,384**	**3,482**	**3,860**	**3,643**
DE	142	105	124	134	144
NJ	847	798	787	816	735
PA,E	1,145	1,018	1,012	1,275	1,081
PA,M	454	443	457	470	494
PA,W	572	485	504	520	489
VI	69	79	75	67	91
BANKRUPTCY	77	81	93	78	89
U.S. TAX COURT	35	8	12	11	8
NLRB	49	32	25	28	33
ADMINISTRATIVE AGENCIES	122	108	131	139	233
ORIGINAL PROCEEDINGS*	101	227	262	322	246
4TH CIRCUIT	**4,897**	**4,627**	**4,689**	**5,303**	**4,658**
MD	859	780	801	722	679
NC,E	428	415	413	487	417
NC,M	268	273	237	299	314
NC,W	269	272	285	380	327
SC	708	581	646	620	596
VA,E	1,145	1,116	1,048	1,147	1,111
VA,W	492	361	344	358	301
WV,N	127	137	113	135	111
WV,S	175	161	211	225	200
BANKRUPTCY	125	87	68	83	66
U.S. TAX COURT	17	13	19	14	8
NLRB	32	36	25	29	27
ADMINISTRATIVE AGENCIES	219	146	140	119	177
ORIGINAL PROCEEDINGS*	33	249	339	685	324

Table B-3. (September 30, 2002—Continued)

Source	1998	1999	2000	2001	2002
5TH CIRCUIT	**8,096**	**8,275**	**8,253**	**8,642**	**8,784**
LA,E	711	682	653	625	582
LA,M	201	173	231	210	183
LA,W	530	485	532	482	454
MS,N	209	260	289	224	256
MS,S	347	316	337	385	363
TX,N	1,478	1,395	1,280	1,438	1,363
TX,E	915	865	735	705	843
TX,S	1,848	1,890	1,785	1,897	2,162
TX,W	1,303	1,189	1,192	1,254	1,367
BANKRUPTCY	195	165	166	139	142
U.S. TAX COURT	29	11	16	25	19
NLRB	13	16	17	15	28
ADMINISTRATIVE AGENCIES	219	239	279	302	341
ORIGINAL PROCEEDINGS*	98	589	741	941	681
6TH CIRCUIT	**4,704**	**4,884**	**4,916**	**4,853**	**4,619**
KY,E	360	371	319	277	250
KY,W	266	290	288	267	236
MI,E	981	879	994	1,016	1,059
MI,W	406	439	386	343	382
OH,N	828	738	765	704	644
OH,S	608	642	604	486	477
TN,E	288	320	302	318	308
TN,M	258	228	247	245	306
TN,W	410	405	387	315	325
BANKRUPTCY	73	90	72	87	62
U.S. TAX COURT	32	20	12	14	8
NLRB	51	60	39	68	31
ADMINISTRATIVE AGENCIES	103	72	73	110	173
ORIGINAL PROCEEDINGS*	40	330	428	603	358

Table B-3. (September 30, 2002—Continued)

Source	1998	1999	2000	2001	2002
7TH CIRCUIT	**3,297**	**3,431**	**3,461**	**3,455**	**3,418**
IL,N	1,285	1,186	1,180	1,128	1,191
IL,C	270	288	320	337	311
IL,S	299	283	305	239	263
IN,N	262	325	294	311	315
IN,S	410	332	358	369	358
WI,E	303	408	316	316	349
WI,W	254	237	265	260	238
BANKRUPTCY	48	39	40	41	46
U.S. TAX COURT	15	13	13	21	16
NLRB	28	39	34	31	29
ADMINISTRATIVE AGENCIES	85	80	78	88	113
ORIGINAL PROCEEDINGS*	38	201	258	314	189
8TH CIRCUIT	**3,330**	**3,353**	**3,165**	**3,034**	**3,216**
AR,E	443	424	463	373	378
AR,W	161	138	131	130	145
IA,N	129	147	132	154	165
IA,S	171	210	192	166	198
MN	474	462	392	354	410
MO,E	617	537	504	462	513
MO,W	679	540	483	460	535
NE	257	249	270	198	203
ND	61	73	48	42	53
SD	166	197	136	113	136
BANKRUPTCY	48	36	30	50	40
U.S. TAX COURT	18	8	19	17	10
NLRB	12	14	14	16	11
ADMINISTRATIVE AGENCIES	64	81	49	44	125
ORIGINAL PROCEEDINGS*	30	237	302	455	294

Table B-3. (September 30, 2002—Continued)

Source	1998	1999	2000	2001	2002
9TH CIRCUIT	**9,070**	**9,383**	**9,147**	**10,342**	**11,421**
AK	159	130	113	135	106
AZ	654	617	637	791	781
CA,N	927	911	866	852	820
CA,E	705	775	735	934	893
CA,C	2,133	2,027	2,219	2,365	2,294
CA,S	634	582	586	621	577
HI	171	382	163	190	187
ID	139	128	106	113	119
MT	167	192	136	165	232
NV	422	451	469	571	466
OR	466	484	418	466	508
WA,E	140	139	142	232	168
WA,W	528	557	571	529	488
GUAM	46	42	36	17	22
NMI	12	13	22	18	16
BANKRUPTCY	323	310	290	260	174
U.S. TAX COURT	87	68	89	53	59
NLRB	40	32	29	34	18
ADMINISTRATIVE AGENCIES	1,173	1,009	984	1,063	2,822
ORIGINAL PROCEEDINGS*	144	534	536	933	671
10TH CIRCUIT	**2,582**	**2,800**	**2,656**	**2,758**	**2,661**
CO	470	527	521	545	552
KS	358	365	373	342	397
NM	353	357	435	411	338
OK,N	237	259	208	179	178
OK,E	169	162	142	147	141
OK,W	496	429	385	410	361
UT	208	254	201	230	233
WY	107	114	77	89	111
BANKRUPTCY	47	42	33	33	38
U.S. TAX COURT	50	39	41	13	22
NLRB	8	6	11	11	4
ADMINISTRATIVE AGENCIES	43	45	37	36	76
ORIGINAL PROCEEDINGS*	36	201	192	312	210

Table B-3. (September 30, 2002—Continued)

Source	1998	1999	2000	2001	2002
11TH CIRCUIT	**6,356**	**7,034**	**7,067**	**7,535**	**7,472**
AL,N	379	498	540	500	501
AL,M	316	264	228	270	273
AL,S	229	323	266	213	229
FL,N	480	527	488	576	506
FL,M	1,222	1,457	1,473	1,531	1,533
FL,S	1,836	1,767	1,801	1,900	1,967
GA,N	766	879	947	888	898
GA,M	372	272	339	347	353
GA,S	372	400	257	359	358
BANKRUPTCY	134	123	106	70	71
U.S. TAX COURT	29	29	21	16	35
NLRB	23	11	17	21	16
ADMINISTRATIVE AGENCIES	99	67	101	94	262
ORIGINAL PROCEEDINGS*	99	417	483	750	470

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

* BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 1999 Through 2003

Source	1999	2000	2001	2002	2003
TOTAL APPEALS	**54,693**	**54,697**	**57,464**	**57,555**	**60,847**
U.S. DISTRICT COURTS	46,931	46,487	47,327	47,068	46,358
BANKRUPTCY	1,109	1,007	961	843	902
ADMINISTRATIVE AGENCIES, TOTAL [1]	3,280	3,237	3,300	5,789	9,988
U.S. TAX COURT	240	274	222	205	173
LABR	15	13	28	7	21
FCC	157	166	135	125	103
FERC	153	147	160	200	141
FTC	2	2	-	-	3
NLRB	341	323	364	291	235
EPA	176	162	130	120	148
ICC	1	-	-	-	1
INS	1,731	1,723	1,760	4,449	8,833
OTHER ADMIN. AGENCIES	464	427	501	392	330
ORIGINAL PROCEEDINGS [2]	3,373	3,966	5,876	3,855	3,599
DC CIRCUIT	**1,438**	**1,506**	**1,401**	**1,126**	**1,121**
U.S. DISTRICT COURTS	774	842	740	659	647
BANKRUPTCY	3	2	3	4	3
U.S. TAX COURT	10	9	8	7	8
NLRB	54	58	55	53	39
ADMINISTRATIVE AGENCIES [1]	486	500	480	340	344
ORIGINAL PROCEEDINGS [2]	111	95	115	63	80
1ST CIRCUIT	**1,454**	**1,463**	**1,762**	**1,667**	**1,844**
ME	139	128	164	115	141
MA	538	537	659	621	635
NH	126	105	112	96	117
RI	134	156	150	134	122
PR	338	358	498	524	574
BANKRUPTCY	40	32	24	35	36
U.S. TAX COURT	1	5	3	3	5
NLRB	5	7	5	10	3
ADMINISTRATIVE AGENCIES [1]	67	54	55	69	145
ORIGINAL PROCEEDINGS [2]	66	81	92	60	66

Table B-3. (September 30, 2003—Continued)

Source	1999	2000	2001	2002	2003
2ND CIRCUIT	**4,630**	**4,892**	**4,519**	**4,870**	**6,359**
CT	378	367	357	374	358
NY,N	403	484	395	401	361
NY,E	1,134	1,245	1,034	1,139	1,078
NY,S	1,723	1,820	1,684	1,571	1,688
NY,W	270	298	283	358	314
VT	63	75	57	59	48
BANKRUPTCY	93	75	93	76	85
U.S. TAX COURT	20	18	27	10	11
NLRB	36	47	51	31	37
ADMINISTRATIVE AGENCIES [1]	299	214	184	562	2,118
ORIGINAL PROCEEDINGS [2]	211	249	354	289	261
3RD CIRCUIT	**3,384**	**3,482**	**3,860**	**3,643**	**3,957**
DE	105	124	134	144	138
NJ	798	787	816	735	741
PA,E	1,018	1,012	1,275	1,081	1,060
PA,M	443	457	470	494	549
PA,W	485	504	520	489	520
VI	79	75	67	91	113
BANKRUPTCY	81	93	78	89	87
U.S. TAX COURT	8	12	11	8	20
NLRB	32	25	28	33	27
ADMINISTRATIVE AGENCIES [1]	108	131	139	233	505
ORIGINAL PROCEEDINGS [2]	227	262	322	246	197
4TH CIRCUIT	**4,627**	**4,689**	**5,303**	**4,658**	**4,887**
MD	780	801	722	679	619
NC,E	415	413	487	417	462
NC,M	273	237	299	314	257
NC,W	272	285	380	327	282
SC	581	646	620	596	631
VA,E	1,116	1,048	1,147	1,111	1,077
VA,W	361	344	358	301	443
WV,N	137	113	135	111	109
WV,S	161	211	225	200	210
BANKRUPTCY	87	68	83	66	65
U.S. TAX COURT	13	19	14	8	9
NLRB	36	25	29	27	24
ADMINISTRATIVE AGENCIES [1]	146	140	119	177	346
ORIGINAL PROCEEDINGS [2]	249	339	685	324	353

Table B-3. (September 30, 2003—Continued)

Source	1999	2000	2001	2002	2003
5TH CIRCUIT	**8,275**	**8,253**	**8,642**	**8,784**	**8,613**
LA,E	682	653	625	582	531
LA,M	173	231	210	183	164
LA,W	485	532	482	454	444
MS,N	260	289	224	256	213
MS,S	316	337	385	363	388
TX,N	1,395	1,280	1,438	1,363	1,234
TX,E	865	735	705	843	782
TX,S	1,890	1,785	1,897	2,162	2,159
TX,W	1,189	1,192	1,254	1,367	1,459
BANKRUPTCY	165	166	139	142	109
U.S. TAX COURT	11	16	25	19	27
NLRB	16	17	15	28	9
ADMINISTRATIVE AGENCIES [1]	239	279	302	341	449
ORIGINAL PROCEEDINGS [2]	589	741	941	681	645
6TH CIRCUIT	**4,884**	**4,916**	**4,853**	**4,619**	**4,964**
KY,E	371	319	277	250	315
KY,W	290	288	267	236	244
MI,E	879	994	1,016	1,059	952
MI,W	439	386	343	382	486
OH,N	738	765	704	644	659
OH,S	642	604	486	477	507
TN,E	320	302	318	308	304
TN,M	228	247	245	306	330
TN,W	405	387	315	325	337
BANKRUPTCY	90	72	87	62	73
U.S. TAX COURT	20	12	14	8	10
NLRB	60	39	68	31	26
ADMINISTRATIVE AGENCIES [1]	72	73	110	173	387
ORIGINAL PROCEEDINGS [2]	330	428	603	358	334

Table B-3. (September 30, 2003—Continued)

Source	1999	2000	2001	2002	2003
7TH CIRCUIT	**3,431**	**3,461**	**3,455**	**3,418**	**3,517**
IL,N	1,186	1,180	1,128	1,191	1,146
IL,C	288	320	337	311	291
IL,S	283	305	239	263	260
IN,N	325	294	311	315	334
IN,S	332	358	369	358	411
WI,E	408	316	316	349	299
WI,W	237	265	260	238	245
BANKRUPTCY	39	40	41	46	66
U.S. TAX COURT	13	13	21	16	5
NLRB	39	34	31	29	28
ADMINISTRATIVE AGENCIES [1]	80	78	88	113	260
ORIGINAL PROCEEDINGS [2]	201	258	314	189	172
8TH CIRCUIT	**3,353**	**3,165**	**3,034**	**3,216**	**3,190**
AR,E	424	463	373	378	346
AR,W	138	131	130	145	137
IA,N	147	132	154	165	189
IA,S	210	192	166	198	216
MN	462	392	354	410	410
MO,E	537	504	462	513	442
MO,W	540	483	460	535	519
NE	249	270	198	203	211
ND	73	48	42	53	77
SD	197	136	113	136	131
BANKRUPTCY	36	30	50	40	36
U.S. TAX COURT	8	19	17	10	15
NLRB	14	14	16	11	14
ADMINISTRATIVE AGENCIES [1]	81	49	44	125	233
ORIGINAL PROCEEDINGS [2]	237	302	455	294	214

Table B-3. (September 30, 2003—Continued)

Source	1999	2000	2001	2002	2003
9TH CIRCUIT	**9,383**	**9,147**	**10,342**	**11,421**	**12,872**
AK	130	113	135	106	110
AZ	617	637	791	781	870
CA,N	911	866	852	820	770
CA,E	775	735	934	893	813
CA,C	2,027	2,219	2,365	2,294	2,345
CA,S	582	586	621	577	540
HI	382	163	190	187	146
ID	128	106	113	119	159
MT	192	136	165	232	242
NV	451	469	571	466	542
OR	484	418	466	508	479
WA,E	139	142	232	168	202
WA,W	557	571	529	488	430
GUAM	42	36	17	22	20
NMI	13	22	18	16	23
BANKRUPTCY	310	290	260	174	221
U.S. TAX COURT	68	89	53	59	49
NLRB	32	29	34	18	21
ADMINISTRATIVE AGENCIES [1]	1,009	984	1,063	2,822	4,291
ORIGINAL PROCEEDINGS [2]	534	536	933	671	599
10TH CIRCUIT	**2,800**	**2,656**	**2,758**	**2,661**	**2,540**
CO	527	521	545	552	531
KS	365	373	342	397	331
NM	357	435	411	338	298
OK,N	259	208	179	178	198
OK,E	162	142	147	141	126
OK,W	429	385	410	361	349
UT	254	201	230	233	261
WY	114	77	89	111	104
BANKRUPTCY	42	33	33	38	44
U.S. TAX COURT	39	41	13	22	4
NLRB	6	11	11	4	5
ADMINISTRATIVE AGENCIES [1]	45	37	36	76	119
ORIGINAL PROCEEDINGS [2]	201	192	312	210	170

Table B-3. (September 30, 2003—Continued)

Source	1999	2000	2001	2002	2003
11TH CIRCUIT	**7,034**	**7,067**	**7,535**	**7,472**	**6,983**
AL,N	498	540	500	501	440
AL,M	264	228	270	273	280
AL,S	323	266	213	229	255
FL,N	527	488	576	506	398
FL,M	1,457	1,473	1,531	1,533	1,479
FL,S	1,767	1,801	1,900	1,967	1,662
GA,N	879	947	888	898	876
GA,M	272	339	347	353	295
GA,S	400	257	359	358	318
BANKRUPTCY	123	106	70	71	77
U.S. TAX COURT	29	21	16	35	10
NLRB	11	17	21	16	2
ADMINISTRATIVE AGENCIES [1]	67	101	94	262	383
ORIGINAL PROCEEDINGS [2]	417	483	750	470	508

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

[1] IN 2002 AND 2003, THE COURTS OF APPEALS REPORTED AN UNPRECEDENTED INCREASE IN APPEALS OF DECISIONS OF THE BOARD OF IMMIGRATION APPEALS, PARTICULARLY IN THE SECOND AND NINTH CIRCUITS.

[2] BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.

Table B-3.
U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2000 Through 2004

Source	2000	2001	2002	2003	2004
TOTAL APPEALS	**54,697**	**57,464**	**57,555**	**60,847**	**62,762**
U.S. DISTRICT COURTS	46,487	47,327	47,068	46,358	45,581
BANKRUPTCY	1,007	961	843	902	862
ADMINISTRATIVE AGENCIES, TOTAL [1]	3,237	3,300	5,789	9,988	12,255
U.S. TAX COURT	274	222	205	173	192
LABR	13	28	7	21	24
FCC	166	135	125	103	126
FERC	147	160	200	141	267
FTC	2	-	-	3	3
NLRB	323	364	291	235	285
EPA	162	130	120	148	138
ICC	-	-	-	1	-
INS	1,723	1,760	4,449	8,833	10,812
OTHER ADMIN. AGENCIES	427	501	392	330	408
ORIGINIAL PROCEEDINGS [2]	3,966	5,876	3,855	3,599	4,064
DC CIRCUIT	**1,506**	**1,401**	**1,126**	**1,121**	**1,390**
U.S. DISTRICT COURTS	842	740	659	647	824
BANKRUPTCY	2	3	4	3	7
U.S. TAX COURT	9	8	7	8	10
NLRB	58	55	53	39	41
ADMINISTRATIVE AGENCIES [1]	500	480	340	344	423
ORIGINIAL PROCEEDINGS [2]	95	115	63	80	85
1ST CIRCUIT	**1,463**	**1,762**	**1,667**	**1,844**	**1,723**
ME	128	164	115	141	143
MA	537	659	621	635	578
NH	105	112	96	117	121
RI	156	150	134	122	116
PR	358	498	524	574	510
BANKRUPTCY	32	24	35	36	19
U.S. TAX COURT	5	3	3	5	4
NLRB	7	5	10	3	4
ADMINISTRATIVE AGENCIES [1]	54	55	69	145	156
ORIGINIAL PROCEEDINGS [2]	81	92	60	66	72

Table B-3. (September 30, 2004—Continued)

Source	2000	2001	2002	2003	2004
2ND CIRCUIT	**4,892**	**4,519**	**4,870**	**6,359**	**7,008**
CT	367	357	374	358	294
NY,N	484	395	401	361	426
NY,E	1,245	1,034	1,139	1,078	1,187
NY,S	1,820	1,684	1,571	1,688	1,630
NY,W	298	283	358	314	267
VT	75	57	59	48	58
BANKRUPTCY	75	93	76	85	81
U.S. TAX COURT	18	27	10	11	12
NLRB	47	51	31	37	24
ADMINISTRATIVE AGENCIES [1]	214	184	562	2,118	2,711
ORIGINIAL PROCEEDINGS [2]	249	354	289	261	318
3RD CIRCUIT	**3,482**	**3,860**	**3,643**	**3,957**	**3,871**
DE	124	134	144	138	139
NJ	787	816	735	741	731
PA,E	1,012	1,275	1,081	1,060	1,022
PA,M	457	470	494	549	519
PA,W	504	520	489	520	532
VI	75	67	91	113	65
BANKRUPTCY	93	78	89	87	90
U.S. TAX COURT	12	11	8	20	9
NLRB	25	28	33	27	35
ADMINISTRATIVE AGENCIES [1]	131	139	233	505	542
ORIGINIAL PROCEEDINGS [2]	262	322	246	197	187
4TH CIRCUIT	**4,689**	**5,303**	**4,658**	**4,887**	**4,957**
MD	801	722	679	619	608
NC,E	413	487	417	462	408
NC,M	237	299	314	257	311
NC,W	285	380	327	282	250
SC	646	620	596	631	732
VA,E	1,048	1,147	1,111	1,077	1,114
VA,W	344	358	301	443	347
WV,N	113	135	111	109	110
WV,S	211	225	200	210	206
BANKRUPTCY	68	83	66	65	58
U.S. TAX COURT	19	14	8	9	8
NLRB	25	29	27	24	31
ADMINISTRATIVE AGENCIES [1]	140	119	177	346	404
ORIGINIAL PROCEEDINGS [2]	339	685	324	353	370

Table B-3. (September 30, 2004—Continued)

Source	2000	2001	2002	2003	2004
5TH CIRCUIT	**8,253**	**8,642**	**8,784**	**8,613**	**8,509**
LA,E	653	625	582	531	537
LA,M	231	210	183	164	179
LA,W	532	482	454	444	463
MS,N	289	224	256	213	240
MS,S	337	385	363	388	302
TX,N	1,280	1,438	1,363	1,234	1,400
TX,E	735	705	843	782	680
TX,S	1,785	1,897	2,162	2,159	1,999
TX,W	1,192	1,254	1,367	1,459	1,352
BANKRUPTCY	166	139	142	109	116
U.S. TAX COURT	16	25	19	27	22
NLRB	17	15	28	9	18
ADMINISTRATIVE AGENCIES [1]	279	302	341	449	537
ORIGINIAL PROCEEDINGS [2]	741	941	681	645	664
6TH CIRCUIT	**4,916**	**4,853**	**4,619**	**4,964**	**4,841**
KY,E	319	277	250	315	340
KY,W	288	267	236	244	239
MI,E	994	1,016	1,059	952	881
MI,W	386	343	382	486	483
OH,N	765	704	644	659	662
OH,S	604	486	477	507	456
TN,E	302	318	308	304	290
TN,M	247	245	306	330	265
TN,W	387	315	325	337	356
BANKRUPTCY	72	87	62	73	81
U.S. TAX COURT	12	14	8	10	10
NLRB	39	68	31	26	38
ADMINISTRATIVE AGENCIES [1]	73	110	173	387	373
ORIGINIAL PROCEEDINGS [2]	428	603	358	334	367

Table B-3. (September 30, 2004—Continued)

Source	2000	2001	2002	2003	2004
7TH CIRCUIT	**3,461**	**3,455**	**3,418**	**3,517**	**3,377**
IL,N	1,180	1,128	1,191	1,146	1,106
IL,C	320	337	311	291	291
IL,S	305	239	263	260	224
IN,N	294	311	315	334	310
IN,S	358	369	358	411	330
WI,E	316	316	349	299	265
WI,W	265	260	238	245	261
BANKRUPTCY	40	41	46	66	48
U.S. TAX COURT	13	21	16	5	9
NLRB	34	31	29	28	26
ADMINISTRATIVE AGENCIES [1]	78	88	113	260	279
ORIGINIAL PROCEEDINGS [2]	258	314	189	172	228
8TH CIRCUIT	**3,165**	**3,034**	**3,216**	**3,190**	**3,101**
AR,E	463	373	378	346	341
AR,W	131	130	145	137	100
IA,N	132	154	165	189	207
IA,S	192	166	198	216	206
MN	392	354	410	410	377
MO,E	504	462	513	442	432
MO,W	483	460	535	519	497
NE	270	198	203	211	245
ND	48	42	53	77	53
SD	136	113	136	131	111
BANKRUPTCY	30	50	40	36	24
U.S. TAX COURT	19	17	10	15	11
NLRB	14	16	11	14	17
ADMINISTRATIVE AGENCIES [1]	49	44	125	233	176
ORIGINIAL PROCEEDINGS [2]	302	455	294	214	304

Table B-3. (September 30, 2004—Continued)

Source	2000	2001	2002	2003	2004
9TH CIRCUIT	**9,147**	**10,342**	**11,421**	**12,872**	**14,274**
AK	113	135	106	110	103
AZ	637	791	781	870	814
CA,N	866	852	820	770	819
CA,E	735	934	893	813	758
CA,C	2,219	2,365	2,294	2,345	2,322
CA,S	586	621	577	540	488
HI	163	190	187	146	164
ID	106	113	119	159	158
MT	136	165	232	242	299
NV	469	571	466	542	633
OR	418	466	508	479	432
WA,E	142	232	168	202	236
WA,W	571	529	488	430	453
GUAM	36	17	22	20	22
NMI	22	18	16	23	15
BANKRUPTCY	290	260	174	221	217
U.S. TAX COURT	89	53	59	49	60
NLRB	29	34	18	21	20
ADMINISTRATIVE AGENCIES [1]	984	1,063	2,822	4,291	5,575
ORIGINIAL PROCEEDINGS [2]	536	933	671	599	686
10TH CIRCUIT	**2,656**	**2,758**	**2,661**	**2,540**	**2,646**
CO	521	545	552	531	485
KS	373	342	397	331	396
NM	435	411	338	298	339
OK,N	208	179	178	198	165
OK,E	142	147	141	126	129
OK,W	385	410	361	349	368
UT	201	230	233	261	272
WY	77	89	111	104	120
BANKRUPTCY	33	33	38	44	42
U.S. TAX COURT	41	13	22	4	11
NLRB	11	11	4	5	14
ADMINISTRATIVE AGENCIES [1]	37	36	76	119	107
ORIGINIAL PROCEEDINGS [2]	192	312	210	170	198

Table B-3. (September 30, 2004—Continued)

Source	2000	2001	2002	2003	2004
11TH CIRCUIT	**7,067**	**7,535**	**7,472**	**6,983**	**7,065**
AL,N	540	500	501	440	460
AL,M	228	270	273	280	212
AL,S	266	213	229	255	209
FL,N	488	576	506	398	415
FL,M	1,473	1,531	1,533	1,479	1,503
FL,S	1,801	1,900	1,967	1,662	1,570
GA,N	947	888	898	876	849
GA,M	339	347	353	295	336
GA,S	257	359	358	318	309
BANKRUPTCY	106	70	71	77	79
U.S. TAX COURT	21	16	35	10	26
NLRB	17	21	16	2	17
ADMINISTRATIVE AGENCIES [1]	101	94	262	383	495
ORIGINIAL PROCEEDINGS [2]	483	750	470	508	585

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

[1] BEGINNING IN 2002 AND THROUGH 2004, THE COURTS OF APPEALS REPORTED AN UNPRECEDENTED INCREASE IN APPEALS OF DECISIONS OF THE BOARD OF IMMIGRATION APPEALS, PARTICULARLY IN THE SECOND AND NINTH CIRCUITS.

[2] BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.

Table B-1.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending September 30, 2003

Circuit and Nature of Proceeding	Cases Pending Oct. 1, 2002[1]	Cases Commenced			Cases Terminated								Cases Pending Sept. 30, 2003
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
ALL CIRCUITS	**40,149**	**60,847**	**59,538**	**1,309**	**56,396**	**2,108**	**27,279**	**13,344**	**13,935**	**27,009**	**8,791**	**18,218**	**44,600**
CRIMINAL	9,925	11,968	11,782	186	11,678	651	2,949	995	1,954	8,078	2,435	5,643	10,215
U.S. PRISONER PETITIONS	3,173	5,350	5,156	194	5,753	50	3,932	2,784	1,148	1,771	231	1,540	2,770
OTHER U.S. CIVIL	2,579	3,239	3,162	77	3,394	165	1,219	336	883	2,010	808	1,202	2,424
PRIV. PRISONER PETITIONS	6,762	12,341	11,996	345	12,768	70	9,210	6,236	2,974	3,488	675	2,813	6,335
OTHER PRIVATE CIVIL	10,980	13,460	13,156	304	13,607	904	6,113	1,514	4,599	6,590	3,770	2,820	10,833
BANKRUPTCY	711	902	892	10	870	55	375	84	291	440	238	202	743
ADMINISTRATIVE APPEALS	5,271	9,988	9,848	140	4,822	185	2,772	1,157	1,615	1,865	617	1,248	10,437
ORIGINAL PROCEEDINGS [2]	748	3,599	3,546	53	3,504	28	709	238	471	2,767	17	2,750	843
DISTRICT OF COLUMBIA	**1,092**	**1,121**	**1,105**	**16**	**1,182**	**119**	**549**	**146**	**403**	**514**	**276**	**238**	**1,031**
CRIMINAL	91	121	120	1	97	5	40	4	36	52	36	16	115
U.S. PRISONER PETITIONS	81	122	119	3	116	3	68	34	34	45	8	37	87
OTHER U.S. CIVIL	211	224	222	2	278	33	96	24	72	149	80	69	157
PRIV. PRISONER PETITIONS	12	34	33	1	24	-	14	2	12	10	1	9	22
OTHER PRIVATE CIVIL	107	146	144	2	155	14	66	17	49	75	35	40	98
BANKRUPTCY	4	3	3	-	6	-	4	1	3	2	-	2	1
ADMINISTRATIVE APPEALS	573	391	384	7	436	64	236	54	182	136	114	22	528
ORIGINAL PROCEEDINGS [2]	13	80	80	-	70	-	25	10	15	45	2	43	23
FIRST CIRCUIT	**1,251**	**1,844**	**1,841**	**3**	**1,573**	**85**	**912**	**388**	**524**	**576**	**355**	**221**	**1,522**
CRIMINAL	525	672	670	2	518	38	358	145	213	122	87	35	679
U.S. PRISONER PETITIONS	87	125	124	1	127	1	91	55	36	35	13	22	85
OTHER U.S. CIVIL	79	98	98	-	113	5	49	18	31	59	28	31	64
PRIV. PRISONER PETITIONS	74	116	116	-	99	1	65	53	12	33	17	16	91
OTHER PRIVATE CIVIL	360	578	578	-	530	37	271	83	188	222	172	50	408
BANKRUPTCY	31	36	36	-	26	1	8	2	6	17	15	2	41
ADMINISTRATIVE APPEALS	67	153	153	-	93	1	61	29	32	31	22	9	127
ORIGINAL PROCEEDINGS [2]	28	66	66	-	67	1	9	3	6	57	1	56	27

Table B-1.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending September 30, 2001

Circuit and Nature of Proceeding	Cases Pending Oct. 1, 2000*	Cases Commenced			Cases Terminated								Cases Pending Sept. 30, 2001
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
ALL CIRCUITS	**40,261**	**57,464**	**56,117**	**1,347**	**57,422**	**2,797**	**25,785**	**11,761**	**14,024**	**28,840**	**9,315**	**19,525**	**40,303**
CRIMINAL	10,216	11,281	11,105	176	11,165	706	2,586	809	1,777	7,873	2,657	5,216	10,332
U.S PRISONER PETITIONS	3,017	6,138	5,935	203	5,587	74	3,911	2,500	1,411	1,602	219	1,383	3,568
OTHER U.S CIVIL	2,878	3,567	3,492	75	3,772	334	1,301	325	976	2,137	839	1,298	2,673
PRIV. PRISONER PETITIONS	7,032	12,205	11,836	369	12,377	124	8,568	5,422	3,146	3,685	681	3,004	6,860
OTHER PRIVATE CIVIL	12,342	14,136	13,801	335	14,812	1,207	6,341	1,419	4,922	7,264	4,063	3,201	11,666
BANKRUPTCY	833	961	929	32	948	56	410	91	319	482	248	234	846
ADMINISTRATIVE APPEALS	3,082	3,300	3,216	84	3,245	267	1,661	811	850	1,317	580	737	3,137
ORIGINAL PROCEEDINGS[1]	861	5,876	5,803	73	5,516	29	1,007	384	623	4,480	28	4,452	1,221
DISTRICT OF COLUMBIA	**1,260**	**1,401**	**1,385**	**16**	**1,391**	**199**	**603**	**167**	**436**	**589**	**240**	**349**	**1,270**
CRIMINAL	66	92	92	-	84	3	25	1	24	56	32	24	74
U.S PRISONER PETITIONS	83	149	144	5	139	1	77	34	43	61	10	51	93
OTHER U.S CIVIL	188	299	296	3	277	19	110	22	88	148	55	93	210
PRIV. PRISONER PETITIONS	34	42	41	1	54	-	30	5	25	24	2	22	22
OTHER PRIVATE CIVIL	142	158	156	2	185	16	79	27	52	90	31	59	115
BANKRUPTCY	722	3	3	-	2	-	2	1	1	-	-	-	1
ADMINISTRATIVE APPEALS	25	543	539	4	544	160	254	71	183	130	109	21	721
ORIGINAL PROCEEDINGS[1]		115	114	1	106	-	26	6	20	80	1	79	34
FIRST CIRCUIT	**1,266**	**1,762**	**1,748**	**14**	**1,515**	**105**	**476**	**9**	**467**	**934**	**350**	**584**	**1,513**
CRIMINAL	431	631	629	2	431	48	147	-	147	236	89	147	631
U.S PRISONER PETITIONS	86	195	193	2	144	2	45	2	43	97	7	90	137
OTHER U.S CIVIL	110	101	100	1	123	12	34	3	31	77	32	45	88
PRIV. PRISONER PETITIONS	95	145	142	3	129	2	41	-	41	86	12	74	111
OTHER PRIVATE CIVIL	412	511	506	5	490	40	171	3	168	279	168	111	433
BANKRUPTCY	27	24	24	-	29	-	10	-	10	19	13	6	22
ADMINISTRATIVE APPEALS	71	63	62	1	75	1	23	1	22	51	25	26	59
ORIGINAL PROCEEDINGS[1]	34	92	92	-	94	-	5	-	5	89	4	85	32

Table B-1.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit During the 12-Month Period Ending September 30, 1999

Circuit and Nature of Proceeding	Cases Pending Oct. 1, 1998*	Cases Commenced			Cases Terminated								Cases Pending Sept. 30, 1999
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
ALL CIRCUITS	**41,666**	**54,693**	**53,415**	**1,278**	**54,088**	**2,651**	**24,710**	**10,915**	**13,795**	**26,727**	**9,924**	**16,803**	**42,271**
CRIMINAL	10,590	10,251	10,070	181	10,675	879	2,410	821	1,589	7,386	2,918	4,468	10,166
U.S. PRISONER PETITIONS	3,489	5,211	5,048	163	5,296	89	3,575	2,459	1,116	1,632	265	1,367	3,404
OTHER U.S. CIVIL	3,253	4,010	3,929	81	4,179	326	1,509	380	1,129	2,344	889	1,455	3,084
PRIV. PRISONER PETITIONS	7,153	11,980	11,658	322	11,499	124	8,012	4,605	3,407	3,363	580	2,783	7,634
OTHER PRIVATE CIVIL	12,585	15,479	15,159	320	15,307	935	6,626	1,607	5,019	7,746	4,394	3,352	12,757
BANKRUPTCY	972	1,109	1,086	23	1,150	64	528	131	397	558	276	282	931
ADMINISTRATIVE APPEALS	3,456	3,280	3,113	167	3,122	214	1,455	671	784	1,453	574	879	3,614
ORIGINAL PROCEEDINGS[1]	168	3,373	3,352	21	2,860	20	595	241	354	2,245	28	2,217	681
DISTRICT OF COLUMBIA	**1,553**	**1,438**	**1,425**	**13**	**1,655**	**300**	**686**	**269**	**417**	**669**	**290**	**379**	**1,336**
CRIMINAL	106	105	105	-	138	15	41	8	33	82	44	38	73
U.S. PRISONER PETITIONS	45	120	117	3	112	4	58	27	31	50	5	45	53
OTHER U.S. CIVIL	414	298	292	6	489	180	111	23	88	198	83	115	223
PRIV. PRISONER PETITIONS	33	33	33	-	47	3	21	12	9	23	4	19	19
OTHER PRIVATE CIVIL	177	218	214	4	234	26	87	14	73	121	48	73	161
BANKRUPTCY	6	3	3	-	6	2	-	-	-	4	1	3	3
ADMINISTRATIVE APPEALS	762	550	550	-	529	70	334	173	161	125	104	21	783
ORIGINAL PROCEEDINGS[1]	10	111	111	-	100	-	34	12	22	66	1	65	21
FIRST CIRCUIT	**1,035**	**1,454**	**1,443**	**11**	**1,323**	**27**	**686**	**265**	**421**	**610**	**364**	**246**	**1,166**
CRIMINAL	317	387	384	3	324	11	121	41	80	192	118	74	380
U.S. PRISONER PETITIONS	89	144	140	4	141	2	114	64	50	25	8	17	92
OTHER U.S. CIVIL	85	119	119	-	107	1	44	13	31	62	24	38	97
PRIV. PRISONER PETITIONS	60	104	104	-	86	-	61	44	17	25	9	16	78
OTHER PRIVATE CIVIL	386	521	517	4	517	12	254	51	203	251	184	67	390
BANKRUPTCY	18	40	40	-	23	1	16	4	12	6	2	4	35
ADMINISTRATIVE APPEALS	59	73	73	-	64	-	44	25	19	20	17	3	68
ORIGINAL PROCEEDINGS[1]	21	66	66	-	61	-	32	23	9	29	2	27	26

Table B-1.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the Twelve-Month Period Ended September 30, 1997

Circuit and Nature of Proceeding	Cases Pending Oct. 1, 1996*	Cases Commenced			Cases Terminated								Cases Pending Sept. 30, 1997
							Procedural Terminations			Terminations on the Merits			
		Total	Original	Reinstated	Total	Cases Disposed of by Consolidation	Total	By Judge	By Staff	Total	After Oral Hearing	After Submission on Briefs	
ALL CIRCUITS	**38,774**	**52,319**	**51,088**	**1,231**	**51,194**	**3,038**	**22,316**	**8,729**	**13,587**	**25,840**	**10,357**	**15,483**	**39,899**
CRIMINAL	10,146	10,521	10,340	181	10,466	861	2,285	719	1,566	7,320	2,957	4,363	10,201
U.S. PRISONER PETITIONS	2,859	5,183	4,965	218	4,449	80	2,658	1,649	1,009	1,711	176	1,535	3,593
OTHER U.S. CIVIL	3,253	3,803	3,726	77	4,200	304	1,433	360	1,073	2,463	999	1,464	2,856
PRIV. PRISONER PETITIONS	6,486	11,005	10,692	313	11,019	126	7,251	3,416	3,835	3,642	576	3,066	6,472
OTHER PRIVATE CIVIL	11,932	15,423	15,069	354	15,122	1,050	6,281	1,637	4,644	7,791	4,585	3,206	12,233
BANKRUPTCY	1,070	1,158	1,131	27	1,269	85	510	133	377	674	378	296	959
ADMINISTRATIVE APPEALS	2,913	4,412	4,355	57	3,944	521	1,741	701	1,040	1,682	665	1,017	3,381
ORIGINAL PROCEEDINGS	115	814	810	4	725	11	157	114	43	557	21	536	204
DISTRICT OF COLUMBIA	**1,825**	**1,531**	**1,520**	**11**	**1,833**	**223**	**878**	**191**	**687**	**732**	**344**	**388**	**1,523**
CRIMINAL	175	157	157	-	194	44	41	7	34	109	79	30	138
U.S. PRISONER PETITIONS	89	98	94	4	113	15	40	10	30	58	4	54	74
OTHER U.S. CIVIL	289	287	287	-	374	30	127	47	80	217	76	141	202
PRIV. PRISONER PETITIONS	61	41	39	2	69	2	42	13	29	25	1	24	33
OTHER PRIVATE CIVIL	220	184	179	5	245	25	86	29	57	134	53	81	159
BANKRUPTCY	8	5	5	-	8	1	2	-	2	5	2	3	5
ADMINISTRATIVE APPEALS	970	727	727	-	791	105	527	81	446	159	128	31	906
ORIGINAL PROCEEDINGS	13	32	32	-	39	1	13	4	9	25	1	24	6
FIRST CIRCUIT	**953**	**1,449**	**1,437**	**12**	**1,371**	**34**	**641**	**239**	**402**	**696**	**428**	**268**	**1,031**
CRIMINAL	301	358	352	6	354	3	132	38	94	219	141	78	305
U.S. PRISONER PETITIONS	45	136	135	1	89	2	64	55	9	23	4	19	92
OTHER U.S. CIVIL	80	115	115	-	113	3	52	9	43	58	31	27	82
PRIV. PRISONER PETITIONS	77	133	133	-	127	2	82	46	36	43	9	34	83
OTHER PRIVATE CIVIL	372	581	577	4	556	23	245	65	180	288	207	81	397
BANKRUPTCY	23	36	36	-	44	1	17	2	15	26	20	6	15
ADMINISTRATIVE APPEALS	47	78	77	1	78	-	47	23	24	31	16	15	47
ORIGINAL PROCEEDINGS	8	12	12	-	10	-	2	1	1	8	-	8	10

Table B.
U.S. Courts of Appeals—Commenced, Terminated, and Pending During the Twelve-Month Periods Ended September 30, 1996 and 1997

Circuit	Filings			Terminations			Pending		
	1996	1997	Percent Change	1996	1997	Percent Change	1996*	1997	Percent Change
TOTAL	**51,991**	**52,319**	**.6**	**50,413**	**51,194**	**1.5**	**38,774**	**39,899**	**2.9**
DISTRICT OF COLUMBIA	1,347	1,531	13.7	1,674	1,833	9.5	1,825	1,523	-16.5
FIRST	1,367	1,449	6.0	1,395	1,371	-1.7	953	1,031	8.2
SECOND	4,562	4,816	5.6	4,207	4,378	4.1	2,183	2,621	20.1
THIRD	3,604	3,458	-4.1	3,369	3,479	3.3	2,172	2,151	-1.0
FOURTH	4,914	4,754	-3.3	5,130	4,629	-9.8	3,323	3,448	3.8
FIFTH	7,546	7,573	.4	7,010	7,301	4.2	4,817	5,089	5.6
SIXTH	4,606	4,622	.3	4,218	4,626	9.7	3,735	3,731	-.1
SEVENTH	3,248	3,350	3.1	3,149	3,311	5.1	2,296	2,335	1.7
EIGHTH	3,384	3,335	-1.4	3,212	3,215	.1	1,907	2,027	6.3
NINTH	8,502	8,692	2.2	8,175	8,515	4.2	7,445	7,622	2.4
TENTH	2,582	2,629	1.8	2,687	2,466	-8.2	1,923	2,086	8.5
ELEVENTH	6,329	6,110	-3.5	6,187	6,070	-1.9	6,195	6,235	.6

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.
* REVISED.

Table B.
U.S. Courts of Appeals—Commenced, Terminated, and Pending
During the Twelve-Month Periods Ended September 30, 1997 and 1998

Circuit	Filings			Terminations			Pending		
	1997	1998	Percent Change	1997	1998	Percent Change	1997*	1998	Percent Change
TOTAL	**52,319**	**53,805**	**2.8**	**51,194**	**52,002**	**1.6**	**39,846**	**41,649**	**4.5**
DISTRICT OF COLUMBIA	1,531	1,627	6.3	1,833	1,590	-13.3	1,523	1,560	2.4
FIRST	1,449	1,437	-.8	1,371	1,430	4.3	1,044	1,051	.7
SECOND	4,816	4,796	-.4	4,378	4,289	-2.0	2,628	3,135	19.3
THIRD	3,458	3,613	4.5	3,479	3,231	-7.1	2,121	2,503	18.0
FOURTH	4,754	4,897	3.0	4,629	5,233	13.0	3,445	3,109	-9.8
FIFTH	7,573	8,096	6.9	7,301	7,774	6.5	5,052	5,374	6.4
SIXTH	4,622	4,704	1.8	4,626	4,330	-6.4	3,733	4,107	10.0
SEVENTH	3,350	3,297	-1.6	3,311	3,261	-1.5	2,330	2,366	1.5
EIGHTH	3,335	3,330	-.1	3,215	3,397	5.7	2,020	1,953	-3.3
NINTH	8,692	9,070	4.3	8,515	8,425	-1.1	7,634	8,279	8.4
TENTH	2,629	2,582	-1.8	2,466	2,614	6.0	2,082	2,050	-1.5
ELEVENTH	6,110	6,356	4.0	6,070	6,428	5.9	6,234	6,162	-1.2

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.
* REVISED

Table B.
U.S. Courts of Appeals—Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 1998 and 1999

Circuit	Filings			Terminations			Pending		
	1998	1999	Percent Change	1998	1999	Percent Change	1998*	1999	Percent Change
TOTAL	**53,805**	**54,693**	**1.7**	**52,002**	**54,088**	**4.0**	**41,666**	**42,271**	**1.5**
DISTRICT OF COLUMBIA	1,627	1,438	-11.6	1,590	1,655	4.1	1,553	1,336	-14.0
FIRST	1,437	1,454	1.2	1,430	1,323	-7.5	1,035	1,166	12.7
SECOND	4,796	4,630	-3.5	4,289	4,245	-1.0	3,155	3,540	12.2
THIRD	3,613	3,384	-6.3	3,231	3,199	-1.0	2,505	2,690	7.4
FOURTH	4,897	4,627	-5.5	5,233	5,149	-1.6	3,103	2,581	-16.8
FIFTH	8,096	8,275	2.2	7,774	8,593	10.5	5,373	5,055	-5.9
SIXTH	4,704	4,884	3.8	4,330	4,800	10.9	4,110	4,194	2.0
SEVENTH	3,297	3,431	4.1	3,261	3,444	5.6	2,362	2,349	-.6
EIGHTH	3,330	3,353	.7	3,397	3,280	-3.4	1,960	2,033	3.7
NINTH	9,070	9,383	3.5	8,425	8,402	-.3	8,293	9,274	11.8
TENTH	2,582	2,800	8.4	2,614	2,754	5.4	2,055	2,101	2.2
ELEVENTH	6,356	7,034	10.7	6,428	7,244	12.7	6,162	5,952	-3.4

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT INCLUDED IN THIS TABLE.
* REVISED.

Table B.
U.S. Courts of Appeals—Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 1999 and 2000

Circuit	Filings			Terminations			Pending		
	1999	2000	Percent Change	1999	2000	Percent Change	1999*	2000	Percent Change
TOTAL	**54,693**	**54,697**	**.0**	**54,088**	**56,512**	**4.5**	**42,225**	**40,410**	**-4.3**
DISTRICT OF COLUMBIA	1,438	1,506	4.7	1,655	1,582	-4.4	1,336	1,260	-5.7
FIRST	1,454	1,463	.6	1,323	1,365	3.2	1,167	1,265	8.4
SECOND	4,630	4,892	5.7	4,245	4,829	13.8	3,556	3,619	1.8
THIRD	3,384	3,482	2.9	3,199	3,162	-1.2	2,697	3,017	11.9
FOURTH	4,627	4,689	1.3	5,149	4,710	-8.5	2,572	2,551	-.8
FIFTH	8,275	8,253	-.3	8,593	8,535	-.7	5,013	4,731	-5.6
SIXTH	4,884	4,916	.7	4,800	5,090	6.0	4,211	4,037	-4.1
SEVENTH	3,431	3,461	.9	3,444	3,601	4.6	2,351	2,211	-6.0
EIGHTH	3,353	3,165	-5.6	3,280	3,280	.0	2,017	1,902	-5.7
NINTH	9,383	9,147	-2.5	8,402	9,216	9.7	9,288	9,219	-.7
TENTH	2,800	2,656	-5.1	2,754	2,737	-.6	2,066	1,985	-3.9
ELEVENTH	7,034	7,067	.5	7,244	8,405	16.0	5,951	4,613	-22.5

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.
* REVISED.

Table B.
U.S. Courts of Appeals—Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2000 and 2001

Circuit	Filings			Terminations			Pending		
	2000	2001	Percent Change	2000	2001	Percent Change	2000*	2001	Percent Change
TOTAL	**54,697**	**57,464**	**5.1**	**56,512**	**57,422**	**1.6**	**40,261**	**40,303**	**.1**
DISTRICT OF COLUMBIA	1,506	1,401	-7.0	1,582	1,391	-12.1	1,260	1,270	.8
FIRST	1,463	1,762	20.4	1,365	1,515	11.0	1,266	1,513	19.5
SECOND	4,892	4,519	-7.6	4,829	4,175	-13.5	3,597	3,941	9.6
THIRD	3,482	3,860	10.9	3,162	3,594	13.7	2,933	3,199	9.1
FOURTH	4,689	5,303	13.1	4,710	5,078	7.8	2,526	2,751	8.9
FIFTH	8,253	8,642	4.7	8,535	8,784	2.9	4,728	4,586	-3.0
SIXTH	4,916	4,853	-1.3	5,090	4,691	-7.8	4,039	4,201	4.0
SEVENTH	3,461	3,455	-.2	3,601	3,616	.4	2,211	2,050	-7.3
EIGHTH	3,165	3,034	-4.1	3,280	3,414	4.1	1,908	1,528	-19.9
NINTH	9,147	10,342	13.1	9,216	10,372	12.5	9,190	9,160	-.3
TENTH	2,656	2,758	3.8	2,737	2,792	2.0	1,981	1,947	-1.7
ELEVENTH	7,067	7,535	6.6	8,405	8,000	-4.8	4,622	4,157	-10.1

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.
* REVISED.

Table B.
U.S. Courts of Appeals—Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2001 and 2002

Circuit	Filings			Terminations			Pending		
	2001	2002	Percent Change	2001	2002	Percent Change	2001*	2002	Percent Change
TOTAL	**57,464**	**57,555**	**.2**	**57,422**	**56,586**	**-1.5**	**39,996**	**40,965**	**2.4**
DISTRICT OF COLUMBIA	1,401	1,126	-19.6	1,391	1,303	-6.3	1,269	1,092	-13.9
FIRST	1,762	1,667	-5.4	1,515	1,758	16.0	1,515	1,424	-6.0
SECOND	4,519	4,870	7.8	4,175	4,206	.7	3,955	4,619	16.8
THIRD	3,860	3,643	-5.6	3,594	3,784	5.3	3,216	3,075	-4.4
FOURTH	5,303	4,658	-12.2	5,078	5,074	-.1	2,742	2,326	-15.2
FIFTH	8,642	8,784	1.6	8,784	8,390	-4.5	4,579	4,973	8.6
SIXTH	4,853	4,619	-4.8	4,691	4,878	4.0	4,203	3,944	-6.2
SEVENTH	3,455	3,418	-1.1	3,616	3,293	-8.9	2,051	2,176	6.1
EIGHTH	3,034	3,216	6.0	3,414	3,180	-6.9	1,520	1,556	2.4
NINTH	10,342	11,421	10.4	10,372	10,042	-3.2	8,847	10,226	15.6
TENTH	2,758	2,661	-3.5	2,792	2,543	-8.9	1,946	2,064	6.1
ELEVENTH	7,535	7,472	-.8	8,000	8,135	1.7	4,153	3,490	-16.0

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.
* REVISED.

Table B.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2004 and 2005

Circuit	Filings			Terminations			Pending		
	2004	2005	Percent Change	2004	2005	Percent Change	2004*	2005	Percent Change
TOTAL	**62,762**	**68,473**	**9.1**	**56,381**	**61,975**	**9.9**	**51,226**	**57,724**	**12.7**
DISTRICT OF COLUMBIA	1,390	1,379	-0.8	1,155	1,158	0.3	1,242	1,463	17.8
FIRST	1,723	1,912	11.0	1,643	1,888	14.9	1,619	1,643	1.5
SECOND	7,008	7,035	0.4	4,611	6,501	41.0	9,431	9,965	5.7
THIRD	3,871	4,498	16.2	3,787	4,268	12.7	3,250	3,480	7.1
FOURTH	4,957	5,307	7.1	4,713	4,754	0.9	2,768	3,321	20.0
FIFTH	8,509	9,052	6.4	8,100	7,496	-7.5	4,850	6,406	32.1
SIXTH	4,841	5,211	7.6	4,655	5,232	12.4	4,540	4,519	-0.5
SEVENTH	3,377	3,789	12.2	3,294	3,706	12.5	2,378	2,461	3.5
EIGHTH	3,101	3,611	16.4	2,916	3,287	12.7	2,004	2,328	16.2
NINTH	14,274	16,037	12.4	12,151	13,399	10.3	13,436	16,074	19.6
TENTH	2,646	2,911	10.0	2,448	2,708	10.6	2,164	2,367	9.4
ELEVENTH	7,065	7,731	9.4	6,908	7,578	9.7	3,544	3,697	4.3

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.
* REVISED.

Table B.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2002 and 2003

Circuit	Filings			Terminations			Pending		
	2002	2003	Percent Change	2002	2003	Percent Change	2002*	2003	Percent Change
TOTAL	**57,555**	**60,847**	**5.7**	**56,586**	**56,396**	**-.3**	**40,149**	**44,600**	**11.1**
DISTRICT OF COLUMBIA	1,126	1,121	-.4	1,303	1,182	-9.3	1,092	1,031	-5.6
FIRST	1,667	1,844	10.6	1,758	1,573	-10.5	1,251	1,522	21.7
SECOND	4,870	6,359	30.6	4,206	4,262	1.3	4,670	6,767	44.9
THIRD	3,643	3,957	8.6	3,784	3,801	.4	3,089	3,245	5.1
FOURTH	4,658	4,887	4.9	5,074	4,668	-8.0	2,300	2,519	9.5
FIFTH	8,784	8,613	-1.9	8,390	9,135	8.9	4,966	4,444	-10.5
SIXTH	4,619	4,964	7.5	4,878	4,557	-6.6	3,943	4,350	10.3
SEVENTH	3,418	3,517	2.9	3,293	3,390	2.9	2,164	2,291	5.9
EIGHTH	3,216	3,190	-.8	3,180	2,896	-8.9	1,518	1,812	19.4
NINTH	11,421	12,872	12.7	10,042	11,220	11.7	9,625	11,277	17.2
TENTH	2,661	2,540	-4.5	2,543	2,627	3.3	2,042	1,955	-4.3
ELEVENTH	7,472	6,983	-6.5	8,135	7,085	-12.9	3,489	3,387	-2.9

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.
* REVISED.

Table B.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2003 and 2004

Circuit	Filings			Terminations			Pending		
	2003	2004	Percent Change	2003	2004	Percent Change	2003*	2004	Percent Change
TOTAL	**60,847**	**62,762**	**3.1**	**56,396**	**56,381**	**.0**	**44,690**	**51,071**	**14.3**
DISTRICT OF COLUMBIA	1,121	1,390	24.0	1,182	1,155	-2.3	1,031	1,266	22.8
FIRST	1,844	1,723	-6.6	1,573	1,643	4.5	1,521	1,601	5.3
SECOND	6,359	7,008	10.2	4,262	4,611	8.2	6,843	9,240	35.0
THIRD	3,957	3,871	-2.2	3,801	3,787	-.4	3,248	3,332	2.6
FOURTH	4,887	4,957	1.4	4,668	4,713	1.0	2,522	2,766	9.7
FIFTH	8,613	8,509	-1.2	9,135	8,100	-11.3	4,445	4,854	9.2
SIXTH	4,964	4,841	-2.5	4,557	4,655	2.2	4,348	4,534	4.3
SEVENTH	3,517	3,377	-4.0	3,390	3,294	-2.8	2,292	2,375	3.6
EIGHTH	3,190	3,101	-2.8	2,896	2,916	.7	1,808	1,993	10.2
NINTH	12,872	14,274	10.9	11,220	12,151	8.3	11,294	13,417	18.8
TENTH	2,540	2,646	4.2	2,627	2,448	-6.8	1,953	2,151	10.1
ELEVENTH	6,983	7,065	1.2	7,085	6,908	-2.5	3,385	3,542	4.6

NOTE: THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE.
* REVISED.

U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE

DISTRICT OF COLUMBIA				12-MONTH PERIOD ENDING SEPTEMBER 30					
				2000	1999	1998	1997	1996	1995
OVERALL CASELOAD STATISTICS	Appeals Filed	Total		1,506	1,438	1,627	1,531	1,347	1,625
		Prisoner		226	153	155	139	161	179
		Other**		631	630	766	508	561	674
		Criminal		82	105	137	157	151	155
		Administrative		567	550	569	727	474	617
		% Change in Total Filings	Over Last Year		4.7				
			Over Earlier Years			-7.4	-1.6	11.8	-7.3
	Appeals Terminated	Total		1,582	1,655	1,590	1,833	1,674	1,670
		Consolidations & Cross Appeals		280	300	285	223	293	286
		Procedural		673	686	672	878	686	681
		On The Merits	Total	629	669	633	732	695	703
			Prisoner	73	73	84	83	88	71
			Other	340	389	291	381	319	329
			Criminal	58	82	100	109	131	138
			Administrative	158	125	158	159	157	165
			Percent by Active Judges	98.6	99.0	98.5	98.5	99.8	99.9
	Pending Appeals			1,260	1,336	1,560	1,523	1,825	2,158
ACTIONS PER ACTIVE JUDGE*	Terminations on the Merits			183	182	173	214	196	196
	Procedural Terminations			61	73	48	55	55	44
	Written Decisions	Total		61	60	57	72	62	67
		Signed		23	20	23	25	26	23
		Unsigned		38	40	34	47	36	44
		Without Comment		-	-	-	-	-	-

* Includes only judges active during the entire 12 month period.

** See "Explanation of Selected Terms."

Show Page Two

U.S. COURT OF APPEALS
JUDICIAL CASELOAD PROFILE
PAGE 2

DISTRICT OF COLUMBIA				12-MONTH PERIOD ENDING SEPTEMBER 30						2000 Numerical Standing
				2000	1999	1998	1997	1996	1995	
Number of Judgeships/Number of Panels				12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	
Number of Sitting Senior Judges				1	1	1	1	1	0	
Number of Vacant Judgeship Months**				22.4	12.0	12.0	12.0	13.0	12.3	
ACTIONS PER PANEL*	Appeals Filed		Total	377	360	407	383	337	406	12
			Prisoner	57	38	39	35	40	45	12
			Other	157	158	192	127	140	168	12
			Criminal	21	26	34	39	38	39	12
			Administrative	142	138	142	182	119	154	1
	Appeals Terminated		Total	396	414	398	458	419	418	12
			Consolidations & Cross Appeals	71	75	72	55	73	72	2
			Procedural	168	172	168	220	172	170	12
		On The Merits	Total	157	167	158	183	174	176	12
			Prisoner	18	18	21	21	22	18	12
			Other	84	97	72	95	80	82	12
			Criminal	15	21	25	27	33	35	12
			Administrative	40	31	40	40	39	41	2
	Pending Appeals			315	334	390	381	456	540	12
Median Time	Median Time from Filing Notice of Appeal to Disposition			7.3	8.6	9.4	10.9	12.0	12.8	1
Other Caseload Per Judgeship	Applications for Interlocutory Appeals			1	1	1	1	1	0	9
	Pro Se Mandamus Petitions			**	1	7	15	2	2	
	Petitions for Rehearing			26	22	24	27	21	22	11

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Coffina, Scott

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001	Talking Points	Nomination of Peter Keisler to the D.C. Circuit	1	N.D.	P5;
002	Email	RE: Follow-Up for Senate Staff on 11th Seat - To: William Kelley, et al. - From: Jennifer Brosnahan	1	07/24/2006	P5;
003	Email	RE: Meeting with Grassley & Sessions Staff on 11th Judge - To: Bosnahan, Jennifer, et al. - From: John Smith	1	07/24/2006	P5;
004	Draft	D.C. Circuit Facts	3	N.D.	P5;
005	Letter	[Recommendation letter with attachments] - To: Fred Fielding - From: Richard Burr	7	08/31/2007	P2; P6/b6;

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DC Circuit 11th/12th Seat: DC Circuit 11th/12th Seat

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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Records Not Subject to FOIA

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John- This is a complete overview of the seat history- including when folks were appt; retired, etc. — If you want to also double check our list- you can use this chart.

U.S. Court of Appeals for the District of Columbia Circuit
Seat History

A- Appointed
R- Retired/Resigned D- Death

	1	2	3	4	5	6	7	8	9	10 (created 10/20/78)	11 (created 10/20/78)	12 (created 7/10/1984)
1978	Wilkey	Wright	Leventhal	R. Robb	McGowan	Tamm	Bazelon	MacKinnon	Robinson			N/A
1979	Wilkey	Wright	Leventhal (R- 11/20/79)	R. Robb	McGowan	Tamm	Bazelon (R- 6/30/79)	MacKinnon	Robinson	Wald (A- 7/26/79)	Mikva (A- 9/26/79)	N/A
1980	Wilkey	Wright	R. Ginsburg (A- 6/18/80)	R. Robb	McGowan	Tamm	Edwards (A- 2/20/80)	MacKinnon	Robinson	Wald	Mikva	N/A
1981	Wilkey	Wright	R. Ginsburg	R. Robb	McGowan (R- 8/31/81)	Tamm	Edwards	MacKinnon	Robinson	Wald	Mikva	N/A
1982	Wilkey	Wright	R. Ginsburg	R. Robb (R- 5/31/82) Scalia (A- 8/17/82)	Bork (A- 2/9/82	Tamm	Edwards	MacKinnon	Robinson	Wald	Mikva	N/A
1983	Wilkey	Wright	R. Ginsburg	Scalia	Bork	Tamm	Edwards	MacKinnon (R- 5/20/83) Starr (A- 9/20/83)	Robinson	Wald	Mikva	N/A
1984	Wilkey (R- 12/6/84)	Wright	R. Ginsburg	Scalia	Bork	Tamm	Edwards	Starr	Robinson	Wald	Mikva	
1985		Wright	R. Ginsburg	Scalia	Bork	Tamm (D- 9/22/85) Buckley (A- 12/17/85)	Edwards	Starr	Robinson	Wald	Mikva	Silberman (A- 10/28/85)
1986	Williams (A- 6/16/86)	Wright (R- 6/1/86) D. Ginsburg (A- 10/14/86)	R. Ginsburg	Scalia (E- 9/25/86)	Bork	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1987	Williams	D. Ginsburg	R. Ginsburg	Sentelle (A- 9/11/87)	Bork	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1988	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Bork (R- 2/5/88)	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1989	Williams	D. Ginsburg	R. Ginsburg	Sentelle		Buckley	Edwards	Starr (R- 5/26/89)	Robinson (R- 9/1/89)	Wald	Mikva	Silberman
1990	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Thomas (A- 3/6/90)	Buckley	Edwards	Henderson (A- 7/5/90)	Randolph (A- 7/16/90)	Wald	Mikva	Silberman
1991	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Thomas (E- 10/15/1991)	Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman
1992	Williams	D. Ginsburg	R. Ginsburg	Sentelle		Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman
1993	Williams	D. Ginsburg	R. Ginsburg (E- 8/3/93)	Sentelle		Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman

U.S. Court of Appeals for the District of Columbia Circuit
Seat History

A- Appointed
R- Retired/Resigned D- Death

	1	2	3	4	5	6	7	8	9	10 (created 10/20/78)	11 (created 10/20/78)	12 (created 7/10/1984)
1994	Williams	D. Ginsburg	Tatel (A-10/7/94)	Sentelle	Rogers (A-3/11/94)	Buckley	Edwards	Henderson	Randolph	Wald	Mikva (R-9/19/94)	Silberman
1995	Williams	D. Ginsburg	Tatel	Sentelle	Rogers	Buckley	Edwards	Henderson	Randolph	Wald		Silberman
1996	Williams	D. Ginsburg	Tatel	Sentelle	Rogers	Buckley (R-8/31/96)	Edwards	Henderson	Randolph	Wald		Silberman
1997	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph	Wald	Garland (A-3/20/97)	Silberman
1998	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph	Wald (R-11.16.99)	Garland	Silberman
1999	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	Silberman
2000	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	Silberman (R-11/1/00)
2001	Williams (R-9/30/01)	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	
2002		D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	
2003		D. Ginsburg	Tatel	Sentelle	Rogers	Roberts (A-6/2/03)	Edwards	Henderson	Randolph		Garland	
2004		D. Ginsburg	Tatel	Sentelle	Rogers	Roberts	Edwards	Henderson	Randolph		Garland	
2005	Brown (A-6/10/05)	D. Ginsburg	Tatel	Sentelle	Rogers	Roberts (E-9/29/05)	Edwards (R-11/3/05)	Henderson	Randolph	Griffith (A-6/29/05)	Garland	
2006	Brown	D. Ginsburg	Tatel	Sentelle	Rogers			Henderson	Randolph	Griffith	Garland	Kavanaugh (A- 5/30/06)

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for release

Document Originally
Attached to
Following Page

DRAFT

D.C. Circuit Facts

I. PRECEDENT

- **The D.C. Circuit had 11 active judges for much of 2005, plus a pending nominee.**
    - As of June 2005 (when Thomas Griffith added), there were 11 judges in active service, plus 1 nominee pending (Brett Kavanaugh).
- **It would be consistent with recent precedent for this court to have a total of 12 sitting judges and nominees pending in the Senate.**
    - As of July 2003, there were 9 judges in active service, with 3 additional nominees pending (Brett Kavanaugh, Janice Rogers Brown, and Miguel Estrada).
    - As of May 2004, there were again 9 judges in active service, with 3 nominees pending (Kavanaugh, Brown, Griffith).
- **In particular, a nomination to fill the 11th seat, while 10 judges are in active service, is consistent with precedent from 2005.**
    - As of June 2005 (when Brown added), there were 10 judges in active service, with 2 additional nominees pending (Kavanaugh, Griffith).

II. INCREASED CASELOAD

- **In any event, the D.C. Circuit's increasing caseload justifies filling the 11th seat and the 12th seat.**

A. Detainee Litigation

- The Detainee Treatment Act (DTA) provides that the D.C. Circuit will have exclusive jurisdiction to review (i) decisions of combatant status review tribunals (CSRT) and (ii) final decisions of military commissions.
    - **The DTA will significantly increase the D.C. Circuit's caseload.** There are currently about 470 detainees at GTMO, each of whom has a right to challenge his status determination in the D.C. Circuit. Also, the Administration is working with Congress to move forward with military commissions in a manner consistent with the Supreme Court's *Hamdan* ruling. When such trials take place, detainees will have the right to appeal their convictions to the D.C. Circuit, which would further increase the Circuit's caseload.

- **There are also 350 habeas petitions pending in the federal district court in Washington, which could be appealed to the D.C. Circuit.**

- In addition to the litigation above brought by current GTMO detainees, former detainees are also attempting to sue the government under a variety of legal theories.

    - Because they involve federal defendants, many of these cases have been and would likely be filed in the D.C. Circuit.

B. General caseload facts

- **The total number of pending appeals in the D.C. Circuit is higher than it has been since 1998**, and is almost 20% higher than the figure from 2000.

    - The percent change in pending cases from 2004 to 2005 was 17.8%, which was higher than the nationwide average increase during that period.

- **The number of appeals filed in the D.C. Circuit has increased 22% since 2002**, which is higher than the national average during that period.

- **The median interval from filing a notice of appeal to disposition of a case in the D.C. Circuit has increased substantially since 2000.** The median interval has increased over 50%, from 7.3 months to 11.2 months. This lengthening interval suggests the overall complexity of the cases addressed by the D.C. Circuit as well as the workload of the judges.

    - The median disposition interval is now higher than at any time since 1997.

    - The median disposition interval is increasing at a much faster rate than the national average, which has remained relatively constant since 2000.

- **The D.C. Circuit handles a high percentage of *administrative* appeals, which are often highly complex and require more judicial resources.**

- **About one-third of the cases filed in the D.C. Circuit are administrative appeals, which is a substantially higher proportion than any other circuit**, except for the Ninth Circuit (which presumably has many straightforward immigration appeals). In most other circuits, less than 10% of the caseload is administrative appeals.

    - Since 1998, about one-third of cases terminated are administrative, yet administrative cases account for a significantly greater proportion (ranging 44-59%) of all *pending* cases. This backlog suggests that administrative cases are more difficult and take longer to resolve.

Draft

D.C. Circuit Facts

12 active judges (12th seat created July 10, 1984)

- Between 9/11/1987 (Sentelle appt.) and 2/5/1988 (Bork resigned). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 7/16/1990 (Randolph appt.) and 10/15/1991 (Thomas elevated). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Thomas; Buckley; Edwards; Henderson; Randolph; Wald; Mikva; Silberman)

11 active judges (11th seat created 10/20/1978)

- Between 6/18/1980 (R. Ginsburg appt.) to 8/31/1981 (McGowan retired.) (Wilkey; Wright; R. Ginsburg; R. Robb; McGowan; Tamm; Edwards; MacKinnon; Robinson; Wald; Mikva)
- Between 2/9/1982 (Bork appt.) and 5/31/1982 (R. Robb retired.) (Wilkey; Wright; R. Ginsburg; R. Robb; Bork; Tamm; Edwards; MacKinnon; Robinson; Wald; Mikva)
- Between 8/17/1982 (Scalia appt.) and 5/20/1983 (MacKinnon retired). (Wilkey; Wright; R. Ginsburg; Scalia; Bork; Tamm; Edwards; MacKinnon; Robinson; Wald; Mikva)
- Between 9/20/1983 (Starr appt.) and 12/6/1984 (Wilkey retired). (Wilkey; Wright; R. Ginsburg; Scalia; Bork; Tamm; Edwards; Starr; Robinson; Walk; Mikva)
- Between 12/17/1985 (Buckley appt.) and 6/1/1986 (Wright retired). (Wright; R. Ginsburg; Scalia; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 6/16/1986 (Williams appt.) and 9/25/1986 (Scalia elevated). (Williams; R. Ginsburg; Scalia; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 10/14/86 (D. Ginsburg appt.) and 9/11/1987 (Sentelle appt.– went from being 11 to 12 active judges). (Williams, D. Ginsburg; R. Ginsburg; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman).
- Between 2/5/1988 (Bork resigned—went from being 12 active judges) and 5/26/1989 (Starr resigned). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 7/5/1990 (Henderson appt.) and 7/16/1990 (Randolph appt.--- went from being 11 to 12 active judges). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Thomas; Buckley; Edwards; Henderson; Wald; Mikva; Silberman)
- Between 10/15/1991 (Thomas elevated—went from being 12 active judges) and 8/3/1993 (Ginsburg elevated). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Buckley; Edwards; Henderson; Randolph; Wald; Mikva; Silberman)
- Between 3/11/1994 (Rogers appt.) and 9/19/1994 (Mikva retired). (Williams; D. Ginsburg; Sentelle; Rogers; Buckley; Edwards; Henderson; Randolph; Wald; Mikva; Silberman)
- Between 10/7/1994 (Tatel appt.) and 8/31/1996 (Buckley retired). (Williams; D. Ginsburg; Tatel; Sentelle; Rogers; Buckley; Edwards; Henderson; Randolph; Wald; Silberman)
- Between 3/20/1997 (Garland appt.) and 11/16/1999 (Wald retired). (Williams; D. Ginsburg; Tatel; Sentelle; Rogers; Edwards; Henderson; Randolph; Wald; Garland; Silberman)
- Between 6/29/2005 (Griffith appt.) and 9/29/2005 (Roberts elevated). (Brown, D. Ginsburg, Tatel, Sentelle, Rogers, Roberts, Edwards, Henderson, Randolph, Griffith, Garland)

U.S. Court of Appeals for the District of Columbia Circuit
Seat History

A- Appointed
R- Retired/Resigned D- Death

	1	2	3	4	5	6	7	8	9	10 (created 10/20/78)	11 (created 10/20/78)	12 (created 7/10/1984)
1978	Wilkey	Wright	Leventhal	R. Robb	McGowan	Tamm	Bazelon	MacKinnon	Robinson			N/A
1979	Wilkey	Wright	Leventhal (R-11/20/79)	R. Robb	McGowan	Tamm	Bazelon (R-6/30/79)	MacKinnon	Robinson	Wald (A-7/26/79)	Mikva (A-9/26/79)	N/A
1980	Wilkey	Wright	R. Ginsburg (A- 6/18/80)	R. Robb	McGowan	Tamm	Edwards (A-2/20/80)	MacKinnon	Robinson	Wald	Mikva	N/A
1981	Wilkey	Wright	R. Ginsburg	R. Robb	McGowan (R-8/31/81)	Tamm	Edwards	MacKinnon	Robinson	Wald	Mikva	N/A
1982	Wilkey	Wright	R. Ginsburg	R. Robb (R-5/31/82) Scalia (A-8/17/82)	Bork (A-2/9/82	Tamm	Edwards	MacKinnon	Robinson	Wald	Mikva	N/A
1983	Wilkey	Wright	R. Ginsburg	Scalia	Bork	Tamm	Edwards	MacKinnon (R- 5/20/83) Starr (A-9/20/83)	Robinson	Wald	Mikva	N/A
1984	Wilkey (R-12/6/84)	Wright	R. Ginsburg	Scalia	Bork	Tamm	Edwards	Starr	Robinson	Wald	Mikva	
1985		Wright	R. Ginsburg	Scalia	Bork	Tamm (D-9/22/85) Buckley (A-12/17/85)	Edwards	Starr	Robinson	Wald	Mikva	Silberman (A-10/28/85)
1986	Williams (A-6/16/86)	Wright (R-6/1/86) D. Ginsburg (A-10/14/86)	R. Ginsburg	Scalia (E-9/25/86)	Bork	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1987	Williams	D. Ginsburg	R. Ginsburg	Sentelle (A-9/11/87)	Bork	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1988	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Bork (R-2/5/88)	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1989	Williams	D. Ginsburg	R. Ginsburg	Sentelle		Buckley	Edwards	Starr (R-5/26/89)	Robinson (R- 9/1/89)	Wald	Mikva	Silberman
1990	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Thomas (A-3/6/90)	Buckley	Edwards	Henderson (A- 7/5/90)	Randolph (A- 7/16/90)	Wald	Mikva	Silberman
1991	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Thomas (E-10/15/1991)	Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman
1992	Williams	D. Ginsburg	R. Ginsburg	Sentelle		Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman
1993	Williams	D. Ginsburg	R. Ginsburg (E- 8/3/93)	Sentelle		Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman

U.S. Court of Appeals for the District of Columbia Circuit
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1994	Williams	D. Ginsburg	Tatel (A- 10/7/94)	Sentelle	Rogers (A- 3/11/94)	Buckley	Edwards	Henderson	Randolph	Wald	Mikva (R- 9/19/94)	Silberman
1995	Williams	D. Ginsburg	Tatel	Sentelle	Rogers	Buckley	Edwards	Henderson	Randolph	Wald		Silberman
1996	Williams	D. Ginsburg	Tatel	Sentelle	Rogers	Buckley (R- 8/31/96)	Edwards	Henderson	Randolph	Wald		Silberman
1997	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph	Wald	Garland (A- 3/20/97)	Silberman
1998	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph	Wald (R- 11.16.99)	Garland	Silberman
1999	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	Silberman
2000	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	Silberman (R- 11/1/00)
2001	Williams (R- 9/30/01)	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	
2002		D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	
2003		D. Ginsburg	Tatel	Sentelle	Rogers	Roberts (A- 6/2/03)	Edwards	Henderson	Randolph		Garland	
2004		D. Ginsburg	Tatel	Sentelle	Rogers	Roberts	Edwards	Henderson	Randolph		Garland	
2005	Brown (A- 6/10/05)	D. Ginsburg	Tatel	Sentelle	Rogers	Roberts (E- 9/29/05)	Edwards (R- 11/3/05)	Henderson	Randolph	Griffith (A- 6/29/05)	Garland	
2006	Brown	D. Ginsburg	Tatel	Sentelle	Rogers			Henderson	Randolph	Griffith	Garland	Kavanaugh (A- 5/30/06)

FORMER DC CIRCUIT JUDGES AND WHEN THEY TOOK SENIOR STATUS

August 1, 2006

Name (Last, First)	*Birth Year*	*Age at time of taking SS*	*Start of Service (Date of First Commission)*	*Yrs. Of Service at time of taking SS*	*Age+ Yrs*	*Date took Senior Service*	*Years between eligibility for senior service and when the judge took senior status*
McGowan, Carl E.	1911	70	27-Mar-63	18	88	31-Aug-81	4 years
Robb, Roger	1907	75	6-May-69	13	88	31-May-82	4 years
MacKinnon, George Edward	1906	77	6-May-69	14	91	20-May-83	5 years
Wilkey, Malcolm Richard	1918	66	25-Feb-70	14	80	6-Dec-84	Took Senior Service almost immediately
Wright, James Skelly	1911	75	9-Mar-50	36	111	1-Jun-86	10 years
Robinson, Spottswood William III	1916	73	2-Jul-64	25	98	1-Sep-89	8 years
Buckley, James Lane	1923	73	17-Dec-85	11	84	31-Aug-96	2 years
Silberman, Laurence Hirsch	1935	65	28-Oct-85	15	80	1-Nov-00	Took Senior Service almost immediately
Williams, Stephen Fain	1936	65	16-Jun-86	15	80	30-Sep-01	Took Senior Service almost immediately
Edwards, Harry Thomas	1940	65	20-Feb-80	25	90	3-Nov-05	Took Senior Service almost immediately

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*Yrs indicates number of years of service since first commission

Vacancy Created By	Vacancy Date	Nominee	Date Nomination was submitted to Senate to fill vacancy	Time b/w Vacancy Date & Nomination Date	Date of Nominee's confirmation	Time b/w Nomination Date & Confirmation Date	Time b/w Vacancy Date & Confirmation Date
Scalia	25-Sep-86	Sentelle	2-Feb-87	130d	9-Sep-87	219d	349d
Bork	5-Feb-88	Thomas	31-Oct-89	1yr 8m 26d	6-Mar-90	126d	2yr 1m 1d
	5-Feb-88	Hope	14-Apr-88	69d	Returned	N/A	N/A
Starr	26-May-89	Henderson	8-May-90	347d	29-Jun-90	52d	1yr 1m 3d
Robinson	1-Sep-89	Randolph	8-May-90	249d	13-Jul-90	66d	315d
Thomas	15-Oct-91	Rogers	17-Nov-93	2yr 1m 2d	10-Mar-94	113d	2yr 4m 23d
	15-Oct-91	Roberts	27-Jan-92	104d	Returned	N/A	N/A
Mikva	19-Sep-94	Garland	5-Sep-95 & 7-Jan-97	351d; 2yr 3m 19d	19-Mar-97	1yr 6m 14d	2yr 6m
Buckley	31-Aug-96	Roberts	9-May-01; 4-Sep-01 & 7-Jan-03	4yr 8m 9d; 5yr 4d; 6yr 4m 7d	8-May-03	1yr 11m 29d	6yr 8m 8d
	31-Aug-96	Kagan	17-Jun-99	2yr 9m 17d	Returned	N/A	N/A
Wald	16-Nov-99	Griffith	10-May-04 & 14-Feb-05	4yr 5m 24d; 5yr 2m 29d	14-Jun-05	1yr 1m 4d	5yr 6m 29d
	16-Nov-99	Estrada	9-May-01; 4-Sep-01 & 1-Jan-03	1yr 5m 23d; 1yr 9m 19d; 3yr 1m 22d	Withdrawal	N/A	N/A
	16-Nov-99	Snyder	22-Sep-99	Nom. b/f Vacancy date	Returned	N/A	N/A
Silberman	1-Nov-00	Kavanaugh	25-Jul-03; 14-Feb-05; 25-Jan-06	2yr 8m 24d; 4yr 3m 13d; 5yr 2m 24d	26-May-06	2yr 10m 1d	5yr 6m 25d
Williams	30-Sep-01	Brown	25-Jul-03; 14-Feb-05	1yr 9m 25d; 3yr 4m 15d	8-Jun-05	1yr 10m 14d	3yr 8m 9d
Roberts	29-Sep-05	Keisler	29-Jun-06	273d	N/A	N/A	N/A
Edwards	3-Nov-05	N/A	N/A	N/A	N/A	N/A	N/A

ACTIVE JUDGES NEARLY ELIGIBLE FOR SENIOR STATUS ON THE COURT OF APPEALS FOR THE DC CIRCUIT								
August 1, 2006								
Current Court	*Name (Last, First)*	*Birth Year*	*Age*	*Start of Service (Date of First Commission)*	*Yrs*	*Age+ Yrs*	*Appointed to Current Position By*	*Years until Eligible For Senior Service*
District of Columbia Circuit	Henderson, Karen LeCraft	1944	62	16-Jun-86	20	82	Reagan; H.W. Bush	3 years (when Henderson turns 65)
District of Columbia Circuit	Randolph, Arthur Raymond	1943	63	16-Jul-90	16	79	H.W. Bush	2 years (when Randolph turns 65)
District of Columbia Circuit	Rogers, Judith Ann Wilson	1939	67	11-Mar-94	12	79	Clinton	1/2 year (when Rogers has enough years of service)
District of Columbia Circuit	Sentelle, David Bryan	1943	63	17-Oct-85	21	84	Reagan	2 years (when Sentelle turns 65)
District of Columbia Circuit	Tatel, David S.	1942	64	7-Oct-94	12	76	Clinton	2 years (when Tatel turns 65 and has enough years of service)

*Yrs indicates number of years of service since first commission

DC District Court Facts

- In September 2005, the number of cases pending in the U.S. District Court for the District of Columbia was 26% higher than it was in 1997.
    - The number of cases pending in the District Court has risen significantly (4,634 in 2005 vs. 3,427 in 1997).
    - The number of terminations in the District Court has also risen since 1997. (3,305 in 2005 vs. 3,205 in 1997).
- This higher number of terminated and pending cases in the District Court will likely generate a correspondingly higher number of appeals to the DC Circuit, increasing its caseload.
    - The proportion of the DC Circuit's caseload that comes from the District Court has increased since 1997. In 2005, appeals from the District Court made up 58% of the DC Circuit caseload. In 1997, the proportion was 50%. (In general, appeals from the District Court have comprised over half of the DC Circuit caseload.)

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Talking Points	Nomination of Peter Keisler to the D.C. Circuit	1	N.D.	P5;

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

COLLECTION:
Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: DC Circuit 11th/12th Seat

FRC ID:
14407

OA Num.:
14202

NARA Num.:
14011

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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

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

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

Records Not Subject to FOIA

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

This Document was withdrawn on 7/2/2018 by erg

HANDBOOK OF PRACTICE

and

INTERNAL PROCEDURES

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

As Amended Through July 1, 2006

Anyone seeking an exemption under this provision should complete an exemption request form and return it to the Clerk's Office.

4. *Court Operations During Inclement Weather*

The Court makes its own decision whether to be open in inclement weather. Although the Court of Appeals does not automatically follow the practice of the District Court or the federal government, ordinarily the Chief Judges of the two courts will confer before a determination on whether to close is made. Counsel with filing deadlines or who are scheduled to appear for oral argument must check with the Clerk's Office when there is a possibility that the Court may be closed because of bad weather. Special announcements on closings can be obtained by calling the Clerk's Office general information number (202-216-7000).

5. *The Appeals Management Plan; Complex Cases*

Questions concerning multi-party, multi-issue cases handled pursuant to the Appeals Management Plan, or designated "Complex" under the Case Management Plan, should be directed to the Legal Division. Questions that must be answered by reference to the dockets should be resolved by consulting one of the Court's electronic public access systems, AVIS or the PACER web site. *See supra* Part II.B.3. For further assistance, questions can be directed to the Clerk's Office. The Legal Division will, however, advise practitioners whether a case is being managed by the Legal Division, or whether such management would be appropriate.

6. *General Information*

Requests for information of a general nature about cases, such as whether a brief or specific pleading has been filed, or whether the Court has acted on a motion, should be directed to the Clerk's Office or obtained by accessing docket information through AVIS or the PACER web site. *See supra* Part II.B.3.

7. *Pending Cases*

It is the strict policy of the Court that telephone calls to judges' chambers, or to judges' law clerks or secretaries, concerning the status of any pending case or motion will not be accepted. All such calls will be immediately referred to the Clerk or to the Legal Division.

If the inquiry as to a pending case involves procedural questions or matters of public record, it should be made in accordance with the instructions above. If counsel is experiencing a more specialized problem with a case, he or she should call the Clerk, the Chief Deputy Clerk, the Operations Manager of the Clerk's Office, or the Director of the Legal Division. If the problem does not require immediate attention, the Clerk will usually direct that counsel's inquiry be submitted in writing. The Clerk's Office will forward the letter or motion to the Court or Legal Division, as appropriate.

8. *Disclosure of Panels and Dates*

(a) Merits Panels

Ordinarily, the Court discloses merits panels to counsel in the order setting the case for oral argument. In criminal appeals, unlike most civil appeals, the panel usually will not be disclosed until after the parties

2. *Timeliness*

(*See* Fed. R. App. P. 25(a), 26; D.C. Cir. Rules 25, 26, 27(h), 28(g).)

In computing times prescribed for filings, the day of the event from which the prescribed period begins to run is not included. Furthermore, if the last day of the period falls on a Saturday, Sunday, or legal holiday, the period is extended to the next business day. All intermediate days are included, except when the period prescribed is less than 11 days, in which case Saturdays, Sundays, and legal holidays are not included, unless the period is stated in calendar days. Filing of a motion may be by mail addressed to the Clerk, but the papers must reach the Clerk's Office within the time prescribed. Only briefs, not motions or other pleadings, are timely if mailed on the date due. The Court, however, prefers to receive briefs on the date due. Briefs must be filed according to the schedule set by the Court.

Service by any method other than personal service extends by 3 calendar days the time for responding to the paper served (other than briefs, whose due dates are set by schedule). Papers are presumed to be served by mail unless the certificate of service indicates otherwise. In addition, upon motion for compelling reasons, the Court may extend the time prescribed for filing any papers or allow filings out of time. However, the Court lacks the authority to extend the time for filing papers that commence an appeal, such as a notice of appeal, a petition for review, or a petition filed pursuant to 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 23(f).

Any filing or brief (with the exception of emergency, confidential, or sealed documents) may be left, on the date due, in the Court of Appeals filing depository, currently located at the John Marshall Park entrance near the U.S. Marshal's desk, unless the Court has ordered that the filing be made at a time certain. (By early 2006, the filing depository will be relocated to the Third Street entrance to the Courthouse.) The filing depository is available 24 hours a day, 7 days a week. All filings must be enclosed in an envelope or otherwise securely wrapped. The maximum dimensions for documents deposited are 14 ½ inches by 11 ½ inches by 10 inches. Materials exceeding these dimensions must be split into separate packages and clearly marked. A form provided at the U.S. Marshal's counter must be completed, date/time stamped, and affixed to each package.

Under the Court's Case Management Plan, briefing schedules are usually set after the case has been screened and classified by the Legal Division, and after all outstanding procedural and dispositive motions have been resolved. In cases classified as "Regular Merits" cases, the oral argument date and the briefing schedule are usually set in the same order, and the briefing schedule is computed *back* from the oral argument date. In cases classified as potential "Rule 34(j)" cases, the briefing schedule is set in the order notifying counsel that the case might be disposed of without oral argument under Circuit Rule 34(j). Finally, in cases classified as "Complex," or otherwise identified for management under the Case Management Plan, the briefing format and schedule are formulated by the "complex" or special panel in conjunction with the Legal Division, in most cases based on the parties' responses to an order to show cause concerning a proposed briefing schedule and format.

The amount of time for briefing a "Regular Merits" case may vary, depending on whether it is a district court or agency case, whether there are intervenors or *amici curiae*, whether there are cross-appeals, and whether there is a deferred appendix. Somewhat more problematic is determining when briefing will *commence*, because briefing is tied to the oral argument date, and that date is not normally set until all pending motions are resolved.

Deadlines are monitored by the Clerk's Office; when the deadlines are not met, the matter is called to the party's attention by phone call, letter, or an order from the Court directing the party to show cause why

If a brief uses a proportionally spaced face, the typeface must be at least 11 point and must include serifs, but sans-serif type may be used in headings and captions. If a brief uses a monospaced face, it may have no more than 10 ½ characters per inch. *See* Fed. R. App. P. 32(a)(5), (6); D.C. Cir. Rule 32(a)(1). Briefs must be double-spaced and printed on one side of the page only. Evasion of the length limitations may result in the Court's rejection of the brief.

Briefs other than those submitted by unrepresented parties must have colored covers as follows: appellant - blue; appellee - red; intervenor or *amicus curiae* - green; appellant's reply - gray; supplemental brief - tan. In cases designated "Complex," the cover of the briefs and the first page of motions and other pleadings should indicate the designation "Complex." In cases being considered for disposition without oral argument under Circuit Rule 34(j), the cover of the briefs and the first page of motions and other pleadings should indicate "Case being considered for treatment pursuant to Rule 34(j)."

The front cover of the brief must set forth the following: (1) the name of this Court; (2) the docket number of the appeal and the caption of the case, including the docket number and caption of the lead case in a consolidated appeal; (3) the nature of the proceeding and the name of the court or agency below (*e.g.*, Appeal from the United States District Court for the District of Columbia; Petition for Review of an Order of the Federal Communications Commission); (4) the title of the document (*e.g.*, Brief for Appellant); (5) the names, addresses, and telephone numbers of an unrepresented party or counsel representing the party filing the brief; and (6) the date on which the case has been scheduled for oral argument. One of the attorneys designated on the cover must be a member of the bar of the Court, except as otherwise provided by law.

If a brief does not conform to the Federal Rules of Appellate Procedure and/or to the Circuit Rules, counsel will be called and directed either to file a conforming brief (if the problems are numerous) or an errata to the brief (if the problems are minor). If the brief exceeds the page, line, or word limitations, counsel will be directed to submit either a corrected brief or a motion for leave to exceed the limits on length.

7. *Length*

(*See* Fed. R. App. P. 32(a); D.C. Cir. Rules 28(f), 32.)

Briefs may not exceed the word, line, or page limitations set forth in the Federal and Circuit Rules absent the Court's permission. A principal brief is limited to 30 pages unless the brief complies with the type-volume limitation of 14,000 words or uses a monospaced face and contains no more than 1,300 lines of text. *See* Fed. R. App. P. 32(a)(7). A reply brief is limited to half the type-volume of the principal brief or 15 pages. The length limitations for briefs in cross-appeals are set out in Federal Rule of Appellate Procedure 28.1. *See* IX.A.3. These limits do not include the table of contents; table of citations; statement with respect to oral argument; certificate of parties, rulings, and related cases; the glossary; any addendum containing statutory material, regulations, or evidence supporting the claim of standing; and certificates of service and compliance with type-volume limitations. *The summary of argument, footnotes, and citations are included for purposes of computing the word or page limits.*

Parties submitting briefs under the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) must include in the brief a certificate, signed by counsel of record or, in the case of parties filing briefs pro se, by the party, stating the number of words in the brief or the number of lines of monospaced text. The person preparing this certificate may rely on word or line counts reported by word processing systems provided the word processing system counts words in footnotes and citations. Parties using word

A. Scheduling Sitting Periods

The sitting periods ordinarily begin in September and end in May. While there are usually no formal sitting periods in June, July, and August, panels of the Court are available throughout the summer to hear appeals in which there is an urgent need for immediate consideration. These summer panels also continue to decide motions and cases submitted without argument pursuant to Circuit Rule 34(j).

The sitting periods for each term are scheduled the preceding winter. The Clerk, with the assistance of a computer program, prepares a proposed schedule and submits it to the Court in executive session. The Court accepts the schedule as prepared by the Clerk or modifies it, if necessary.

B. Merits Panels

The Clerk assigns the judges in panels of three to the sitting weeks for which they are available for an entire term. The Clerk attempts to pair each active judge with each other active judge an equal number of weeks during the year, insofar as availability permits. If a judge becomes unavailable, he or she may arrange to switch sitting dates with another judge. Depending on their availability, senior judges of this Court and visiting judges from other courts also serve on panels.

C. Caseload and Case Mix

The Clerk's Office usually schedules at least three cases for each day of a panel's sitting period. The "mix" of cases (criminal appeals, private civil appeals, civil appeals where the federal government is a party, and administrative agency cases) in a given sitting period reflects roughly the proportions of the Court's overall caseload.

D. Scheduling Cases for Argument

Most appeals screened by the Legal Division are classified as "regular merits" cases. The Clerk's Office sets an oral argument date and a briefing schedule in these cases as soon as all pending motions have been resolved. Depending on the availability of open dates on the Court's calendar and the amount of time needed for briefing, the case may be set well in advance of the oral argument. Scheduling is done by a computer. Once a case has been screened, it is entered into the case calendaring program, which selects an oral argument date. The program automatically checks for known recusals, calculates the time necessary to brief the appeal, and makes certain that the case mix both for a specific date and for that week's sitting is acceptable. As a general rule, once they become ready, cases are calendared in order of age, with the oldest cases set first.

From time to time a judge must recuse himself or herself from consideration of a particular case. *See* 28 U.S.C. § 455; Canon 3E, Code of Judicial Conduct, Judicial Conference of the United States. The judge is not required to state the reasons for recusal. The provisional certificate of parties filed with the docketing statement, pursuant to Circuit Rules 12(c) and 15(c), or with a petition for permission to appeal or a petition for an extraordinary writ, pursuant to Circuit Rules 5 and 21, affords the Clerk's Office the opportunity to determine in advance of briefing those judges who would be recused. In most cases, this ensures that the case will not be set for hearing on a day when the recused judge is sitting. In some cases, however, a judge discovers the basis for recusal only after the case has been scheduled before a particular panel. In those cases, a replacement judge is assigned to hear the case on that date.

Cases that have been designated as "Complex" by the Legal Division proceed on their own schedule for briefing and argument.

U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE

DISTRICT OF COLUMBIA				12-MONTH PERIOD ENDING SEPTEMBER 30					
				2005	2004	2003	2002	2001	2000
OVERALL CASELOAD STATISTICS	Appeals Filed	Total		1,379	1,390	1,121	1,126	1,401	1,506
		Prisoner		210	145	156	174	191	226
		Other**		527	609	453	463	575	631
		Criminal		174	162	121	89	92	82
		Administrative		468	474	391	400	543	567
		% Change in Total Filings	Over Last Year		-0.8				
			Over Earlier Years			23.0	22.5	-1.6	-8.4
	Appeals Terminated	Total		1,158	1,155	1,182	1,303	1,391	1,582
		Consolidations & Cross Appeals		149	156	119	203	199	280
		Procedural		491	507	549	566	603	673
		On The Merits	Total	518	492	514	534	589	629
			Prisoner	55	63	55	76	85	73
			Other	307	234	271	276	318	340
			Criminal	50	58	52	43	56	58
			Administrative	106	137	136	139	130	158
			Percent by Active Judges	96.4	94.2	93.3	90.1	98.5	98.6
	Pending Appeals			1,463	1,266	1,031	1,092	1,270	1,260
ACTIONS PER ACTIVE JUDGE*	Terminations on the Merits			170	156	178	180	195	183
	Procedural Terminations			43	42	53	51	54	61
	Written Decisions	Total		60	54	61	62	65	61
		Signed		23	24	25	23	22	23
		Unsigned		37	30	36	39	43	38
		Without Comment		-	-	-	-	-	-

* Includes only judges active during the entire 12 month period.

** See "Explanation of Selected Terms."

Note: Data for petitions for rehearing per judgeship in 2003 have been revised.

DCB

273

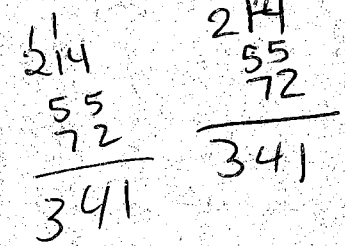
Show Page Two

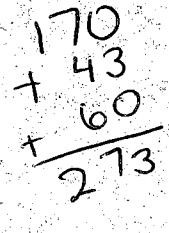
U.S. COURT OF APPEALS
JUDICIAL CASELOAD PROFILE
PAGE 2

DISTRICT OF COLUMBIA				12-MONTH PERIOD ENDING SEPTEMBER 30						2005 Numerical Standing
				2005	2004	2003	2002	2001	2000	
Number of Judgeships/Number of Panels				12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	
Number of Sitting Senior Judges				2	2	2	2	1	1	
Number of Vacant Judgeship Months**				28.6	36.0	44.0	48.0	35.0	22.4	
ACTIONS PER PANEL*	Appeals Filed		Total	345	348	280	282	350	377	12
			Prisoner	53	36	39	44	48	57	12
			Other	131	152	113	116	143	157	12
			Criminal	44	41	30	22	23	21	12
			Administrative	117	119	98	100	136	142	6
	Appeals Terminated		Total	290	289	296	326	348	396	12
			Consolidations & Cross Appeals	37	39	30	50	50	71	9
			Procedural	123	127	137	142	151	168	12
		On The Merits	Total	130	123	129	134	147	157	12
			Prisoner	14	16	14	19	21	18	12
			Other	76	58	68	69	79	84	12
			Criminal	13	15	13	11	14	15	12
			Administrative	27	34	34	35	33	40	11
	Pending Appeals			366	317	258	273	318	315	12
Median Time	Median Time from Filing Notice of Appeal to Disposition			11.2	10.5	12.0	9.7	7.6	7.3	6
Other Caseload Per Judgeship	Applications for Interlocutory Appeals			1	1	1	1	1	1	5
	Petitions for Rehearing			24	21	20	29	34	26	12

U.S. COURT OF APPEALS
JUDICIAL CASELOAD PROFILE
PAGE 2

DISTRICT OF COLUMBIA				12-MONTH PERIOD ENDING SEPTEMBER 30						2005 Numerical Standing
				2005	2004	2003	2002	2001	2000	
Number of Judgeships/Number of Panels				12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	
Number of Sitting Senior Judges				2	2	2	2	1	1	
Number of Vacant Judgeship Months**				28.6	36.0	44.0	48.0	35.0	22.4	
ACTIONS PER PANEL*	Appeals Filed	Total		345	348	280	282	350	377	12
		Prisoner		53	36	39	44	48	57	12
		Other		131	152	113	116	143	157	12
		Criminal		44	41	30	22	23	21	12
		Administrative		117	119	98	100	136	142	6
	Appeals Terminated	Total		290	289	296	326	348	396	12
		Consolidations & Cross Appeals		37	39	30	50	50	71	9
		Procedural		123	127	137	142	151	168	12
		On The Merits	Total	130	123	129	134	147	157	12
			Prisoner	14	16	14	19	21	18	12
			Other	76	58	68	69	79	84	12
			Criminal	13	15	13	11	14	15	12
			Administrative	27	34	34	35	33	40	11
	Pending Appeals			366	317	258	273	318	315	12
Median Time	Median Time from Filing Notice of Appeal to Disposition			11.2	10.5	12.0	9.7	7.6	7.3	6
Other Caseload Per Judgeship	Applications for Interlocutory Appeals			1	1	1	1	1	1	5
	Petitions for Rehearing			24	21	20	29	34	26	12





U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE

DISTRICT OF COLUMBIA

				12 MONTHS ENDED SEPTEMBER 30					
				1997	1996	1995	1994	1993	1992
OVERALL CASELOAD STATISTICS	Appeals Filed	Total		1,531	1,347	1,625	1,770	1,791	1,723
		Prisoner		139	161	179	157	118	93
		Other		508	561	674	606	633	693
		Criminal		157	151	155	163	202	288
		Administrative		727	474	617	844	838	649
		% Change in Total Filings	Over Last Year		13.7				
			Over Earlier Years			-5.8	-13.5	-14.5	-11.2
	Appeals Terminated	Total		1,833	1,674	1,670	1,617	1,877	1,606
		Consolidations & Cross Appeals		223	293	286	264	280	366
		Procedural		878	686	681	578	781	517
		On The Merits	Total	732	695	703	775	816	723
			Prisoner	83	88	71	79	77	71
			Other	381	319	329	371	390	294
			Criminal	109	131	138	159	184	178
			Administrative	159	157	165	166	165	180
			Percent by Active Judges	98.5	99.8	99.9	97.7	99.9	98.9
	Pending Appeals			1,523	1,825	2,158	2,205	2,057	2,146
ACTIONS PER ACTIVE JUDGE	Terminations on the Merits			214	196	196	224	227	195
	Procedural Terminations			55	55	44	59	62	31
	Written Decisions	Total		72	62	67	67	77	65
		Signed		25	26	23	23	23	22
		Unsigned		47	36	44	44	54	43
		Without Comment		-	-	-	-	-	-

* Includes only judges active during the entire 12 month period.

341

Show Page Two

U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE PAGE 2

DISTRICT OF COLUMBIA				12 MONTHS ENDED SEPTEMBER 30						1997 Numerical Standing
				1997	1996	1995	1994	1993	1992	
Number of Judgeships/Number of Panels				12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	12/4.0	
Number of Sitting Senior Judges				1	1	-	1	-	-	
Number of Vacant Judgeship Months				12.0	13.0	12.3	29.9	13.9	8.5	
ACTIONS PER PANEL*	Appeals Filed		Total	383	337	406	443	448	431	12
			Prisoner	35	40	45	39	30	23	12
			Other	127	140	168	152	157	174	12
			Criminal	39	38	39	41	51	72	12
			Administrative	182	119	154	211	210	162	1
	Appeals Terminated		Total	458	419	418	404	469	402	12
			Consolidations & Cross Appeals	55	73	72	65	70	92	6
			Procedural	220	172	170	145	195	129	12
		On The Merits	Total	183	174	176	194	204	181	12
			Prisoner	21	22	18	20	19	18	12
			Other	95	80	82	92	98	73	12
			Criminal	27	33	35	40	46	45	12
			Administrative	40	39	41	42	41	45	2
	Pending Appeals			381	456	540	551	514	537	12
Median Time	Median Time from Filing Notice of Appeal to Disposition			10.9	12.0	12.8	12.0	13.6	12.9	8
Other Caseload Per Judgeship	Applications for Interlocutory Appeals			1	1	-	1	1	1	4
	Pro Se Mandamus Petitions			15	2	2	3	4	3	1
	Petitions for Rehearing			27	21	22	22	22	20	11

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	RE: Follow-Up for Senate Staff on 11th Seat - To: William Kelley, et al. - From: Jennifer Brosnahan	1	07/24/2006	P5;

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

COLLECTION:
Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: DC Circuit 11th/12th Seat

FRC ID:
14407

OA Num.:
14202

NARA Num.:
14011

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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

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

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

Records Not Subject to FOIA

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

This Document was withdrawn on 7/2/2018 by erg

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	RE: Meeting with Grassley & Sessions Staff on 11th Judge - To: Bosnahan, Jennifer, et al. - From: John Smith	1	07/24/2006	P5;

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

COLLECTION:
Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: DC Circuit 11th/12th Seat

FRC ID:
14407

OA Num.:
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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

This Document was withdrawn on 7/2/2018 by erg

DRAFT

D.C. Circuit Facts

I. PRECEDENT

- **The D.C. Circuit had 11 active judges for much of 2005, plus a pending nominee.**
    - As of June 2005 (when Thomas Griffith added), there were 11 judges in active service, plus 1 nominee pending (Brett Kavanaugh).
- **It would be consistent with recent precedent for this court to have a total of 12 sitting judges and nominees pending in the Senate.**
    - As of July 2003, there were 9 judges in active service, with 3 additional nominees pending (Brett Kavanaugh, Janice Rogers Brown, and Miguel Estrada).
    - As of May 2004, there were again 9 judges in active service, with 3 nominees pending (Kavanaugh, Brown, Griffith).
- **In particular, a nomination to fill the 11th seat, while 10 judges are in active service, would be consistent with precedent from 2005.**
    - As of June 2005 (when Brown added), there were 10 judges in active service, with 2 additional nominees pending (Kavanaugh, Griffith).

II. INCREASED CASELOAD

- **In any event, the D.C. Circuit's increasing caseload justifies filling the 11th seat and the 12th seat.**

A. Detainee Litigation

- The Detainee Treatment Act (DTA) provides that the D.C. Circuit will have exclusive jurisdiction to review (i) decisions of combatant status review tribunals (CSRT) and (ii) final decisions of military commissions.
    - **The DTA will significantly increase the D.C. Circuit's caseload.** There are currently about 470 detainees at GTMO, each of whom has a right to challenge his status determination in the D.C. Circuit. Also, the Administration is working with Congress to move forward with military commissions in a manner consistent with the Supreme Court's *Hamdan* ruling. When such trials take place, detainees will have the right to appeal their convictions to the D.C. Circuit, which would further increase the Circuit's caseload.

- **There are also 350 habeas petitions pending in the federal district court in Washington, which could be appealed to the D.C. Circuit.**

- In addition to the litigation above brought by current GTMO detainees, former detainees are also attempting to sue the government under a variety of legal theories.

    - Because they involve federal defendants, many of these cases have been and would likely be filed in the D.C. Circuit.

B. General caseload facts

- **The total number of pending appeals in the D.C. Circuit is higher than it has been since 1998**, and is almost 20% higher than the figure from 2000.

    - The percent change in pending cases from 2004 to 2005 was 17.8%, which was higher than the nationwide average increase during that period.

- **The number of appeals filed in the D.C. Circuit has increased 22% since 2002**, which is higher than the national average during that period.

- **The median interval from filing a notice of appeal to disposition of a case in the D.C. Circuit has increased substantially since 2000.** The median interval has increased over 50%, from 7.3 months to 11.2 months. This lengthening interval suggests the overall complexity of the cases addressed by the D.C. Circuit as well as the workload of the judges.

    - The median disposition interval is now higher than at any time since 1997.

    - The median disposition interval is increasing at a much faster rate than the national average, which has remained relatively constant since 2000.

- **The D.C. Circuit handles a high percentage of *administrative* appeals, which are often highly complex and require more judicial resources.**

- **About one-third of the cases filed in the D.C. Circuit are administrative appeals, which is a substantially higher proportion than any other circuit**, except for the Ninth Circuit (which presumably has many straightforward immigration appeals). In most other circuits, less than 10% of the caseload is administrative appeals.

    - Since 1998, about one-third of cases terminated are administrative, yet administrative cases account for a significantly greater proportion (ranging 44-59%) of all *pending* cases. This backlog suggests that administrative cases are more difficult and take longer to resolve.

U.S. Court of Appeals for the District of Columbia Circuit
Seat History

A- Appointed
R- Retired/Resigned D- Death

	1	2	3	4	5	6	7	8	9	10 (created 10/20/78)	11 (created 10/20/78)	12 (created 7/10/1984)
1978	Wilkey	Wright	Leventhal	R. Robb	McGowan	Tamm	Bazelon	MacKinnon	Robinson			N/A
1979	Wilkey	Wright	Leventhal (R 11/20/79)	R. Robb	McGowan	Tamm	Bazelon (R- 6/30/79)	MacKinnon	Robinson	Wald (A- 7/26/79)	Mikva (A- 9/26/79)	N/A
1980	Wilkey	Wright	R. Ginsburg (A- 6/18/80)	R. Robb	McGowan	Tamm	Edwards (A- 2/20/80)	MacKinnon	Robinson	Wald	Mikva	N/A
1981	Wilkey	Wright	R. Ginsburg	R. Robb	McGowan (R- 8/31/81)	Tamm	Edwards	MacKinnon	Robinson	Wald	Mikva	N/A
1982	Wilkey	Wright	R. Ginsburg	R. Robb (R- 5/31/82) Scalia (A- 8/17/82)	Bork (A- 2/9/82	Tamm	Edwards	MacKinnon	Robinson	Wald	Mikva	N/A
1983	Wilkey	Wright	R. Ginsburg	Scalia	Bork	Tamm	Edwards	MacKinnon (R- 5/20/83) Starr (A- 9/20/83)	Robinson	Wald	Mikva	N/A
1984	Wilkey (R- 12/6/84)	Wright	R. Ginsburg	Scalia	Bork	Tamm	Edwards	Starr	Robinson	Wald	Mikva	
1985		Wright	R. Ginsburg	Scalia	Bork	Tamm (D- 9/22/85) Buckley (A- 12/17/85)	Edwards	Starr	Robinson	Wald	Mikva	Silberman (A- 10/28/85)
1986	Williams (A- 6/16/86)	Wright (R- 6/1/86) D. Ginsburg (A- 10/14/86)	R. Ginsburg	Scalia (E- 9/25/86)	Bork	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1987	Williams	D. Ginsburg	R. Ginsburg	Sentelle (A- 9/11/87)	Bork	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1988	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Bork (R- 2/5/88)	Buckley	Edwards	Starr	Robinson	Wald	Mikva	Silberman
1989	Williams	D. Ginsburg	R. Ginsburg	Sentelle		Buckley	Edwards	Starr (R- 5/26/89)	Robinson (R- 9/1/89)	Wald	Mikva	Silberman
1990	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Thomas (A- 3/6/90)	Buckley	Edwards	Henderson (A- 7/5/90)	Randolph (A- 7/16/90)	Wald	Mikva	Silberman
1991	Williams	D. Ginsburg	R. Ginsburg	Sentelle	Thomas (E- 10/15/1991)	Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman
1992	Williams	D. Ginsburg	R. Ginsburg	Sentelle		Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman
1993	Williams	D. Ginsburg	R. Ginsburg (E- 8/3/93)	Sentelle		Buckley	Edwards	Henderson	Randolph	Wald	Mikva	Silberman

U.S. Court of Appeals for the District of Columbia Circuit
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1994	Williams	D. Ginsburg	Tatel (A-10/7/94)	Sentelle	Rogers (A-3/11/94)	Buckley	Edwards	Henderson	Randolph	Wald	Mikva (R-9/19/94)	Silberman
1995	Williams	D. Ginsburg	Tatel	Sentelle	Rogers	Buckley	Edwards	Henderson	Randolph	Wald		Silberman
1996	Williams	D. Ginsburg	Tatel	Sentelle	Rogers	Buckley (R-8/31/96)	Edwards	Henderson	Randolph	Wald		Silberman
1997	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph	Wald	Garland (A-3/20/97)	Silberman
1998	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph	Wald (R-11.16.99)	Garland	Silberman
1999	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	Silberman
2000	Williams	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	Silberman (R-11/1/00)
2001	Williams (R-9/30/01)	D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	
2002		D. Ginsburg	Tatel	Sentelle	Rogers		Edwards	Henderson	Randolph		Garland	
2003		D. Ginsburg	Tatel	Sentelle	Rogers	Roberts (A-6/2/03)	Edwards	Henderson	Randolph		Garland	
2004		D. Ginsburg	Tatel	Sentelle	Rogers	Roberts	Edwards	Henderson	Randolph		Garland	
2005	Brown (A-6/10/05)	D. Ginsburg	Tatel	Sentelle	Rogers	Roberts (E-9/29/05)	Edwards (R-11/3/05)	Henderson	Randolph	Griffith (A-6/29/05)	Garland	
2006	Brown	D. Ginsburg	Tatel	Sentelle	Rogers			Henderson	Randolph	Griffith	Garland	Kavanaugh (A- 5/30/06)

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, DC 20001-2805

HARRY T. EDWARDS
CIRCUIT JUDGE

TELEPHONE (202) 216-7380
FACSIMILE (202) 273-0119

June 9, 2005

The President
The White House
Washington, D.C. 20500

Mr. President:

Please be advised that on November 3, 2005, I intend to retire from regular active service as a United States Circuit Judge for the District of Columbia Circuit under the provisions of 28 U.S.C. § 371(b)(1), having attained the age and met the service requirements of subsection (c) of that section. It is my intention to continue to render substantial judicial service as a senior judge.

Respectfully yours,

Harry T. Edwards
U.S. Circuit Judge

cc: The Chief Justice of the United States
The Honorable Douglas H. Ginsburg
Leonidas R. Mecham, Director
Administrative Office of the U.S. Courts
Barbara J. Rothstein, Director
Federal Judicial Center
Carol S. Sefren, Chief
Judges' Compensation & Retirement Services Office
Jill C. Sayenga, Circuit Executive

007/01/2005 12:00 FAX

UNITED STATES COURT OF APPEALS
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WASHINGTON, DC 20001-2805

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007/01/2005 12:00 FAX

Brown - June 8, 2005
Griffith June 29, 2005

June - Sept. Edwards Nov
Roberts Sept. 29

- Brown
- Ginsburg
- Tatel
- Sentelle
- Rogers
- Roberts
- Edwards
- Henderson
- Randolph
- Griffith
- Garland

(11)

DRAFT

D.C. Circuit Facts

I. PRECEDENT

- **The D.C. Circuit had 11 active judges for much of 2005, plus a pending nominee.**
    - As of June 29 2005 (when Thomas Griffith added), there were 11 judges in active service, plus 1 nominee pending (Brett Kavanaugh).
- **It would be consistent with recent precedent for this court to have a total of 12 sitting judges and nominees pending in the Senate.**
    - As of July 2003, there were 9 judges in active service, with 3 additional nominees pending (Brett Kavanaugh, Janice Rogers Brown, and Miguel Estrada).
    - As of May 2004, there were again 9 judges in active service, with 3 nominees pending (Kavanaugh, Brown, Griffith).
- **In particular, a nomination to fill the 11th seat, while 10 judges are in active service, would be consistent with precedent from 2005.**
    - As of June 8 2005 (when Brown added), there were 10 judges in active service, with 2 additional nominees pending (Kavanaugh, Griffith).

II. INCREASED CASELOAD

OUT: Roberts – Sept 29
Edwards – Nov 3

- **In any event, the D.C. Circuit's increasing caseload justifies filling the 11th seat and the 12th seat.**

A. Detainee Litigation

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	D.C. Circuit Facts	3	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: DC Circuit 11th/12th Seat

FRC ID:
14407

OA Num.:
14202

NARA Num.:
14011

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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

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

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

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

Records Not Subject to FOIA

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

This Document was withdrawn on 7/2/2018 by erg

You voted against the Garland nomination in Committee and on the floor, stating that **"I do not believe that that that judgeship should be filled based on the caseload in that circuit, and for no other reason."** Several Republicans referenced your analysis when they voted against this nomination (Kyl & Grassley). As you know, Judge Garland was confirmed by a vote of 76-23.

The latest statistics for the DC Circuit indicate that the court's caseload has not changed much since 1997, when the Garland nomination was debated on the Senate floor. **The D.C. Circuit's case filings have dropped from 1,531 in 1997 to 1,379 in 2005. The number of senior judges sitting on the court rose from 1 in 1997 to 2 in 2005** (there are currently 4 senior judges sitting on the DC Circuit). **The number of administrative case filings has declined, from 727 in 1997 to 468 in 2005** (you will recall that then Chief Judge Edwards argued that these were extremely complex cases unique to the DC Circuit, and thus should be weighted more than other kinds of cases). **Even the number of written decisions has declined, from 72 per judge in 1997 to 60 per judge in 2005.** As you can see, the numbers for the DC Circuit have not increased to justify changing your position on filling the 11th or 12th seat on this court. The reality is that the overall numbers for the DC Circuit have declined even further since 1997. Based on these statistics, in the 109th Congress, you and Senator Grassley re-introduced a bill to permanently eliminate the 12th seat on the DC Circuit (S. 2016).

In 1999, when Senator Grassley chaired the Administrative Oversight Subcommittee, it released a Report on Judicial Allocations that showed the DC Circuit had the lowest caseload per judge in the country and its backlog had not increased in the previous decade. The Report concluded that serious consideration should be given to permanently reducing the number of allocated judgeship for the DC Circuit. The Report also stated that in the event that one of the 10 a current active judges took senior status, Congress should consider leaving that vacancy unfilled.

Your floor statements against filling the 11th and 12th seats on the DC Circuit were particularly strong during the debate on Clinton's nominee Merrick Garland to fill the 11th seat (March 19, 1997). You stated, **"[b]ased on my commitment to frugal management of the money of this Nation, I feel the position should not be filled at this time."** You opposed filling the 12th seat based on the low caseload per judge, steady decline in case filings, and substantial long term costs justified not filling the 11th seat on the court. You stated, **"[t]he fact remains that the taxpayers should not be required to pay for a judge we do not need. The taxpayers should not have to pay $1 million per year for a judge that is not needed."**

12 active judges (12th seat created July 10, 1984)

- Between 9/11/1987 (Sentelle appt.) and 2/5/1988 (Bork resigned). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 7/16/1990 (Randolph appt.) and 10/15/1991 (Thomas elevated). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Thomas; Buckley; Edwards; Henderson; Randolph; Wald; Mikva; Silberman)

11 active judges (11th seat created 10/20/1978)

- Between 6/18/1980 (R. Ginsburg appt.) to 8/31/1981 (McGowan retired.) (Wilkey; Wright; R. Ginsburg; R. Robb; McGowan; Tamm; Edwards; MacKinnon; Robinson; Wald; Mikva)
- Between 2/9/1982 (Bork appt.) and 5/3/1982 (R. Robb retired.) (Wilkey; Wright; R. Ginsburg; R. Robb; Bork; Tamm; Edwards; MacKinnon; Robinson; Wald; Mikva)
- Between 8/17/1982 (Scalia appt.) and 5/20/1983 (MacKinnon retired). (Wilkey; Wright; R. Ginsburg; Scalia; Bork; Tamm; Edwards; MacKinnon; Robinson; Wald; Mikva)
- Between 9/20/1983 (Starr appt.) and 12/6/1984 (Wilkey retired). (Wilkey; Wright; R. Ginsburg; Scalia; Bork; Tamm; Edwards; Starr; Robinson; Walk; Mikva)
- Between 12/17/1985 (Buckley appt.) and 6/1/1986 (Wright retired). (Wright; R. Ginsburg; Scalia; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 6/16/1986 (Williams appt.) and 9/25/1986 (Scalia elevated). (Williams; R. Ginsburg; Scalia; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 10/14/86 (D. Ginsburg appt.) and 9/11/1987 (Sentelle appt.– went from being 11 to 12 active judges). (Williams, D. Ginsburg; R. Ginsburg; Bork; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman).
- Between 2/5/1988 (Bork resigned—went from being 12 active judges) and 5/26/1989 (Starr resigned). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Buckley; Edwards; Starr; Robinson; Wald; Mikva; Silberman)
- Between 7/5/1990 (Henderson appt.) and 7/16/1990 (Randolph appt.--- went from being 11 to 12 active judges). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Thomas; Buckley; Edwards; Henderson; Wald; Mikva; Silberman)
- Between 10/15/1991 (Thomas elevated—went from being 12 active judges) and 8/3/1993 (Ginsburg elevated). (Williams; D. Ginsburg; R. Ginsburg; Sentelle; Buckley; Edwards; Henderson; Randolph; Wald; Mikva; Silberman)
- Between 3/11/1994 (Rogers appt.) and 9/19/1994 (Mikva retired). (Williams; D. Ginsburg; Sentelle; Rogers; Buckley; Edwards; Henderson; Randolph; Wald; Mikva; Silberman)
- Between 10/7/1994 (Tatel appt.) and 8/31/1996 (Buckley retired). (Williams; D. Ginsburg; Tatel; Sentelle; Rogers; Buckley; Edwards; Henderson; Randolph; Wald; Silberman)
- Between 3/20/1997 (Garland appt.) and 11/16/1999 (Wald retired). (Williams; D. Ginsburg; Tatel; Sentelle; Rogers; Edwards; Henderson; Randolph; Wald; Garland; Silberman)
- Between 6/29/2005 (Griffith appt.) and 9/29/2005 (Roberts elevated). (Brown, D. Ginsburg, Tatel, Sentelle, Rogers, Roberts, Edwards, Henderson, Randolph, Griffith, Garland)

John - I added those times after there were 11 judges prior to the creation of the 12th seat

I also added a couple other bullets.

United States Senator · North Carolina

RICHARD BURR

217 Russell Senate Office Bldg. • Washington, D.C. 20510-3308
202-224-3154 • FAX 202-228-2981

To: Kate Todd
Fax: 456-7906
From: Andy Moskowitz
Phone: (202) 228-5963
Re: Letter to Fred Fielding
Date: September 6, 2007
Pages (including cover page): 8

Kate,
Attached is the letter we discussed over the phone. Hope all is well!
Thanks,
Andy

Andy Moskowitz
Legislative Counsel
Senator Richard Burr
(202) 224-3154

This transmission is intended only for the use of the person or office to whom it is addressed and may contain information that is privileged, confidential, or protected by law. All others are hereby notified that receipt of this message does not waive any applicable privilege or exemption from disclosure and that any dissemination, distribution, or copying of this communication is prohibited.

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Letter	[Recommendation letter with attachments] - To: Fred Fielding - From: Richard Burr	7	08/31/2007	P2; P6/b6;

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Counsel's Office, White House

SERIES:
Coffina, Scott

FOLDER TITLE:
DC Circuit 11th/12th Seat: DC Circuit 11th/12th Seat

FRC ID:
14407

OA Num.:
14202

NARA Num.:
14011

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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Counsel's Office, White House

Courtwright, Susan - Nominations Files

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W					10365	23228	6294	6494

Folder Title:

Binder - POTUS 05/16/2003

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Agenda	Judicial and U.S. Marshal Selection Meeting with the President	1	05/16/2003	P2; P5; P6/b6;
002	Form	Brett M. Kavanaugh [one page released in full and one page released in part via 2018-0009-P, 08/28/2018]	2	N.D.	P6/b6;
003	Memorandum	Brett M. Kavanaugh	2	N.D.	P5;
004	Form	Janice R. Brown	2	N.D.	P6/b6;
005	Memorandum	Janice R. Brown	2	N.D.	P5;
006	Form	F. Dennis Saylor, IV	2	N.D.	P6/b6;
007	Memorandum	F. Dennis Saylor, IV	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
10365

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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

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Records Not Subject to FOIA

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

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Form	Kenneth M. Karas	2	N.D.	P6/b6;
009	Memorandum	Kenneth M. Karas	2	N.D.	P5;
010	Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	4	05/16/2003	P2; P5; P6/b6;
011	Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	6	05/16/2003	P2; P5; P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
10365

RESTRICTION CODES

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Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Agenda	Judicial and U.S. Marshal Selection Meeting with the President	1	05/16/2003	P2; P5; P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
10365
OA Num.:
6494
NARA Num.:
6294

FOIA ID and Segment:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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

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

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This Document was withdrawn on 12/15/2014 by PSC

1. Brett M. Kavanaugh

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Brett M. Kavanaugh, of Maryland, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Laurence H. Silberman.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Brett M. Kavanaugh [one page released in full and one page released in part via 2018-0009-P, 08/28/2018]	2 |	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
10365

OA Num.:
6494

NARA Num.:
6294

FOIA IDs and Segments:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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Records Not Subject to FOIA

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

This Document was withdrawn on 12/15/2014 by PSC

PREPARED BY: Kyle Sampson

NAME:	Brett M. Kavanaugh		
NAME & STATE:	Brett Michael Kavanaugh of Maryland		
POSITION:	United States Court of Appeals for the District of Columbia Circuit		
TYPE: *(bold one)*	PAS PA SES FT PT	TERM:	LIFE
VICE:	Laurence H. Silberman	GENDER: M	DOB: 2/12/1965
BIRTHPLACE:	Washington, D.C.	PARTY: R	SSN: (b)(6)
ETHNIC HERITAGE:	Caucasian	RACE:	Caucasian
CHILDREN:		SPOUSE:	
VOTING CITY, STATE *(in 2000)*	Bethesda, MD	HOME STATE:	Maryland
CURRENT HOME ADDRESS:	(b)(6)	CURRENT POSITION AND WORK ADDRESS:	Associate Counsel to the President The White House Washington, D.C. 20502
HOME PHONE:	(b)(6)	WORK PHONE:	(202) 456-7984
EDUCATION:	J.D., Yale Law School, 1990. B.A., Yale College, 1987.	AWARDS:	
PREVIOUS POSITIONS HELD:	Partner, Kirkland & Ellis, 1997-98, 1999-2001. Associate Independent Counsel, Office of Independent Counsel, 1994-97, 1998. Law Clerk, Hon. Anthony M. Kennedy, U.S. Supreme Court, 1993-94. Attorney, Office of Solicitor General, 1992-93. Law Clerk, Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, 1991-92. Law Clerk, Hon. Walter Stapleton, U.S. Court of Appeals for the Third Circuit, 1990-91.	MILITARY SERVICE:	None.
PREVIOUS PRESIDENTIAL APPOINTMENTS:	Associate Counsel to the President		

President approved: _____

Security package sent: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Brett M. Kavanaugh	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
10365
OA Num.:
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FOIA ID and Segment:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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2. Janice R. Brown

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Janice R. Brown, of California, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Stephen F. Williams.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Janice R. Brown	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
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OA Num.:
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FOIA ID and Segment:
2018-0009-P
2014-0108-F 1

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Janice R. Brown	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
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THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

F. Dennis Saylor, IV, of Massachusetts, to be United States District Judge for the District of Massachusetts, vice Robert E. Keeton.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	F. Dennis Saylor, IV	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	F. Dennis Saylor, IV	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
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4. Kenneth M. Karas

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Kenneth M. Karas, of New York, to be United States District Judge for the Eastern District of New York, vice Sterling Johnson, Jr.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Kenneth M. Karas	2	N.D.	P6/b6;

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Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

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RESTRICTION CODES

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Records Not Subject to FOIA

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

This Document was withdrawn on 12/15/2014 by PSC

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Kenneth M. Karas	2	N.D.	P5;

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

COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS 05/16/2003

FRC ID:
10365
OA Num.:
6494
NARA Num.:
6294

FOIA ID and Segment:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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

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

Deed of Gift Restrictions

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

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

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	4	05/16/2003	P2; P5; P6/b6;

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
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FOIA Marker

This is not a textual record. This FOIA Marker indicates that material has been removed during FOIA processing by George W. Bush Presidential Library staff.

Counsel's Office, White House

Courtwright, Susan - Nominations Files

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W					10370	23233	6299	6499

Folder Title:

Binder - POTUS Duplicate 05/16/2003

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Agenda	Judicial and U.S. Marshal Selection Meeting with the President	1	N.D.	P2; P5; P6/b6;
002	Form	Brett M. Kavanaugh [one page released in full and one page released in part via 2018-0009-P, 08/28/2018]	2 |	N.D.	P6/b6;
003	Memorandum	Brett M. Kavanaugh	2	N.D.	P5;
004	Form	Janice R. Brown	2	N.D.	P6/b6;
005	Memorandum	Janice R. Brown	2	N.D.	P5;
006	Form	F. Dennis Saylor, IV	2	N.D.	P6/b6;
007	Memorandum	F. Dennis Saylor, IV	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS Duplicate 05/16/2003

FRC ID:
10370

RESTRICTION CODES

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Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Form	Kenneth M. Karas	2	N.D.	P6/b6;
009	Memorandum	Kenneth M. Karas	2	N.D.	P5;
010	Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	4	05/16/2003	P2; P5; P6/b6;
011	Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	6	05/16/2003	P2; P5; P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS Duplicate 05/16/2003

FRC ID:
10370

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Agenda	Judicial and U.S. Marshal Selection Meeting with the President	1	N.D.	P2; P5; P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS Duplicate 05/16/2003

FRC ID:
10370

OA Num.:
6499

NARA Num.:
6299

FOIA ID and Segment:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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This Document was withdrawn on 12/19/2014 by PSC

1. Brett M. Kavanaugh

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Brett M. Kavanaugh, of Maryland, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Laurence H. Silberman.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Brett M. Kavanaugh [one page released in full and one page released in part via 2018-0009-P, 08/28/2018]	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

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FOIA IDs and Segments:
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This Document was withdrawn on 12/19/2014 by PSC

PREPARED BY: Kyle Sampson

NAME:	Brett M. Kavanaugh				
NAME & STATE:	Brett Michael Kavanaugh of Maryland				
POSITION:	United States Court of Appeals for the District of Columbia Circuit				
TYPE: *(bold one)*	PAS PA SES	FT PT		TERM:	LIFE
VICE:	Laurence H. Silberman	GENDER:	M	DOB:	2/12/1965
BIRTHPLACE:	Washington, D.C.	PARTY:	R	SSN:	(b)(6)
ETHNIC HERITAGE:	Caucasian		RACE:	Caucasian	
CHILDREN:			SPOUSE:		
VOTING CITY, STATE *(in 2000)*	Bethesda, MD		HOME STATE:	Maryland	
CURRENT HOME ADDRESS:	(b)(6)	CURRENT POSITION AND WORK ADDRESS:		Associate Counsel to the President The White House Washington, D.C. 20502	
HOME PHONE:	(b)(6)	WORK PHONE:		(202) 456-7984	
EDUCATION:	J.D., Yale Law School, 1990. B.A., Yale College, 1987.	AWARDS:			
PREVIOUS POSITIONS HELD:	Partner, Kirkland & Ellis, 1997-98, 1999-2001. Associate Independent Counsel, Office of Independent Counsel, 1994-97, 1998. Law Clerk, Hon. Anthony M. Kennedy, U.S. Supreme Court, 1993-94. Attorney, Office of Solicitor General, 1992-93. Law Clerk, Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, 1991-92. Law Clerk, Hon. Walter Stapleton, U.S. Court of Appeals for the Third Circuit, 1990-91.	MILITARY SERVICE:		None.	
PREVIOUS PRESIDENTIAL APPOINTMENTS:	Associate Counsel to the President				

President approved: _____

Security package sent: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Brett M. Kavanaugh	2	N.D.	P5;

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2. Janice R. Brown

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Janice R. Brown, of California, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Stephen F. Williams.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Janice R. Brown	2	N.D.	P6/b6;

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Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Janice R. Brown	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS Duplicate 05/16/2003

FRC ID:
10370
OA Num.:
6499
NARA Num.:
6299

FOIA ID and Segment:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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

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

b(1) National security classified information [(b)(1) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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

This Document was withdrawn on 12/19/2014 by PSC

3. F. Dennis Saylor IV

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

F. Dennis Saylor, IV, of Massachusetts, to be United States District Judge for the District of Massachusetts, vice Robert E. Keeton.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	F. Dennis Saylor, IV	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
POTUS Duplicate 05/16/2003

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FOIA IDs and Segments:
2014-0108-F

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	F. Dennis Saylor, IV	2	N.D.	P6/b6;

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SERIES:
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	F. Dennis Saylor, IV	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Binder - POTUS Duplicate 05/16/2003

FRC ID:
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2018-0009-P
2014-0108-F 1

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Records Not Subject to FOIA

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This Document was withdrawn on 12/19/2014 by PSC

4. Kenneth M. Karas

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Kenneth M. Karas, of New York, to be United States District Judge for the Eastern District of New York, vice Sterling Johnson, Jr.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Kenneth M. Karas	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Kenneth M. Karas	2	N.D.	P5;

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	4	05/16/2003	P2; P5; P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	[Nomination materials] [with divider] - To: POTUS - From: Alberto R. Gonzales	6	05/16/2003	P2; P5; P6/b6;

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FOIA Marker

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Counsel's Office, White House

Courtwright, Susan

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	19	18	8	3	10373	23236	6302	6502

Folder Title:

Judicial Nominations - Miscellaneous 2003: 05/16/2003

Withdrawn/Redacted Material
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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Agenda	Judicial, U.S. Attorney, and U.S. Marshal Selection Meeting with the President	1	N.D.	P2; P5; P6/b6;
002	Form	Brett M. Kavanaugh [one page released in full and one page released in part via 2018-0009-P, 08/28/2018]	2	N.D.	P6/b6;
003	Memorandum	Brett M. Kavanaugh	2	N.D.	P5;
004	Form	Jannice R. Brown	2	N.D.	P6/b6;
005	Memorandum	Janice R. Brown	2	N.D.	P5;
006	Form	F. Dennis Saylor IV	2	N.D.	P6/b6;
007	Memorandum	F. Dennis Saylor, IV	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Judicial Nominations - Miscellaneous 2003: 05/16/2003

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This document was prepared on Tuesday, August 28, 2018

2014-0108-F 1
2018-0009-P

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Form	Kenneth M. Karas	2	N.D.	P6/b6;
009	Memorandum	Kenneth M. Karas	2	N.D.	P5;
010	Form	[Nomination materials]	3	N.D.	P2; P5; P6/b6;
011	Form	[Nomination materials]	5	N.D.	P2; P5; P6/b6;

COLLECTION TITLE:
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Agenda	Judicial, U.S. Attorney, and U.S. Marshal Selection Meeting with the President	1	N.D.	P2; P5; P6/b6;

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SERIES:
Courtwright, Susan - Nominations Files

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NARA Num.:
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2014-0108-F

RESTRICTION CODES

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

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

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

Deed of Gift Restrictions

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

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

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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

This Document was withdrawn on 12/2/2014 by PSC

1. Brett M. Kavanaugh

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Brett M. Kavanaugh [one page released in full and one page released in part via 2018-0009-P, 08/28/2018]	2 |	N.D.	P6/b6;

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

COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Judicial Nominations - Miscellaneous 2003: 05/16/2003

FRC ID:
10373

OA Num.:
6502

NARA Num.:
6302

FOIA IDs and Segments:
2018-0009-P
2014-0108-F 1

RESTRICTION CODES

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This Document was withdrawn on 12/2/2014 by PSC

PREPARED BY: Kyle Sampson

NAME:	**Brett M. Kavanaugh**		
NAME & STATE:	**Brett Michael Kavanaugh of Maryland**		
POSITION:	**United States Court of Appeals for the District of Columbia Circuit**		
TYPE: ***(bold one)***	**PAS** PA SES **FT** PT	**TERM:**	**LIFE**
VICE:	**Laurence H. Silberman**	**GENDER:** **M**	**DOB:** **2/12/1965**
BIRTHPLACE:	**Washington, D.C.**	**PARTY:** **R**	**SSN:** (b)(6)
ETHNIC HERITAGE:	**Caucasian**	**RACE:**	**Caucasian**
CHILDREN:		**SPOUSE:**	
VOTING CITY, STATE ***(in 2000)***	**Bethesda, MD**	**HOME STATE:**	**Maryland**
CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	**Associate Counsel to the President The White House Washington, D.C. 20502**
HOME PHONE:	(b)(6)	**WORK PHONE:**	**(202) 456-7984**
EDUCATION:	**J.D., Yale Law School, 1990. B.A., Yale College, 1987.**	**AWARDS:**	
PREVIOUS POSITIONS HELD:	**Partner, Kirkland & Ellis, 1997-98, 1999-2001. Associate Independent Counsel, Office of Independent Counsel, 1994-97, 1998. Law Clerk, Hon. Anthony M. Kennedy, U.S. Supreme Court, 1993-94. Attorney, Office of Solicitor General, 1992-93. Law Clerk, Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, 1991-92. Law Clerk, Hon. Walter Stapleton, U.S. Court of Appeals for the Third Circuit, 1990-91.**	**MILITARY SERVICE:**	**None.**
PREVIOUS PRESIDENTIAL APPOINTMENTS:	**Associate Counsel to the President**		

President approved: _____

Security package sent: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Brett M. Kavanaugh	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Judicial Nominations - Miscellaneous 2003: 05/16/2003

FRC ID:
10373

OA Num.:
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NARA Num.:
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2014-0108-F

RESTRICTION CODES

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This Document was withdrawn on 12/2/2014 by PSC

2. Janice R. Brown

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Jannice R. Brown	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Judicial Nominations - Miscellaneous 2003: 05/16/2003

FRC ID:
10373

OA Num.:
6502

NARA Num.:
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FOIA IDs and Segments:
2014-0108-F

RESTRICTION CODES

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Janice R. Brown	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Judicial Nominations - Miscellaneous 2003: 05/16/2003

FRC ID:
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NARA Num.:
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2014-0108-F

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3. F. Dennis Saylor IV

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	F. Dennis Saylor IV	2	N.D.	P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
Judicial Nominations - Miscellaneous 2003: 05/16/2003

FRC ID:
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6502

NARA Num.:
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2014-0108-F

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	F. Dennis Saylor, IV	2	N.D.	P5;

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4. Kenneth M. Karas

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	Kenneth M. Karas	2	N.D.	P6/b6;

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COLLECTION:
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SERIES:
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Kenneth M. Karas	2	N.D.	P5;

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	[Nomination materials]	3	N.D.	P2; P5; P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Courtwright, Susan - Nominations Files

FOLDER TITLE:
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Form	[Nomination materials]	5	N.D.	P2; P5; P6/b6;

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B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

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Brett Kavanaugh Binder [1]

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Brett M. Kavanaugh

Nominee
to the
United States
Circuit Court of Appeals
for the
District of Columbia

Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

I. Background
   1. Experience

II. Office of Independent Counsel
   1. Starr Report
   2. Vince Foster Investigation
   3. Executive Privilege Article
   4. Executive Order 13233
   5. Defense of Ken Starr

III. Elian Gonzalez

IV. Separation of Church and State
   1. Good News Club
   2. Santa Fe Independent School District
   3. Florida School Vouchers

V. Race

VI. Product Liability Cases
   1. Lewis
   2. Geier
   3. Green

VII. Judicial Nominations

I. Background

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

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

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

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

- ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

- ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – Experience

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

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

  - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 11 years, to public service.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.

  - ✓ In private practice Mr. Kavanaugh focused on appellate matters and as part of his practice, he filed amicus briefs on behalf of clients with the U.S. Supreme Court.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- **Only 3 of the 19 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

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

- In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

  - ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

  - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

  - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

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

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

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

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

Brett Kavanaugh – Age

Allegation: Brett Kavanaugh is too young to be a federal appellate judge – he's only 39 years old.

Facts:

- Mr. Kavanaugh would bring a broad range of experience to the court.
  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.
  - ✓ Mr. Kavanaugh has clerked at two of the U.S. Courts of Appeal, the Third and Ninth Circuits, and at the Supreme Court. He would bring to the D.C. Circuit his experience with those courts.
  - ✓ In private practice and during his service as a prosecutor, Mr. Kavanaugh participated in appellate matters in a number of the federal courts of appeal.
- All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. All have been recognized as distinguished jurists.
  - ✓ Justice Kennedy was appointed to the 9th Circuit when he was 38 years old.
  - ✓ Judge Kozinski was appointed to the 9th Circuit when he was 35 years old.
  - ✓ Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.
- There are many examples of judges who were appointed to the bench at a young age and have had illustrious careers.

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Anthony Kennedy (later	9th	38

appointed to the Supreme Court)		
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

- Age should not be a measure of a person's experience. Many distinguished senators began their service at a young age.
  - ✓ Senators Biden and Kennedy were elected to the Senate at the age of 30, and Senator Leahy was elected at 34.

II. Office of Independent Counsel

Brett Kavanaugh – Starr Report

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

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

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

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

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

  - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

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

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

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

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

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

  - ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

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- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

The Washington Post, February 26, 1999

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February 26, 1999, Friday, Final Edition

SECTION: OP-ED; Pg. A27

LENGTH: 1274 words

HEADLINE: First Let Congress Do Its Job; A deep structural flaw in the independent counsel statute.

BYLINE: Brett M. **Kavanaugh**

BODY:
To many of us, including many who have worked in the independent counsel's office, it seemed clear long ago that the independent counsel statute is a dubious idea. But why exactly is the statute so bad? After all, are independent counsel investigations really more aggressive than the often bare-knuckled Justice Department investigations of political figures such as Mayor Marion Barry or Rep. Joseph McDade? The answer is almost certainly no, as any honest defense lawyer would concede.

But there is a deeper structural flaw with the statute. It permits Congress to enlist an outside agency within the executive branch (the independent counsel) to conduct an intensive investigation of a president or his administration and then report to Congress and the public on the results. The statute thus allows Congress to avoid its own investigative and oversight responsibilities and thereby avoid (or at least defer) responsibility for unpopular or politically divisive investigations. The Lewinsky matter is the clearest example yet of this unfortunate phenomenon.

To begin with, after allegations of presidential obstruction of justice landed in the public domain in January 1998, the House did nothing for nearly eight months, but instead deferred to the independent counsel's investigation. That is not what the Constitution contemplated. When Congress learns of serious allegations against a president, it must quickly determine whether the president is to remain in office, for only Congress (not an independent counsel) has the authority to make that initial and fundamental decision.

In the Lewinsky case, for example, the House Judiciary Committee could have questioned Monica Lewinsky, Betty Currie, Vernon Jordan and perhaps even the president in early 1998 (an approach this author publicly advocated at that time), granted immunity where necessary and gotten to the truth. There simply was no need for this mess to have occupied the country for 13 months.

The constitutional confusion continued when the independent counsel submitted his referral to Congress in September. Consistent with the independent counsel statute, the referral identified several possible "grounds for impeachment," the statutory prerequisite for an independent counsel to directly submit grand jury information involving presidential misconduct to Congress. But that raises a serious question: Why does the statute authorize an independent counsel, a member of the executive branch, to describe the possible grounds for impeachment of the president, a decision in the exclusive province of Congress. (Disclosure: I worked on that part of the independent counsel's referral that identified possible legal grounds for impeachment.)

The constitutional confusion persisted after the referral arrived in Congress. Most assumed

that the Judiciary Committee would, at a minimum, carefully review the referral before authorizing any public release. Some thought that the committee might not release materials submitted by the independent counsel at all, but instead simply use the referral as a springboard to plan and conduct its own investigation. Indeed, the Rodino Judiciary Committee apparently never released the 1974 Jaworski referral, and the Senate Judiciary Committee carefully guards the somewhat analogous FBI background reports on presidential nominees.

In this instance, however, after an overwhelming bipartisan vote, the House publicly released the independent counsel's report without even reviewing it beforehand -- notwithstanding widespread recognition that the referral necessarily would describe extraordinarily sensitive evidence and personal information. The House's immediate and unscreened release of the referral and subsequent release of truckloads of sensitive grand jury material -- the president's grand jury videotape, grand jury transcripts, the Tripp-Lewinsky audiotapes and the like -- obviously caused unnecessary harm to Congress, the presidency, the independent counsel and the public discourse.

The referral process also exposed yet again the fundamental flaw in the statute's requirement that independent counsels file substantive reports, as opposed to simply providing Congress raw evidence. The reports divert attention from the evidence to the perceived accuracy and fairness of the report. Because independent counsel cases involve political figures, the prosecutorial reports are inevitably attacked as politically motivated documents. We now have plenty of examples: the McKay report (attacked as unfair to Edwin Meese), the Walsh report (attacked as unfair to presidents Reagan and Bush) and the Starr report (attacked as unfair to President Clinton). Congress's original conception of independent counsel reports -- that the independent counsel's recitation and interpretation of the evidence would be accepted as gospel by all -- reflects a post-Watergate naivete that has been flatly disproved by two decades of experience.

In this case, moreover, the House's massive public release of the referral and backup evidence not only was unwise on its own terms, but also suggested that the independent counsel -- not the House -- was defining the impeachment process. Of course, after the public release of the referral, many believed that constitutional normality would return -- that the Judiciary Committee would conduct its own investigation and probe witnesses directly, a seemingly necessary ingredient before impeaching and removing a president of the United States. But that, too, never happened. Instead, to the chagrin of constitutional purists, both the House and the Senate rendered their judgments without a full and independent congressional investigation in either body.

So now that it is over, whom do we blame for the morphing of constitutional roles we witnessed over the last year? No one can legitimately blame the independent counsel: He followed the statute and the mandate given him by the attorney general and three-judge court (Sam Dash's reinterpretations notwithstanding), and it obviously was not his role to tell the House that it should be more aggressive in conducting its own impeachment process. Nor can one place much criticism on the House Judiciary Committee, for it deferred to a process seemingly ordained by the independent counsel statute. Rather, the blame lies squarely on the independent counsel statute itself -- the hydraulic force that facilitated, and even caused, the unfortunate blending of constitutional roles throughout the impeachment process. Yet another reason to end this statute and revert to a system more closely resembling the tried-and-true discretionary system of administration-appointed special prosecutors -- one in which Congress does its job and oversees the executive.

To be clear, my criticism of the process the country underwent over the past year is not to say whether President Clinton should or should not have been removed from office. One can argue that the president would have been removed had the proper constitutional process been followed. Alternatively, one can argue that he never would have been impeached. Regardless, the procedure that Congress followed in this case, pursuant to the independent counsel statute, was deeply flawed in that it required a single quasi-executive branch officer

-- who was, on the one hand, defenseless against relentless and orchestrated political assaults and, on the other hand, unaccountable to the people -- to define the impeachment process.

The writer, a Washington attorney, served as an associate counsel for independent counsel Kenneth W. Starr.

GRAPHIC: ILL,,TIM BRINTON

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Brett Kavanaugh – Vince Foster Investigation

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

Facts:

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

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

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

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

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

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

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

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Brett Kavanaugh – *Georgetown Law Journal* Article

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

Facts:

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

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Georgetown Law Journal
July, 1998

Symposium: The Independent Counsel Act: From Watergate to Whitewater and Beyond
Contribution

*2133 THE PRESIDENT AND THE INDEPENDENT COUNSEL

Brett M. Kavanaugh [FNa1]

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TABLE OF CONTENTS

INTRODUCTION 2134

I. BACKGROUND 2138

A. THE CURRENT LEGAL SCHEME 2138

1. The Policy Justification for a Special Counsel 2138

2. Two Statutory Mechanisms for Appointment of Special Counsels 2139

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY? 2140

1. An Illusory Debate 2140

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors 2142

3. Outside Federal Prosecutors are Necessary in Some Cases 2145

II. IMPROVING THE SYSTEM 2145

A. APPOINTMENT AND REMOVAL OF THE SPECIAL COUNSEL 2146

1. Appointment of the Special Counsel 2146

2. Removal of the Special Counsel 2151

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED 2152

C. JURISDICTION 2153

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D. REPORTS 2155

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT 2157

F. THE PRESIDENT'S PRIVILEGES 2161

1. Non-Constitutional Executive Privileges 2163

2. Constitutionally Based Executive Privileges 2166

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege 2172

4. The Policy of Executive Privileges 2173

CONCLUSION 2177

*2134 INTRODUCTION

Officials in the executive branch, including the President and the Attorney General, have an incentive not to find criminal wrongdoing on the part of high-level executive branch officials. A finding that such officials committed criminal wrongdoing has a negative, sometimes debilitating, impact on the President's public approval and his credibility with Congress--and thus ultimately redounds to the detriment of his political party and the social, economic, military, and diplomatic policies that the President, the Attorney General, and other high-ranking members of the Justice Department champion. [FN1] For those reasons, the criminal investigation and prosecution of executive branch officials by the Justice Department poses an actual conflict of interest, as well as the appearance thereof.

In addition, when the law of executive privilege is unclear or involves the application of a balancing test, the Attorney General labors under a further conflict of interest. When the Justice Department seeks access to internal executive branch communications, the Attorney General simultaneously must perform two potentially contradictory functions. First, she must act as the chief legal advisor to the executive branch (a role in which she generally would seek to protect the confidentiality of executive branch communications). Second, she must serve as a prosecutor (a role in which she generally would seek to cabin privileges so as to secure relevant evidence). As former Watergate prosecutor Archibald Cox recognized and as Attorney General Reno's role in the privilege disputes between the President and the Whitewater Independent Counsel has revealed, those dual roles place the Attorney General in a difficult, if not impossible, position in determining when the President's assertion of privileges should be challenged. [FN2] This conflict alone necessitates an outside prosecutor ***2135** (unless the Attorney General announces at the outset of the investigation that she will not accede to any executive privilege claim other than national security). Otherwise, the public cannot be sure that the Attorney General has not improperly sacrificed law enforcement to the President's assertion of executive privilege.

The conflicts of interest under which the Attorney General labors in the investigation and prosecution of executive branch officials, particularly high- level executive branch officials, historically have necessitated a statutory mechanism for the appointment of some kind of outside prosecutor for certain sensitive investigations and cases. As the Watergate Special Prosecution Task Force stated in its report, "the Justice Department has difficulty investigating and prosecuting high officials," and "an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." [FN3] This article agrees that some mechanism for the appointment of an outside prosecutor is necessary in some cases.

Nonetheless, Congress can improve the current "independent counsel" system, which was established by the Ethics in Government Act of 1978. [FN4] Several problems have been identified with the current system, including the following: (1) the appointment mechanism, by attempting to specify situations where an independent counsel is necessary, requires the President and Attorney General to seek appointment of an independent counsel in cases

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where it is not warranted and permits the President and Attorney General to avoid appointment of an independent counsel in cases where it is warranted; (2) the appointment and removal provisions (which do not involve the President) are contrary to our constitutional system of separation of powers and, both in theory and perception, lead to unaccountable independent counsels; (3) the investigations last too long; (4) an independent counsel can investigate matters beyond the initial grant of jurisdiction; and (5) independent counsel investigations have become "politicized" (a commonly used but rarely defined term).

This article suggests that those problems--to the extent they are unique to an independent counsel and do not apply to federal white-collar investigations more generally--result primarily from the uneasy relationship between the President and the independent counsel that the independent counsel statute creates. This article advances several proposals that would clarify the President's role in independent counsel investigations, thereby reducing the number of investigations and expediting those that are necessary. Each of these proposals stands on its own; the adoption of any one proposal does not necessitate or depend upon the adoption of any other.

First, Congress should change the provision for appointing an independent ***2136** counsel. A "special counsel" [FN5] should be appointed in the manner constitutionally mandated for the appointment of other high-level executive branch officials: nomination by the President and confirmation by the Senate. Currently, an independent counsel is appointed by a three-judge panel selected by the Chief Justice of the United States. Although this unusual procedure survived constitutional scrutiny in Morrison v. Olson, [FN6] it is unwise to assign a small panel of federal judges to select the special counsel because the prosecutor, no matter how qualified, will lack the accountability and the instant credibility that comes from presidential appointment and Senate confirmation. Appointment by the President, together with confirmation by the Senate, would provide greater public credibility and moral authority to the independent counsel and would dramatically diminish the ability of a President and his surrogates, both in Congress and elsewhere, to attack the independent counsel as "politically motivated." In addition, any supposed concerns about "accountability" would be alleviated if the independent counsel were appointed (and removable) in the same manner as other high-level executive branch officials.

Second, the President should have absolute discretion (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel. The current statute, by attempting to specify in minute detail the precise situations requiring an independent counsel, is largely overinclusive, thus producing too many investigations. At the same time, the statute is underinclusive because it allows an Attorney General to use the law as a shield in situations that by any ordinary measure would warrant the appointment of a special counsel.

For example, Attorney General Janet Reno appointed an independent counsel to investigate whether Secretary of Agriculture Michael Espy accepted illegal gratuities--a very important investigation, but one that Congress and the people might have entrusted to the Justice Department. [FN7] On the other hand, the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the independent counsel statute's triggering mechanism. That approach ignores the broader question that should be the issue (and historically has been the issue): At the end of the day, will the American people and the Congress have confidence in the credibility of the Justice Department investigation if it culminates in a no-prosecution decision against those high-level executive branch officials under investigation?

Third, with respect to an independent counsel's jurisdiction, Congress should ***2137** codify and expand upon the Eighth Circuit's 1996 decision in United States v. Tucker [FN8] to ensure that the President and the Attorney General, rather than any court, define and monitor the independent counsel's jurisdiction. Such a clarification would place sole responsibility for the independent counsel's jurisdiction on these publicly accountable officials. Congress will exercise sufficient oversight to deter the President and Attorney General from illegitimately restricting the independent counsel's jurisdiction. This change would greatly expedite special counsel investigations. Jurisdictional challenges have caused severe delays. For example, a specious challenge to the Whitewater Independent Counsel's jurisdiction delayed a trial of Arkansas Governor Jim Guy Tucker for over two and one-half years before he and his codefendants finally pled guilty.

Fourth, Congress should eliminate the statutory reporting requirement. The reporting requirement adds great time and expense to independent counsel investigations, and the reports are inevitably viewed as political documents. The

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ordinary rules of prosecutorial secrecy should apply to evidence gathered during an independent counsel investigation, except that the special counsel should be authorized to provide the President and the House Judiciary Committee with a classified report of any evidence regarding possible misconduct by current officers of the executive branch (including the President) that might dictate removal by the President or impeachment by the Congress.

Fifth, Congress can answer a question that the Constitution does not explicitly address, but that can greatly influence independent counsel investigations: Is the President of the United States subject to criminal indictment while he serves in office? Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate. Removal of the President is a process inextricably intertwined with its seismic political effects. Any investigation that might conceivably result in the removal of the President cannot be separated from the dramatic and drastic consequences that would ensue. This threat inevitably causes the President to treat the special counsel as a dangerous adversary instead of as a federal prosecutor seeking to root out criminality.

Whether the Constitution allows indictment of a sitting President is debatable (thus, Congress would not have the authority to establish definitively that a sitting President is subject to indictment). Removing that uncertainty by providing that the President is not subject to indictment would expedite investigations in which the President is involved (Watergate, Iran- Contra, and Whitewater) and would ensure that the ultimate judgment on the President's conduct (inevitably wrapped up in its political effects) is made where all great national political judgments ultimately must be made--in the Congress of the United States.

Sixth, Congress should codify the current law of executive privilege available in criminal litigation to the effect that the President may not maintain any executive privilege, other than a national security privilege, in response to a ***2138** grand jury or criminal trial subpoena sought by the United States. That rule strikes the appropriate balance between the need of federal law enforcement to conduct a thorough investigation and the need of the President for confidential discussions and advice. Codifying the law of executive privilege in this manner would expedite investigations of executive branch officials and ensure that such investigations are thorough and effective (at least, unless the courts were to reverse course and fashion a broader privilege as a matter of constitutional law).

These six proposals together would reduce the number of special counsel investigations and expedite those investigations that do occur. The proposals would enhance the public credibility of special counsel investigations, reduce the inherent tension between the President and the special counsel, and better enable a special counsel to conduct a thorough and effective law enforcement investigation of executive branch wrongdoing. Finally, the changes would ensure that a specific entity (Congress) is directly and solely responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether that conduct warrants a public sanction.

I. BACKGROUND

A. THE CURRENT LEGAL SCHEME

1. The Policy Justification for a Special Counsel

The theory behind the appointment of an outside federal prosecutor is that the Justice Department cannot be trusted to investigate an executive branch official as thoroughly as the Justice Department would investigate some other similarly situated person. [FN9] Regardless whether the Justice Department is actually capable of putting political self-interest aside and conducting a thorough investigation, the problem remains. In cases in which charges are not brought, Congress and the public will question whether the investigation has been as thorough and aggressive as it would have been absent the political incentive not to indict. There is no real or meaningful check to deter an under-aggressive or white-washed Justice Department investigation of executive branch officials or their associates.

On the flip side, however, contrary to the claims of some critics, there is a real check against an over-aggressive special prosecutor--the same check that deters an over-aggressive Justice Department prosecutor. It is the jury. As

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Professor Katy Harriger correctly noted:

Prosecutors, both independent and regular, must have sufficient evidence to ***2139** convince a jury that a crime has been committed. One clear constraint on independent counsel ... is one that is on all prosecutors. They must ask themselves whether their case will pass the "smell test" in front of a jury. Will they find criminal action beyond a reasonable doubt? There is virtually no incentive for any prosecutor, independent or otherwise, to pursue a criminal case that fails that test. To argue then that there are no checks on the independent counsel is, to say the least, disingenuous for it ignores the fact that independent counsel do not operate outside the established legal system in their pursuit of criminal cases. They cannot escape the requirement that their case against an individual be reviewed by an impartial judge and a jury of his peers. [FN10]

Indeed, an acquittal is far more damaging for an independent counsel (whose record will be judged on, at most, a handful of prosecuted cases) than for the Justice Department prosecutor who will handle dozens if not hundreds of cases in his career and for whom one acquittal is ordinarily not a significant blemish.

2. Two Statutory Mechanisms for Appointment of Special Counsels

Commentators do not always appreciate that current federal law provides two different mechanisms for appointment of special counsel to investigate and prosecute a particular matter. First, under the discretionary "special attorney" provisions, the Attorney General may directly select a special attorney to conduct a particular investigation where she deems it appropriate. [FN11] Consistent with this authority, Attorneys General throughout our history have looked outside the Justice Department to appoint special attorneys to handle particular high-profile or politically charged cases. [FN12] For example, the Watergate special prosecutors and the first Whitewater outside counsel were appointed directly by the Attorney General under this authority.

Second, under §§ 591-599 of Title 28, the mandatory "independent counsel" statute, Congress has specified a number of covered persons as to whom the Attorney General must seek the appointment of an independent counsel if, after a preliminary investigation, she finds "reasonable grounds to believe that further investigation is warranted." [FN13] The Attorney General does not select an independent counsel herself, but instead applies to a panel of three judges (the "Special Division") preselected by the Chief Justice of the United States. [FN14] The panel of judges then selects an independent counsel. [FN15] The independent counsel's ***2140** jurisdiction is technically defined by the Special Division, [FN16] although the Special Division defines it in the manner requested by the Attorney General. [FN17] The independent counsel is to conduct all investigations and prosecutions "in the name of the United States," [FN18] and is to conclude his investigation by notifying the Special Division and filing a report on "the work of the independent counsel." [FN19] The independent counsel may not expand his jurisdiction to cover unrelated matters except upon application to the Attorney General and approval by the Special Division. [FN20] Pursuant to this statute, nearly twenty independent counsel have served since 1978, most notably in the Iran-Contra and Whitewater matters.

There are two important differences between the discretionary "special attorney" statute and the mandatory "independent counsel" statute. First, the special attorney is appointed by the Attorney General, not by a panel of judges. (Neither system involves the Senate.) Second, the Attorney General possesses unfettered discretion whether to seek a special attorney for a particular case, whereas the independent counsel statute requires that the Attorney General seek an independent counsel in certain cases.

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY?

1. An Illusory Debate

Let's briefly put aside the questions of who should appoint the outside federal prosecutor as well as the question of under what circumstances the outside prosecutor should be appointed. The initial, fundamental issue is whether Congress should provide any statutory mechanism for authorizing the selection of persons outside the Justice Department to lead particular federal criminal investigations and prosecutions. Indeed, the rhetoric spewed and the ink spilled over the independent counsel law often frame the question in these terms--namely, whether an outside prosecutor is ever necessary for the investigation of executive branch officials.

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This supposed debate is, however, entirely illusory. Even the most severe ***2141** critics of the current independent counsel statute concede that a prosecutor appointed from outside the Justice Department is necessary in some cases.

For example, Professor Julie O'Sullivan has criticized many aspects of the mandatory independent counsel regime. She nonetheless concedes that "[a]s in the past, in extraordinary cases where the appearance or reality of a genuine conflict of interest requires that a matter be referred to someone outside the DOJ, that referral should be made to a regulatory IC" appointed from outside the Justice Department by the Attorney General. [FN21] In other words, Professor O'Sullivan agrees that there must be some legal mechanism for appointing an outside special counsel to handle high-profile investigations of executive branch officials.

Similarly, former Justice Department official Terry Eastland has criticized the independent counsel statute in a lengthy analysis of the history and policy of special prosecutors. But Mr. Eastland, too, believes that "[i]nsofar as criminal investigation and prosecution goes, Presidents or their Attorneys General could exercise their discretionary authority in cases of conflict of interest and name Watergate-type prosecutors." [FN22]

Theodore Olson, head of the Office of Legal Counsel under President Reagan, has criticized the statute but also has stated that "there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation because public integrity requires that." [FN23] Mr. Olson noted that Attorney General William Barr, for example, had selected special prosecutors from outside the Justice Department to ensure that the lead prosecutor was not a "permanent direct subordinate of the Attorney General or the President." [FN24]

The Bush Administration lobbied against the independent counsel statute in 1992. However, the Deputy Attorney General conceded that "we all recognize that there is a need" for the Attorney General to appoint an outside counsel on occasion, and explained that Attorney General Barr "has on two occasions availed himself of the statute [28 U.S.C. § 515] that allows him to appoint an outside authority as a special counsel." [FN25]

Finally, the most famous critic of the independent counsel statute is Justice Antonin Scalia. His dissent in Morrison v. Olson, [FN26] the decision upholding the constitutionality of the independent counsel statute, is largely an analysis of the Constitution's separation of powers, including the requirements of the Appointments Clause and the Court's jurisprudence regarding the removal power of the ***2142** President. Notwithstanding the length and force of his dissent, Justice Scalia's objection to the independent counsel statute was really quite simple: The President must be able to appoint and remove at will the independent counsel. If the President can select the independent counsel, and the President can remove the independent counsel at will, then Justice Scalia would have no objection. [FN27]

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors

It is not surprising that most critics of the current mandatory independent counsel statute accept the appointment of prosecutors from outside the Department of Justice in certain cases. This Nation possesses a deeply rooted tradition of appointing an outside prosecutor to run particular federal investigations of ***2143** executive branch officials. Outside counsels are not a modern phenomenon. Between 1870 (the birth of the Justice Department) and 1973, presidential administrations appointed outside prosecutors on multiple occasions. [FN28]

In 1875, for example, President Ulysses S. Grant named a special counsel to prosecute the St. Louis Whiskey Ring--a scandal involving a close friend of President Grant. President Grant later ordered the firing of the special prosecutor because the prosecutor was allegedly too aggressive. [FN29]

During President Theodore Roosevelt's Administration, two outside counsels were appointed. In 1902, the Attorney General appointed a Democrat as special counsel to prosecute a land fraud implicating a high-level executive branch officer. The following year, President Roosevelt appointed a special counsel to investigate charges of corruption in the Post Office. [FN31] In so doing, President Roosevelt stated that "I should like to prevent any man getting the idea that I am shielding anyone." [FN30]

In 1924, following a Senate resolution calling for appointment of a special prosecutor, [FN32] President Calvin Coolidge appointed two special prosecutors, one Republican and one Democrat, to jointly conduct the criminal

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investigation of the Teapot Dome scandal. [FN33] The special prosecutors subsequently obtained the conviction of the former Secretary of Interior for taking a bribe. [FN34]

In 1952, President Harry Truman's Attorney General appointed a Republican as special counsel to investigate allegations of criminal wrongdoing within the administration, including within the Justice Department. [FN35] Like President Grant over seventy years earlier, President Truman's Attorney General eventually fired the special prosecutor.

In 1973, President Nixon's Attorney General named a Democrat, Archibald Cox, as special prosecutor to investigate and prosecute the Watergate cases. President Nixon fired Mr. Cox, but subsequently appointed another Democrat, Leon Jaworski. The prosecutor eventually obtained the convictions of numerous members of the Nixon Administration.

In the wake of Watergate, Congress enacted the Ethics in Government Act of 1978, [FN36] which required the appointment of an independent counsel in certain cases. Since then, Presidents and Attorneys General have sought the appointment *2144 of nearly twenty independent counsels under the statute but also continued to appoint special prosecutors outside the mandatory independent counsel mechanism in cases where that statute did not apply or had lapsed.

During President Bush's Administration, for example, Attorney General William Barr appointed retired Judge Frederick Lacey as special counsel to investigate allegations related to Iraqi involvement in an American bank, the so-called BNL investigation. He also appointed Judge Nicholas Bua to investigate the Inslaw case, which involved allegations directed at the Justice Department. [FN37]

In 1994, during a brief period when the independent counsel statute had lapsed, President Clinton asked the Attorney General to appoint a special counsel to investigate the Whitewater matter, which involved criminal referrals and allegations against former business partners of the President (James B. McDougal and Susan H. McDougal) and a separate, specific allegation of wrongdoing against the President by former Arkansas businessman and Judge David L. Hale. The Attorney General selected Robert B. Fiske, Jr., who served until the independent counsel statute was reauthorized, at which time the panel of judges determined that the statute required appointment of an independent counsel who was not an administration official. [FN38]

This extensive history demonstrates a clear "tradition" of "naming special prosecutors in certain, exceptional circumstances." [FN39] It shows that criminal investigations of executive branch officials or their associates were handled either "through normal channels, within the Justice Department, or outside them through counsels specially appointed by the President or the Attorney General and therefore accountable to the President for their exercise of power." [FN40]

*2145 3. Outside Federal Prosecutors are Necessary in Some Cases

American legal history has clearly demonstrated the necessity of a mechanism to appoint an outside prosecutor to conduct certain sensitive investigations of executive branch officials. In light of this consistent historical practice, it would take an extraordinarily compelling justification for Congress to turn its back on history and common sense by eliminating all mechanisms for appointing a prosecutor from outside the executive branch.

Such a case has not been made--nor has anyone really attempted to make it. And although there is no scientific answer to the question, it is rather untenable as a matter of common sense to contend that an outside prosecutor is never necessary--that an ordinary Justice Department prosecutor should always preside over a Justice Department investigation. What if the allegation of wrongdoing is directed against the Attorney General herself? What if the allegation of wrongdoing is against the President's spouse or his best friend or the White House Counsel? Would any rational American in such a case believe that the Attorney General and the Justice Department would pursue the matter as vigorously as an outside prosecutor whose personal and professional interests would not be adversely affected by a thorough and vigorous investigation? Two centuries of experience inform us that the citizens (as represented by Congress and the media) will not accept such a procedure. Indeed, the fact that there have been so

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many outside prosecutors appointed throughout our history demonstrates their importance and necessity. And the further fact that even the strongest critics of the mandatory independent counsel statute concede that an outside prosecutor is necessary in some cases is telling evidence that some mechanism for appointment of an outside prosecutor is appropriate.

For these reasons, future debates should not focus on whether a special counsel statute is necessary, but rather on the more pertinent questions of by whom and under what conditions a special counsel should be appointed.

II. IMPROVING THE SYSTEM

This article proposes that Congress enact the following statutory language in lieu of the current independent counsel statute.

Section 1. Appointment and Jurisdiction of a Special Counsel

(a) When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

(b) The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

***2146** Section 2. Reports by a Special Counsel.

The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

This article also proposes that Congress adopt two provisions not inextricably linked to special counsel investigations, but which have a substantial impact on them.

Presidential Immunity.

The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

Presidential Privileges.

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by a federal statute or rule that refers specifically to the privileges available to government officials or agencies in grand jury or criminal trial proceedings.

A. Appointment and removal of the special counsel

The single most important change this article proposes concerns the appointment and removal of an independent counsel. Congress should eliminate §§ 591-599 of Title 28, and adopt a new statutory provision:

When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

This seemingly simple change in appointment and removal would greatly change the perception of the appointed prosecutor and thus would satisfy many opponents of the current statute.

1. Appointment of the Special Counsel

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There are two current statutory alternatives for selecting an independent counsel. Under § 515 and § 543 of Title 28 , the Attorney General has the ***2147** discretion to select a special attorney herself (as Robert Fiske was selected). If the mandatory independent counsel statute is triggered, under § 592, the Attorney General applies to the Special Division and the three-judge panel selects an independent counsel (as Kenneth Starr was selected).

Neither alternative suffices in the kind of investigations of executive branch officials and their associates likely to cause the President and Attorney General, in the exercise of discretion, to seek a special counsel. Congress, therefore, should repeal the provision in the independent counsel statute providing for appointment of an independent counsel by the Special Division and should instead provide that a special counsel be appointed in the manner constitutionally mandated for high-level executive branch officials: appointment by the President and confirmation by the Senate. [FN41]

Section 515, by which the Attorney General directly selects a special attorney, is problematic because there is no check to prevent the President or Attorney General from handpicking a "patsy" prosecutor. Section 592, the current independent counsel statute by which the Special Division selects a special counsel, is problematic for different reasons.

First, the judges selecting the independent counsel may be perceived as politically motivated partisans because of their previous careers and affiliations. (Sure enough, the current Special Division panel repeatedly has been attacked as excessively partisan.) If the selection process is perceived as political, the credibility of the independent counsel will suffer. [FN42]

Second, because of its isolation and its inability to conduct a searching inquiry of the candidates, the panel may select someone who does not possess the qualifications that a special counsel should possess--simply because the panel of judges is not able to conduct the kind of search and inquiry that would produce the best possible person.

Third, neither § 515 nor § 592 provides the independent counsel with the moral authority and public credibility that will insulate him from the inevitable political attacks. The need for a special counsel to have the greatest possible insulation against erroneous charges of political partisanship has been demonstrated time and again. Whether it is Ron Ziegler complaining that the Watergate ***2148** Special Prosecution Task Force is a hotbed of liberals or President Clinton agreeing that the Whitewater Independent Counsel is out to get him, charges of political partisanship are almost sure to occur during independent counsel investigations.

Such attacks are inevitable because they are built into the system. The very point of an outside federal prosecutor is to counter the assumption that the investigation has been whitewashed because of political kinship (the charge to which the Department of Justice has been subject in the campaign fundraising investigation). [FN43] For that reason, outside special counsels historically have been selected from the party other than that of the President. [FN44] But the appointment of someone from the party opposing the President inevitably sparks doubts whether the outside counsel--theoretically a political "foe" of the President in some sense--possesses too much of a partisan agenda against the President.

Watergate Special Prosecutor Archibald Cox is perhaps the most notorious example. He had worked in the Kennedy Administration and was a very close friend and ally of Senator Edward Kennedy (an opponent of President Nixon). But in virtually all cases, the independent counsel will be quite vulnerable to attacks of political partisanship by the President and his allies simply by virtue of his known political affiliation.

This is not an idle problem. The glib answer that the independent counsel should just "take it" when he is criticized as politically motivated is a nice theory, but it does not work in practice. Although many prosecutors receive complaints that they are politically motivated, those complaints take on a different order of magnitude when they emanate from the Oval Office. [FN45] Sustained presidential (and presidentially directed) criticism of an independent counsel eventually will have an impact on a large percentage of the citizens and on their opinion of the independent counsel. Those citizens include both potential witnesses and potential jurors. The decision by witnesses whether to volunteer the full truth (or not) often may depend on their impressions of the credibility and integrity of the special counsel. As to juries, a truly energetic political campaign to destroy the credibility of an independent

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counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but *2149 the most clear-cut cases of guilt. [FN46]

Congress can and should make it harder for future Presidents and presidential allies to attack the credibility of outside federal prosecutors. The best way to ensure as much insulation as possible, consistent with our constitutional structure, is to require presidential appointment and Senate confirmation. This process would serve many purposes.

First, the President could not credibly attack the special counsel whom the President had appointed. Similarly, Senate confirmation would make it difficult for anyone to claim that the special counsel is excessively partisan, for any person likely to put politics above law and evidence would not navigate the confirmation process.

Second, presidential appointment and Senate confirmation would ensure that the credentials of a special counsel are extraordinarily high. And particular issues regarding the nominee's past could be fleshed out and explained rather than being dredged up years down the road by the subjects of the investigation.

Third, unlike the special attorney provision of § 515, Senate confirmation would prevent charges that the special counsel is too sympathetic to the incumbent administration. Before the independent counsel statute was reauthorized in 1994, Robert Fiske was selected by the Attorney General as a special attorney for Whitewater. Like Kenneth Starr after him, Mr. Fiske possessed precisely the kind of superb credentials one would hope for in a special counsel. Yet Mr. Fiske was not subject to Senate confirmation, and Republicans such as Senator Lauch Faircloth were subsequently able to attack Fiske as soft on the administration. [FN47] These attacks on Fiske's supposed partisanship would have seemed ludicrous had those same Senators been forced to vote for him during the confirmation process.

Senate confirmation "serves both to curb executive abuses of the appointment power ... and to promote a judicious choice of persons for filling the offices of the union." [FN48] As Alexander Hamilton noted, "the necessity of their concurrence would have a powerful ... operation. It would be an excellent check upon a spirit of favoritism in the President. ... The possibility of rejection would be a strong motive to care in proposing." [FN49] The Supreme Court similarly noted that " b y requiring the joint participation of the President and *2150 the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." [FN50]

To be sure, presidential appointment and Senate confirmation is not a fool- proof method of insulating a special counsel from unfair political attacks. But it would render the special counsel "accountable," in theory and appearance, and would give the special counsel greater ability to pursue his tasks without being subject to unfair and unrelenting political attack. In short, it would provide the aura of moral and political authority that the special counsel needs if he is to do his job as aggressively as we would hope.

There no doubt will be some objections to this proposal. Some might argue that the President would not be inclined to appoint a truly independent and aggressive prosecutor because the allegations almost by definition would involve the activities of his close associates. But that is the wisdom of Senate confirmation. Indeed, the President would be wise to and likely would consult closely not only with his Attorney General and perhaps his White House Counsel, but also with Senate leaders, before even nominating a special counsel. Moreover, the media no doubt would aggressively probe the background and credentials of the individual selected by the President. The danger of the President appointing, and the Senate confirming, a crony or patsy as special counsel seems almost nonexistent.

As noted above, some might oppose this proposal by arguing that a prosecutor should not worry about attacks on his reputation. That, too, is a naive view. Attacks on the prosecutor's reputation ultimately are designed to scare potential witnesses and to infect the jury pool with negative feelings towards the prosecution. It is no secret that many defense attorneys engage in these smear tactics. The prosecutor, as a representative of the people of the United States, must take appropriate steps to counter such attacks lest they allow an injustice to occur--namely, a guilty person being erroneously acquitted because of the jury's negative view of the prosecutor. By means of this proposal, Congress can help to prevent such dangerous reputational attacks on a special counsel.

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Others might oppose this proposal on the ground that Senate confirmation is a slow and unwieldy process or that it could turn into a political circus. Neither argument is ultimately persuasive. When the Senate considers nominees for important positions as to which there are severe time constraints, the Senate can and does act very quickly. For example, the Senate proceeds with extraordinary expedition to confirm the Cabinet of a newly elected President so that the Cabinet is in place when the President takes office. A respected individual selected as special counsel would be promptly considered and confirmed.

To be sure, certain Senators might use the opportunity to attack the subject of the investigation, or alternatively to attack the nominee. The first scenario seems unavoidable, but not particularly costly. As to the second, that is the point of the process. Any special counsel who would engender significant opposition should ***2151** not be nominated in the first place--or should be withdrawn if serious opposition develops.

2. Removal of the Special Counsel

Currently, an independent counsel can be removed for "good cause," [FN51] a term undefined as a matter of law or practice. A special attorney appointed directly by the Attorney General can be removed at will. [FN52]

The "good cause" provision strikes many commentators as unconstitutional or, at least, unwise. As Justice Scalia intimated in Morrison, at first blush it is somewhat difficult to understand why the President does not have the authority to dismiss any executive branch official at will. [FN53] In any event, Justice Scalia also argued that a federal prosecutor should be removable at will for more practical reasons--that "the primary check against prosecutorial abuse is a political one" and that the independent counsel system thwarts this traditional check on a prosecutor's actions. [FN54] If there is an out-of-control prosecutor, Justice Scalia reasons that the President should possess the authority and the responsibility to remedy the situation.

The notion that the independent counsel is "unaccountable" has become the mantra of subjects of the investigation who inevitably attempt to denigrate the investigation as partisan and out of control. Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him. Congress should give back to the President the full power to act when he believes that a particular independent counsel is "out to get him." Such a step not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up.

The objection to "removal at will" is that the independent counsel might be too timid because of fear that he could be fired. That objection overstates the danger. After all, a number of special prosecutors have been appointed throughout our history, and there is simply no persuasive evidence that the threat of removal adversely affected their investigations. Indeed, in a perverse way, removal is a sure way to immortality, as Archibald Cox learned. Moreover, ***2152** President Nixon's firing of Cox--the last occasion when a President removed a special counsel--created an enormous controversy and triggered impeachment proceedings. [FN55] History clearly demonstrates that the President will pay an enormous political price if he does not have a persuasive justification for dismissing a special counsel. The deterrent to a President dismissing a special counsel thus would be the same as the deterrent to his firing the Attorney General--a practical and political (as opposed to legal) deterrent requiring the President to be able to explain his decision to Congress and the public.

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED

As noted above, this article proposes the following statutory language.

When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

Congress should no longer try to specify in advance the circumstances requiring a special counsel. The triggering mechanism of the current mandatory independent counsel statute can be grossly over-or under-inclusive depending on the circumstances. In some cases, the Attorney General is required to request an independent counsel even when

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it seems evident that Congress and the public would accept the credibility of a Justice Department investigation (for example, the investigation of Secretary of Labor Alexis Herman). In other cases, such as the Democratic campaign fundraising matter, the mandatory appointment provision of the statute is not triggered, even though there seems an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation.

Indeed, the campaign fundraising matter has revealed a series of heretofore unforeseen flaws in the triggering mechanism of the statute. First, the decision whether to appoint an independent counsel has degenerated into a debate between the Attorney General and her critics over the precise features of the triggering mechanism--for example, whether a sufficiently specific and credible allegation has been made against a "covered person." This dispute has focused on the question of which telephones were used to make certain fundraising calls. The debate over such technicalities has obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries. [FN56]

***2153** Second, at least at the outset of the investigation, Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive. Over the reported objection of FBI investigators, Justice Department officials prohibited certain investigative techniques because the threshold for triggering the independent counsel statute was not met. [FN57] Thus, the Attorney General (or, at least, her delegates) has used the statute not as a sword against executive branch officials, but as a shield to protect them.

Of course, the precise specificity and credibility of allegations against covered persons should be irrelevant. For purposes of the independent counsel statute, the important question should not be whether certain technical requirements have or have not been met. Instead, it should be the following: Will the Congress and the public have confidence in the credibility and thoroughness of the investigation if the investigation results in a determination that such officials did not violate the criminal law?

There can be no definitive answer to this question, but that is the point. Depending on the circumstances--who committed the alleged offense, the nature of the offense, the credibility of the Attorney General, the confidence of the Congress in the Justice Department--there may be more or less of a perceived need for a special counsel to take over. It has proved wildly unwise for Congress to try to anticipate those situations; the debate over whether an independent counsel should be appointed for the campaign fundraising issues has only highlighted the flaws in the current triggering mechanism.

Some might contend that the statute should still be mandatory against certain officials such as the President and Attorney General. As will be discussed further below, an independent counsel should never be appointed to prosecute the President (because a sitting President should not be subject to criminal indictment until he leaves office or is removed by impeachment proceedings). If the Attorney General is the subject of a truly serious allegation and remains in office, the people can be confident that the President or the Congress will ensure that a special counsel is appointed.

In sum, the decision whether to appoint a special counsel should be at the President's discretion as informed by the Congress and the media. That is as it should be--those audiences are the two primary representatives of the citizens, and the citizens are the persons who ultimately must be persuaded that an investigation resulting in a no-prosecution decision was thorough and credible.

C. JURISDICTION

The following proposed statutory language relates to jurisdiction.

When the public interest requires, the President may appoint, by and with ***2154** the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

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The current mandatory independent counsel statute authorizes the Attorney General to delineate the independent counsel's jurisdiction, to refer related matters to the counsel, and to seek expansion of the counsel's jurisdiction. The statute is silent on the question of whether a criminal defendant or subpoena recipient can challenge the jurisdiction of the prosecutor. In United States v. Tucker, however, the Eighth Circuit ruled that the independent counsel's jurisdiction, as specified by the Attorney General, is not subject to judicial review. [FN58]

Congress should clarify the jurisdictional provisions in a manner consistent with Tucker, such that only the President and Attorney General, and not the courts, define and monitor the independent counsel's jurisdiction. This clarification would ensure direct oversight over the independent counsel's jurisdiction by the official primarily affected (the Attorney General), but should not unduly hamper the investigation.

As explained by the Eighth Circuit in Tucker, the Attorney General, on behalf of the President, has the competence and authority to monitor an independent counsel's jurisdiction. Ordinarily, she is the "traffic cop" who decides whether a particular investigation should be handled by Main Justice or by a local United States Attorney's Office. She also resolves clashes between different United States Attorneys' offices. So, too, with respect to a special counsel's jurisdiction, the Attorney General should play the role of traffic cop, the role she already performs to some degree. Of course, there is always a danger that the President or Attorney General will attempt to limit an independent counsel's investigation to protect the administration. Regular congressional oversight of the independent counsel's jurisdiction should deter the imposition of such restraints, however.

To be sure, one can expect that there will be some friction at the margins between the special counsel and the Attorney General. [FN59] The Attorney General must take pains not to hamstring the special counsel, not to make his investigation less effective than an ordinary Justice Department investigation. In particular, it is, of course, common and accepted (and even necessary) police and prosecutorial practice to attempt to investigate and prosecute witnesses for other ***2155** crimes, thereby inducing the witness to tell the truth in the primary investigation. As Robert Fiske has correctly noted, it would be unwise in the extreme for the Attorney General to take that authority away from a special counsel: "I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation." [FN60]

Codifying Tucker thus would not only clarify the role of the Attorney General and special counsel, but also would greatly expedite special counsel investigations. Judicial challenges to independent counsel jurisdiction have caused severe delays in the Michael Espy and Whitewater independent counsel investigations. For example, a trial of Arkansas Governor Jim Guy Tucker in the Whitewater investigation was delayed well over two and one-half years because of a challenge to the independent counsel's jurisdiction.

D. REPORTS

Congress should enact the following statutory language regarding the special counsel's duty to provide information regarding the evidence developed during his investigation.

The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

The most illogical part of the current independent counsel statute is its final report requirement. The provision was originally designed to ensure that the special prosecutor did not "whitewash" the investigation. That rationale does not justify a report; the fear of whitewashing is the reason that a special counsel is appointed in the first place. If anything, the supposed justification for the reporting requirement would call for the Justice Department to provide a report in those high-profile investigations where there is a potential for a conflict, but where the Department nonetheless conducts the investigation.

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In any event, § 594(h) of the current statute requires that an independent counsel's final report set forth "fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." [FN61] ***2156** Before the 1994 amendment, the statute also required that the final report set forth "the reasons for not prosecuting any matter within the prosecutorial jurisdiction" of the independent counsel. [FN62]

Section 595(c) of Title 28 also requires that the independent counsel report to the Congress on any information that "may constitute grounds for an impeachment." [FN63] The latter provision codifies the process by which Leon Jaworski transmitted a report to Congress during the Watergate investigation. As far as is publicly known, however, a report under § 595(c) has never been issued since its enactment in 1978.

As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process. A report discussing facts and evidence would make sense if the prosecutor's goal was to establish publicly by a preponderance of the evidence what happened with respect to a particular event--as often is the case in congressional or inspector general investigations, or in civil litigation. That is not the goal of the independent counsel. Instead, an independent counsel is appointed only to investigate certain suspected violations of federal criminal law in order to determine whether criminal violations occurred, and to prosecute such violations if they did occur. That goal--to determine whether criminal violations occurred--is quite different from the goal of issuing public conclusions regarding a particular event. [FN64]

On the other hand, as is reflected in § 595(c), there is a strong sense that evidence of the conduct of executive branch officers should not be concealed, at least not from Congress, which is constitutionally assigned the duty to determine their fitness for office. Thus, any information gathered with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress (not dissimilar to the manner in which FBI background information is disclosed when a nomination is pending). The statutory language proposed by this article thus attempts to incorporate the best of § 594(h) and § 595(c), to eliminate the worst, and to ensure that, on the one hand, miscreants not serve in the executive branch, and on the ***2157** other, that personal privacy and reputation not be sacrificed unnecessarily and unwisely.

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT

This article proposes the following statutory language to establish that a sitting President cannot be indicted.

The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

The supposed "politicization" of independent counsel investigations occurs primarily in those investigations where the President is a target or a potential defendant; those investigations quickly become politicized because of the threat that the President might be indicted. As will be explained, a serious question exists as to whether the Constitution permits the indictment of a sitting President. Regardless how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation. [FN65]

In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated--whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party--and thus also for the political, economic, social,

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diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed, beg, an all-out attack by the innumerable ***2158** actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr--the four modern special prosecutors to investigate presidents.

The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate--and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office. [FN66]

Watergate Special Prosecutor Jaworski concluded, for example, that "the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused." Accordingly, he thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him:

[Tlhe impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts. [FN67]

President Nixon similarly argued that "[w]hatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them." [FN68] As Solicitor General, Robert Bork reached the same conclusion, arguing that a Vice President could be criminally prosecuted, but that the President could not. [FN69] Judge George MacKinnon, too, argued that "a President is subject to the criminal ***2159** laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office." [FN70] To indict and prosecute a President or to arrest him before trial "would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties." [FN71] Therefore, he concluded, " t he real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties." [FN72]

The Supreme Court's decision in Clinton v. Jones [FN73] indicated that the President is subject to private lawsuits to remedy individuals harmed. But the Court's decision does not apply to criminal proceedings against the President, which seek to enforce public, not private, rights. The Court thus repeatedly referred in its opinion to "private" actions against the President. [FN74]

The constitutional mechanism of impeachment recognizes, at least implicitly, that criminal prosecution of a sitting President is fraught with peril-- virtually untenable as a matter of practice and unwise as a matter of policy. The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President's political party (and the causes he champions) would almost certainly be devastated. Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor--whether it be the Attorney General or special counsel--and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. [FN75] Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made--in the Congress of the United States.

***2160** The words of Alexander Hamilton ring as true today as they did two centuries ago:

[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of

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some public trust ... are of a nature which may with peculiar propriety be denominated POLITICAL .... The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other.... [FN76]

Investigation of the President, Hamilton stated, is a kind of "NATIONAL INQUEST" and "[i]f this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves." [FN77]

The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion "to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." [FN78] In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards. [FN79] The Federalist Papers similarly point out that:

the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. [FN80]

Hamilton further noted that the checks on a President include that he shall be "liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." [FN81]

Thus, the Framers explained the wisdom, and perhaps also the constitutional necessity, of the idea that public judgment with respect to the President be ***2161** rendered not by a prosecutor or jury, but by the Congress. A prosecutor acts to vindicate harm to the public, not to any private individual (unlike in a civil case such as Clinton v. Jones). The decision to vindicate harm to the public caused by the President, no matter how he caused it, should belong to the Congress in the first instance.

Why is the President different from Members of Congress or Supreme Court Justices or Cabinet officials? The Constitution vests the entire executive power in a single President: the powers of the Commander in Chief of the Army and the Navy, the power to command the Executive Departments, the power shared with the Senate to make treaties and to appoint Ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant reprieves and pardons. [FN82]

While federal prosecutors have credibly prosecuted Cabinet officers, White House officials, and other friends and associates of the President, a credible determination by a federal prosecutor to indict (or not indict) the President himself would be nigh impossible. The experience of recent years has only reinforced the wisdom of the Framers.

What, then, should happen? When nonfrivolous allegations or evidence of wrongdoing by the President is received by a prosecutor, that evidence should be forwarded to the House of Representatives. If Congress declines to investigate, or to impeach and remove the President, there can be no criminal prosecution of the President at least until his term in office expires. [FN83] (Most criminal investigations include multiple potential defendants, so the criminal investigation as a whole generally might proceed, depending on the circumstances.) As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President. There is simply no danger that such crimes would go criminally unpunished; the only question is when they can be punished.

F. THE PRESIDENT'S PRIVILEGES

The following statutory language is proposed:

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United

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States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by federal statute or rule that refers specifically to the privileges ***2162** available to government officials or agencies in grand jury or criminal trial proceedings.

One major cause of delay in independent counsel investigations has been the repeated assertion of various executive privileges. The privilege assertions not only force the President and various independent counsels into adversary postures, but they also have undermined the independent counsel's ability to conduct an expeditious and thorough investigation. During the last quarter- century, the federal courts have resolved many of the executive privilege issues that have arisen during criminal investigations. [FN84] In particular, the Supreme Court's 1974 decision in United States v. Nixon, [FN85] the Eighth Circuit's 1997 decision in In re Grand Jury Subpoena Duces Tecum, [FN86] and Judge Silberman's 1990 concurrence in United States v. North [FN87] (as well as a subsequent 1997 D.C. Circuit decision in In re Sealed Case [FN88]) have essentially defined the boundaries of the executive privileges that the President may assert in federal grand jury or criminal proceedings. The result of those cases is clear: the courts may not enforce a President's privilege claim (other than one based on national security) in response to a grand jury subpoena or a criminal trial subpoena sought by the United States.

Any dire claims that this rule disables the Presidency are overstated, moreover, because the President is always free to withhold other sensitive or critical information if he finds it necessary. [FN89] To do so, a President must order the federal prosecutor not to seek the information and must fire the prosecutor if he refuses (as President Nixon fired Archibald Cox). [FN90] Such action would surely focus substantial public attention on the President's privilege claims, but if the President's argument is as strong as he purportedly believes, he should (and must) be able to explain it to the Congress and the public. But Nixon, and the cases since Nixon, establish that the President cannot rely on the courts to protect him except with respect to national security information. [FN91]

***2163** The current law of governmental privileges available in criminal proceedings derives from two sources: (1) Section 535 of Title 28, which requires all executive branch officials to disclose any information to law enforcement regarding possible criminal activity by a member of the executive branch, thus overriding any purported common-law privileges available to the President; and (2) the Supreme Court's decision in Nixon regarding the scope of the constitutional executive privilege for presidential communications available to the President under article II of the Constitution.

1. Non-Constitutional Executive Privileges

Federal Rule of Evidence 501 provides that privileges in federal criminal trials and grand jury proceedings are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except as "provided by Act of Congress" or the Constitution. Section 535(b) of Title 28 makes clear for purposes of federal criminal proceedings that the President may not maintain any common-law privilege claim such as the governmental attorney-client and work product privileges that President Clinton asserted in the Whitewater investigation. The statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reportedly to the Attorney General by the head of the department or agency.... [FN92]

In its decision in In re Grand Jury Subpoena, the Eighth Circuit labeled the statute "significant," and stated that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. [FN93]

Some have attempted to dismiss this statute, arguing that it contains an implicit exception for information received by government attorneys. [FN94] That ***2164** argument contravenes the clear and all-encompassing language of the statute. The statute contains no distinction between information obtained by government attorneys and that obtained by other government employees. In addition, Congress included a specific exception to this disclosure obligation for "class es of information" as to which the Attorney General "directs otherwise," [FN95] and the Attorney General has not exempted information obtained by government attorneys representing the government. As a matter of elementary

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statutory construction, that explicit exception confirms the statute's plain meaning--and no further exceptions can be judicially inferred or created. [FN96]

The legislative history supports that conclusion as well. The House Committee Report accompanying § 535 stated that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." [FN97] The report emphasizes that " i f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have complete cooperation from the department or agency concerned." [FN98] The Justice Department supported the legislation:

The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law- enforcement officer of the Government is to have free access to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office. [FN99]

In addition, the President's official counsels have traditionally recognized this obligation. For example, Lloyd Cutler, who served as White House Counsel in two Administrations, has stated that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." [FN100] Mr. Cutler noted that there is a "Government rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible ***2165** violation of a criminal statute." [FN101] Mr. Cutler further remarked that " w hen you hear of a charge and you talk to someone in the White House ... about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" [FN102]

Similarly, twenty-five years ago, after White House Counsel John Dean had resigned, Robert Bork was asked whether he would consider becoming President Nixon's official White House Counsel. Bork asked Chief of Staff Alexander Haig whether he would be on the government payroll and was told that he would be. He then explained to Haig that "[a] government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the president, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." [FN103] (Bork ultimately did not receive the job).

In the same vein, the 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a possible violation of law. If there is a reasonable suspicion of a crime ... about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." [FN104]

Some have argued against this commonsense conclusion, pointing for apparent support to several unpublished Office of Legal Counsel (OLC) memoranda--but the Eighth Circuit quickly and correctly concluded they were totally inapposite. [FN105] The OLC memoranda do not apply to situations where a government attorney represents a government agency and learns information during ***2166** the course of her official representation of that agency. [FN106]

In short, § 535 refutes any claim of an executive common-law privilege (including a governmental attorney-client or work product privilege) in federal criminal proceedings in response to a grand jury or trial subpoena sought by the United States.

2. Constitutionally Based Executive Privileges

Section 535, of course, does not prevent the President from asserting constitutionally based privileges. In United States v. Nixon, [FN107] the Supreme Court applied the executive privilege for presidential communications, which the President had asserted in response to a criminal trial subpoena sought by the United States. For purposes of criminal cases where the United States has sought a subpoena, the Court concluded that executive privilege protects only national security and foreign affairs information. [FN108]

The dispute in Nixon arose in connection with a criminal trial of seven individuals, including former White House officials. The District Court issued a trial subpoena sought by the United States (represented by the special

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prosecutor) to obtain tape recordings of conversations among President Nixon and various high-level White House officials, including White House Counsel John Dean. [FN109] President Nixon resisted production of the tapes, citing the executive privilege for presidential communications.

In the Supreme Court, President Nixon argued that the subpoena did not meet the threshold requirements under Federal Rule of Criminal Procedure 17 of relevance and admissibility. [FN110] He also asserted executive privilege, citing article II of the Constitution. [FN111] President Nixon contended that the executive privilege for presidential communications was absolute and that the courts could not compel production of the tapes. Even if the privilege were not absolute and "even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items," President Nixon argued that "the Special Prosecutor must demonstrate a unique and compelling need to overcome ***2167** the privileged nature of the materials." [FN112] President Nixon thus argued in the alternative for some heightened showing, not dissimilar to the standard applied by the D.C. Circuit in Nixon v. Sirica, where the Court of Appeals held that the privilege claim of President Nixon was overcome by the "uniquely powerful" showing made by the special prosecutor. [FN113]

The Supreme Court found that the special prosecutor had met the relevance and admissibility requirements of Federal Rule of Criminal Procedure 17 for trial subpoenas: "there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment" and there was "a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment." [FN114]

The Court recognized, based on Article II, a "presumptive privilege for Presidential communications." [FN115] The privilege derived, the Court said, from the Constitution and from the "valid need for protection of communications between high Government officials and those who advise and assist them"--the "importance" of which "is too plain to require further discussion." [FN116] The Court stated that " t he expectation of a President to the confidentiality of his conversations and correspondence ... has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." [FN117] The privilege, the Court said, was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." [FN118]

However, the Court stated that the tapes, by President Nixon's concession, did not reveal military or diplomatic secrets and thus did not implicate the President's authority "as Commander-in-Chief and as the Nation's organ for foreign affairs." [FN119] The Court therefore found that the President possessed only a "generalized interest in confidentiality." [FN120]

The Court then struck the balance between the President's generalized interest in confidentiality and the "need for relevant evidence in criminal trials." [FN121] In this regard, the Court said it was important to distinguish the need for evidence in criminal proceedings from the need for evidence in congressional proceedings, civil cases, or Freedom of Information Act (FOIA) actions. In the latter situations, it may well be that the executive privilege for presidential ***2168** communications is absolute (or in the case of congressional subpoenas, a nonjusticiable question). However, the criminal context is different. As the Court emphasized, the traditional commitment to the rule of law is "nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." [FN122] The Court further noted that " t he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. ... To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." [FN123]

The Court then held that the need for relevant evidence in criminal proceedings outweighed the President's "generalized interest in confidentiality" unless the executive privilege claim was founded on a claim of state secrets:

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair

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adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. [FN124]

The Court thus accepted neither President Nixon's primary argument that the privilege was absolute, nor his secondary argument that the Special Prosecutor must show a "unique and compelling need" to obtain the tapes. The Court found that the showing under Rule 17 itself demonstrated a need sufficient to obtain non-state secret presidential communications in criminal proceedings. The Court thus ordered that, upon remand, "[s]tatements that meet the test of admissibility and relevance" must be produced to the special prosecutor. [FN125] Nixon, in short, held that the showing required under Rule 17 (relevance and admissibility for a trial subpoena; relevance for a grand jury subpoena) itself demonstrates the specific need for evidence that overrides the President's ***2169** general need for confidentiality. [FN126]

Lest there be any doubt about the meaning of Nixon, a foray into internal memoranda available from the Library of Congress provides historical confirmation. The Court specifically and consciously rejected the suggestion of President Nixon and the D.C. Circuit in Nixon v. Sirica that there be a case-by-case balancing test in which the prosecutor or grand jury must make some particularized, compelling showing in addition to the showing required by Rule 17. The memoranda among the Justices reveal some initial disagreement regarding this precise question, with Justice Byron White being in favor of the position ultimately adopted and Justice Lewis Powell favoring some undefined higher showing of need. The case was argued on July 8, 1974. On July 12, Justice Powell wrote to the Justices that "[w]e were not entirely in agreement as to the standard to be met in overcoming the privilege." [FN127] Justice White wrote on July 15, 1974:

[T]he privilege does not extend to evidence that is relevant and admissible in a criminal prosecution. The public interest in enforcing its laws and the rights of defendants to make their defense supply whatever necessity or compelling need that may be required to reject a claim of privilege when there has been a sufficient showing that the President is in possession of relevant and admissible evidence. ... I, therefore, differ with Nixon v. Sirica insofar as it held that the Special Prosecutor must make some special showing beyond relevance and admissibility. Necessarily, then, the trial judge, who followed Nixon v. Sirica, did not apply the correct standard in this case. [FN128]

After the Chief Justice circulated a new draft that still did not fully accord with Justice White's views, Justice White wrote the Conference on July 18, 1974:

[The current draft] impl[ies] that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, my view is that relevance and admissibility themselves provide whatever compelling need must be shown. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and admissibility. [FN129]

***2170** Justice White felt sufficiently strong about this issue to add that "it is likely that I shall write separately if your draft becomes the opinion of the Court." [FN130]

On July 22, Justice Potter Stewart circulated an alternative draft on the privilege issue containing the suggestions of Justice White. The draft no longer contained any reference to a heightened standard, and the cover memo indicated that the opinion had received the approval of Justices White and Thurgood Marshall. The Chief Justice then quickly incorporated the Stewart section into his opinion and recirculated the entire draft the next day, July 23. All of the Justices then joined, and the opinion was issued on July 24, 1974. [FN131]

This interpretation of Nixon was advanced by Judge Silberman in his 1990 concurrence in United States v. North.

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[FN132] The district court in that case, Judge Silberman noted, had interpreted Nixon as "constructing a very high barrier to a criminal defendant who wishes to call a President or ex- President who, it is asserted, will give evidence relevant to the defense." [FN133] Finding "it instructive to note how easily the Court in Nixon was satisfied that the tapes sought by the Special Prosecutor ... were relevant," Judge Silberman indicated that in cases where national security is not asserted, no special showing other than relevance is necessary even after executive privilege is claimed. [FN134] Judge Silberman continued:

To be sure, the Court used the language "essential to the justice of the pending criminal case" and "demonstrated specific need for evidence" in describing what was needed to overcome the President's qualified privilege. But the Court does not appear to have meant anything more than the showing that satisfied Rule 17(c). Nowhere in the opinion does the Court ever describe any offer by the Special Prosecutor other than the rather perfunctory showing of relevance .... Even in the section of the opinion dealing with executive privilege, the Court stated that "the President's broad interest in confidentiality ***2171** of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." [FN135]

In the 1997 dispute between President Clinton and the Whitewater Independent Counsel over the governmental attorney-client privilege, the Eighth Circuit addressed President Clinton's contention that Nixon set forth some higher standard for executive branch documents than that required by Rule 17. The Court concluded otherwise, stating that "Nixon is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." [FN136] The Court stated that it "doubt ed " that a case-by-case need determination "constitutes the proper need threshold" set forth in Nixon. [FN137]

The D.C. Circuit also addressed an executive privilege dispute between the President and Independent Counsel Donald Smaltz in the investigation of former Secretary of Agriculture Michael Espy. [FN138] The decision is essentially in accord with the above analysis, although certain parts advance a slightly different articulation. In particular, noting Judge Silberman's opinion in North, the court first opined that it would be "strange" if Nixon required nothing more to overcome the presidential privilege than the showing required by Rule 17, because then the privilege "would have no practical benefit." [FN139] Of course, Nixon indicated that the privilege may well be absolute in civil, congressional, and FOIA proceedings; it is only in the discrete realm of criminal proceedings where the privilege may be overcome. [FN140]

In any event, any difference between Judge Silberman and this D.C. Circuit panel is more apparent than real, more procedural than substantive. At the outset, it is significant that the Court specifically rejected the President's argument that "the information sought must be shown to be critical to an accurate judicial determination." [FN141] That argument, the Court said, "simply is incompatible with the Supreme Court's repeated emphasis in Nixon on the importance ***2172** of access to relevant evidence in a criminal proceeding." [FN142] The court concluded that in grand jury cases where national security is not at issue and where the Rule 17 standard is satisfied, presidential communications can be obtained, first, if "each discrete group of the subpoenaed materials likely contains important evidence," and, second, if the evidence "is not available with due diligence elsewhere." [FN143]

The court stated that this first component "can be expected to have limited impact." [FN144] In the grand jury setting, moreover, "the fact that evidence covered by the presidential communications privilege may be inadmissible should not affect a court's determination of the grand jury's need for the material." [FN145] The court further stated that the second component also will be "easily" satisfied when "an immediate White House advisor is being investigated for criminal behavior." [FN146] Even in cases where a person outside the White House is under investigation, the court said that this second component still will be satisfied when the proponent can "demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove." [FN147] Of course, that showing can be made in virtually all investigations--few facts are ever fully confirmed or disproved. The court further stated that this standard would not impose "too heavy" a burden on the subpoena proponent. [FN148]

In short, the D.C. Circuit opinion does not deviate in substance from Nixon, the Eighth Circuit's opinion, or Judge Silberman's approach; it differs, if at all, only with respect to the time when relevant information can be obtained, as the court itself recognized. [FN149]

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege

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Nixon is important not only for constitutionally based privileges, but also because it establishes a principle that applies to other common law privilege claims that the President might raise. For example, even if § 535 of Title 28 were erased from the U.S. Code, Nixon itself demonstrates, as the Eighth *2173 Circuit held, that any claim of governmental attorney- client or work product privilege would be similarly overcome in federal criminal proceedings.

The judicial process in this country is deeply committed to the principle that "the public ... has a right to every [person's] evidence." [FN150] Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." [FN151] Privileges thus "are not lightly created nor expansively construed." [FN152] In light of these settled principles, the Supreme Court has recognized privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the states, and is justified by overriding public policy considerations.

In criminal proceedings, a governmental attorney-client or work product privilege has no roots whatsoever. There is no case, statute, rule, or agency opinion suggesting that a department or agency of the United States (or any state governmental entity) can maintain a full-blown governmental attorney- client or work product privilege in federal criminal or grand jury proceedings. [FN153]

Nixon, moreover, held that even the deeply rooted and constitutionally mandated executive privilege for presidential communications did not override the need for relevant evidence in criminal proceedings, except when a specific claim of national security was at issue. The decision in Nixon demonstrates that a governmental attorney-client and work product privilege (the other two privileges that have been at issue in investigations of executive branch officials) also cannot overcome the need for relevant evidence in criminal proceedings. If the constitutionally rooted executive privilege for presidential communications is overcome by the need for relevant evidence in criminal proceedings, the result cannot be different for a newly conceived governmental attorney-client and work product privilege. A fortiori, a governmental attorney-client or work product privilege fails in federal criminal proceedings.

4. The Policy of Executive Privileges

Section 535, the Eighth Circuit decision, and the Supreme Court decision in Nixon demonstrate as a matter of law that the only executive privilege currently valid against the United States in federal criminal proceedings is a national security/state secrets privilege. As a policy matter, that rule reflects the proper *2174 balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings.

Government officials, even government attorneys, are public officials who work for the people. Any claim to confidentiality against the United States stands on a radically different footing than a claim made by a private party. The Supreme Court recognized the difference between such public and private responsibilities in declining to apply an attorney-like privilege to an accountant's work papers:

> The Hickman work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. ... [T]he independent auditor assumes a public responsibility transcending any employment relationship with the client. ... This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [FN154]

For this same reason, in addressing the narrow question of a governmental attorney-client privilege, respected commentators and the American Law Institute (ALI) reject equating private corporations with public entities. The McCormick treatise states that "[w]here the entity in question is governmental ..., significantly different considerations appear." [FN155] Professors Wright and Graham note that "the costs of the government privilege may be very high. ... L egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information." [FN156] Indeed, the ALI's Restatement (Third) of the Law Governing Lawyers states that the rules for private lawyers do not translate to public lawyers; instead, " m ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for

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information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." [FN157]

These commonsense propositions led the Eighth Circuit flatly to reject any claim that a governmental or executive attorney-client or work product privilege could be asserted against the federal grand jury. The court stated that the "general duty of public service calls upon government employees and agencies ***2175** to favor disclosure over concealment." [FN158] Citing Arthur Young, the court explained that " t he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." [FN159] The court added:

[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. [FN160]

If the law embodied the contrary position, a government official (including the President or White House Counsel) safely could tell a White House or other agency attorney (or other official) that he destroyed subpoenaed documents, paid off potential witnesses, erased a subpoenaed tape, or concealed subpoenaed materials--or worse. The courts have rightly rejected the executive's attempt to conceal such information, and Congress should codify those results to prevent future Presidents from trying the same gambit.

Supporters of broad executive privileges contend that limiting privileges will have a chilling effect--that the presidency might be disabled and that governmental officials might be less forthcoming to a President or government attorney if they knew that the information could be disclosed in criminal proceedings. This argument, however, was rejected by the Supreme Court in Nixon (in the context of the all-encompassing presidential communications privilege) and was rejected by the Eighth Circuit (in the context of governmental attorney-client and work product privileges).

It is surely true that a President and government attorneys must be able to obtain information in order to perform their functions, but that assertion proves nothing. The interest in gathering facts to perform those functions does not require the further step of concealing facts from a federal grand jury if they are (or become) relevant to a federal criminal investigation.

As noted above, the dire claims about the disabling of the presidency are false, moreover, because the President is always free to withhold other information if he finds that necessary. To do so, a President must simply order the federal prosecutor not to seek the information and fire him if he refuses, thus taking political responsibility for his privilege claims. [FN161]

The chilling-effect argument is illusory, in any event, because executive branch employees and attorneys know that they do not control the ultimate ***2176** assertion of privilege in any forum. [FN162] As a result, the government employee can have no expectation of confidentiality and no assurance that his communications or work product will remain confidential if called for in federal criminal proceedings. Thus, government employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.

In addition, the frequency of disclosure will be low. Even in today's environment, the overwhelming majority of White House business and federal agency work never comes under grand jury scrutiny. [FN163] Grand jury investigations obviously occur more often than criminal trials, but grand juries operate in secret and thus present little risk of chilling particular conversations, as the Supreme Court has emphasized. [FN164]

Finally, the debate over privileges, particularly a governmental attorney- client privilege, often is framed in generalities and fails to consider actual situations where the issue might arise. There are three basic situations where a government attorney or official might obtain information from other government employees and where the information might become relevant to a subsequent criminal investigation.

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The first situation occurs when the employee seeks advice from a government attorney or official about his possible future course of conduct. If the employee follows the advice and does not commit a criminal act, it is hard to see what chill or harm might be caused by subsequent disclosure of the information. On the other hand, if the employee ignores the advice and commits a criminal act, then what possible governmental interest is there in protecting the employee from the charge that he knew his activity was criminal? Moreover, if the attorney mistakenly advises the employee that a proposed course of conduct is not criminal, even the employee will wish that communication disclosed if he is subsequently prosecuted. In the end, the only employee seeking advice about proposed conduct who will be chilled is the employee who hopes to obtain a government attorney's blessing for potentially criminal conduct. That scenario, however, hardly justifies creation of a far-reaching privilege.

The second category arises where the employee seeks to discuss past conduct that might be criminal. In that situation, of course, the primary interest of the United States is and must be in detecting and prosecuting crime, as the OLC repeatedly has emphasized. The United States has no interest in harboring criminals in government employment, even at high levels. Agency attorneys employed by and representing the United States are not authorized to act as criminal defense attorneys against the United States.

***2177** The OLC thus has long rejected any suggestion that the United States can participate on both sides of a criminal investigation. [FN165] That explains why there is no tradition suggesting that a government attorney can consult with an employee about the employee's past criminal conduct and then refuse to disclose that information to the federal grand jury. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States, so an agency cannot be adverse to the United States in a criminal prosecution. When an agency becomes aware of internal wrongdoing, the agency's sole interest is to ferret it out, and there can be no risk of endangering a governmental interest by doing so and by disclosing the results to federal law enforcement authorities.

The third situation occurs not where the employee initiates conversation, but where the agency elicits information from its employees about some event. Government agencies and government agency attorneys often have a legitimate interest in obtaining facts about a particular event; the fact- gathering process enables an agency head (or delegate) to discipline employees, institute new policies that will prevent similar errors in the future, inform the Congress or the public of the facts, or merely deal with the latest political controversy. Thus, the White House has conducted numerous internal investigations, as have many agencies and inspectors general. Given the number of such investigations, a far-reaching and novel governmental attorney-client privilege is, by definition, unnecessary to encourage such activity. [FN166] Unlike a corporation (which is subject to indictment), no legitimate government agency would be, or has been, discouraged from conducting internal factfinding by the knowledge that any evidence of crime uncovered will in fact be presented to the relevant law enforcement authorities. Indeed, this was the premise behind the enactment of Section 535 (and the many inspector general statutes as well).

CONCLUSION

Outside federal prosecutors are here to stay. They have existed at least since President Grant's Administration. As we have seen over the last twenty- five ***2178** years, the system of outside prosecutors can make an extraordinary difference in how our nation is governed. As Justice Scalia stated, the debate over a special counsel is about power--that is, "[t]he allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish ...." [FN167]

The fundamental flaw with the current independent counsel statute is that it creates, almost by definition, a scenario whereby the President and the independent counsel are adversaries. From that basic mistake flows most of the other problems that critics identify in the statute. Clarifying the role of the President in the manner proposed in this article would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.

[FNa1]. Mr. Kavanaugh served as Associate Counsel in the Office of the Whitewater Independent Counsel from 1994 to 1997 and also for a period in 1998. The views reflected in this article are his own.

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[FN1]. The Attorney General is a political actor, as are all high officials of the Justice Department. In other words, the Attorney General supports not only the ideas and policies of the incumbent administration but also publicly supports candidates for elective office who espouse those policies.

[FN2]. Mr. Cox has noted that the "normal position" of the Justice Department is "one for defending an expanding executive privilege," whereas the Special Prosecutor in Watergate and other subsequent investigations "were challenging executive privilege. So there are some real conflicts." 67th Annual Judicial Conference of the United States Court of Appeals for the Fourth Circuit, The Independent Counsel Process: Is It Broken and How Should It Be Fixed?, at 138 (June 27, 1997) [hereinafter Fourth Circuit Judicial Conference] (emphasis added). The Justice Department's brief in the litigation between the President and the Whitewater Independent Counsel Kenneth W. Starr demonstrated this point. The Justice Department has agreed with neither the White House nor the Independent Counsel about the proper scope of privilege. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Office of the President v. Office of Independent Counsel at 20, 117 S.Ct. 2482 (1997) (No. 96-1783) ("The United States has compelling interests in investigating and prosecuting crimes--inside or outside the government--and the Justice Department's performance of those tasks is aided by the duty of the President and other government officials to report evidence of criminal violations to the Attorney General. At the same time ... the President must have access to legal advice that is frank, fully informed, and confidential.").

[FN3]. 1975 REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, at 137- 38.

[FN4]. 28 U.S.C. §§ 591-99 (1994).

[FN5]. The Olympian term "independent counsel" has always promised more than it could deliver. Moreover, the term would be inappropriate under the regime proposed here because "independent" connotes a counsel appointed outside the Executive Branch and accountable to no one. The Ethics in Government Act initially called for the appointment of a "special prosecutor," but Congress changed the name in 1982 to "independent counsel." The term "special counsel" best captures the position and is used here in describing the proposed regime.

[FN6]. 487 U.S. 654 (1988).

[FN7]. See George D. Brown, The Gratuities Offense, and the RICO Approach to Independent Counsel Jurisdiction, 86 GEO. L.J. 2045, 2049 (1998).

[FN8]. 78 F.3d 1313 (8th Cir.), cert. denied, 1 17 S.Ct. 76 (1996).

[FN9]. The Justice Department is a department within the executive branch whose head is appointed by the President. See 28 U.S.C. § 501 (1994) ("The Department of Justice is an executive department of the United States at the seat of Government."); 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

[FN10]. KATY J. HARRIGER, THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 153 (1992) (emphasis added) (quotation marks omitted).

[FN11]. 28 U.S.C. § 515 (1994); 28 U.S.C. § 543 (1994).

[FN12]. See infra text accompanying notes 28-40.

[FN13]. 28 U.S.C. § 592(c)(1)(A). The Attorney General's decision is judicially unreviewable, however, which means that threat of impeachment or other congressional retaliation is the only legally enforceable check requiring the Attorney General to enforce the law.

[FN14]. 28 U.S.C. § 592(c).

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[FN15]. Id. § 593(b).

[FN16]. Id. § 593(b)(3).

[FN17]. Morrison, 487 U.S. at 679.

[FN18]. 28 U.S.C. § 594(a)(9). The symbolism of this nomenclature is important and should be retained in any future legislation. Criminal defendants (and other critics) inevitably try to imply to juries (and the public) that the appointed counsel is somehow an extra-governmental official who does not warrant the same respect as prosecutors representing the United States. In the 1996 trial of Jim Guy Tucker, James McDougal, and Susan McDougal, for example, the defendants refused to refer to the prosecutors as the "United States," arguing that "they are independent Counsel appointed under a special act." The Court put a quick end to this tactic: "The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins." United States v. McDougal, Tucker, and McDougal, No. LR-CR-95-173, Tr. at 4525-27 (E.D. Ark. Apr. 11, 1996).

[FN19]. 28 U.S.C. § 594(h).

[FN20]. Id. § 593(c).

[FN21]. Julie R. O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 505 (1996).

[FN22]. TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL 134 (1989).

[FN23]. Fourth Circuit Judicial Conference, supra note 2, at 133.

[FN24]. Id.

[FN25]. Reauthorization of the Independent Counsel Law: Hearing on S. 3131 Before the Subcomm. on Oversight of the Senate Comm. on Governmental Affairs, 102nd Cong. 15 (1992) (testimony of George J. Terwilliger III Deputy Attorney General of the United States).

[FN26]. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[FN27]. In the final pages of his dissent, Justice Scalia also pointed out what he termed the "[un]fairness" of an independent counsel investigation, and he did so in broad terms that arguably seem to apply to all special counsel, whether appointed by a court or by the President (or Attorney General). In comparing a special counsel to an "ordinary" Justice Department prosecutor, however, Justice Scalia appeared to rely on a romantic vision of "ordinary" federal prosecutors. In fact, an "ordinary" federal prosecutor is at least as likely to engage in hardball, near-the-edge tactics as a special counsel whose every move is publicly tracked, analyzed, and criticized. Moreover, the only concrete measure of over-aggressiveness is the prosecutor's conviction rate. A careful prosecutor should not bring many cases that end in outright acquittal on all counts. As it turns out, the record of independent counsels appointed under the statute is better than that of the Justice Department. Only one independent counsel appointed under the statute has ever suffered an outright jury acquittal, which is an impressive record, particularly given the skilled attorneys retained by the defendants in such cases.

Justice Scalia also pointed out that ordinary federal prosecutors suffer from constraints on resources and that independent counsels generally do not. Morrison, 487 U.S. at 727-33 (Scalia, J., dissenting). That is not an entirely accurate or persuasive argument. First, the fact that some federal prosecutors' offices may be understaffed and thus unable to prosecute federal crimes that should be prosecuted is hardly a model for investigations of possible crimes by our highest national officials. Indeed, that is the kind of backwards logic that Justice Scalia ordinarily ridicules. Second, in allocating its enormous annual appropriation, the Department of Justice regularly determines that certain kinds of crimes warrant intensive investigation and prosecution, whether it be drug distribution or health care fraud

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or abortion clinic bombings or church burnings or the like. By means of the independent counsel statute, Congress has simply made the altogether rational judgment that public corruption by high federal officials should be one such area of concentration. That policy judgment hardly warrants condemnation. It is worth noting, in that regard, that the United States Attorney's office for the District of Columbia recently has received severe public criticism for devoting insufficient resources to public corruption cases. See. e.g., Paul Butler, Why Won't the Prosecutor Prosecute?, LEGAL TIMES, Jan. 19, 1998, at 19 (discussing the lack of prosecutions for corruption among public officials). Third, contrary to the implicit undercurrent of Justice Scalia's discussion of "fairness," the Justice Department itself devotes extraordinary resources to numerous high-profile public corruption cases. The Congressman Dan Rostenkowski case, the Mayor Marion Barry prosecution, the campaign fundraising investigation, the Governor Fife Symington case in Arizona, and the Congressman Joseph McDade investigation in Pennsylvania are all recent examples of massive, single-minded, intense, and occasionally out-of-control (in the case of Congressman McDade, perhaps) investigations. The history of independent counsel investigations certainly measures up no worse than those investigations. Fourth, any true comparison of resource constraints is, in the end, virtually impossible because the Justice Department never identifies exactly how much money its prosecutors and the FBI spend on particular investigations and prosecutions; thus, the Department is able to "hide" its costs and avoid the kind of public and congressional scrutiny that independent counsels constantly face. How much money did the United States spend pursuing Congressman McDade? Governor Symington? Mayor Barry? A lot.

[FN28]. See RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT (C. Vann Woodward ed., 1974).

[FN29]. See EASTLAND, supra note 22, at 8; DAVID A. LOGAN, HISTORICAL USES OF A SPECIAL PROSECUTOR: THE ADMINISTRATIONS OF PRESIDENTS GRANT, COOLIDGE AND TRUMAN 7 (Congressional Research Service Nov. 23, 1973).

[FN31]. Id. at 8.

[FN30]. EASTLAND, supra note 22, at 8, 14.

[FN32]. S.J. RES. 54, 68th Cong. (1924).

[FN33]. This article advocates the procedure of presidential appointment and Senate confirmation used during the Teapot Dome Scandal.

[FN34]. EASTLAND, supra note 22, at 8-9.

[FN35]. Id. at 8. The Justice Department was not created until 1870, and there was very little federal criminal law before the 20th century.

[FN36]. 28 U.S.C. §§ 591-99 (1994).

[FN37]. See Reauthorization Hearings, supra note 25, at 15 (1992).

[FN38]. The independent counsel statute states: "The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States." 28 U.S.C. § 593(b)(2). This provision on its face disqualified Mr. Fiske from appointment as independent counsel under the statute. In the public law reauthorizing the statute in 1994, however, Congress stated that the usual disqualification did not apply to persons appointed as regulatory independent counsel, thus granting the Special Division discretion whether to appoint Mr. Fiske. See Pub. L. No. 103-270, §§ 7(a), (h). The court chose not to appoint Mr. Fiske on the theory that, notwithstanding Congress' ad hoc suspension of § 593(b)(2), the policy, if not the strict terms of the provision, still disqualified Mr. Fiske because he was an administration official.

[FN39]. EASTLAND, supra note 22, at 8. This tradition is not confined to the federal system. The state of New York also has a tradition of appointing special prosecutors (Thomas Dewey, for example) to investigate and prosecute

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public corruption cases. See Harriger, supra note 10, at 3.

[FN40]. Id. at 15. At the same time, there is a long tradition of congressional investigation of executive branch malfeasance. These investigations often occur simultaneously with criminal investigations of executive branch officials. Some of these congressional investigations have led to the resignation of executive branch officials, and sometimes efforts have been made to impeach (although no executive branch official has been impeached by the House and convicted by the Senate). Congressional investigations historically have been the primary manner in which the public learns whether executive branch officials have committed malfeasance in office. This tradition has continued to the present day. This article argues that Congress must continue to have primary responsibility for determining whether the President should be removed.

[FN41]. Although the Supreme Court upheld the system of court-appointed outside counsel in Morrison v. Olson, the separation of powers analysis in that case is quite inconsistent with the analysis in more recent cases such as Edmond v. United States, 117 S.Ct. 1573 (1997). In particular, Morrison held that the independent counsel was an "inferior officer" whose appointment thus could be wrested from the President. Morrison, 487 U.S. at 671-72. In Edmond, however, the Court said that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." Edmond, 117 S.Ct. at 1581. Under this mode of analysis, an independent counsel could not realistically be considered an inferior officer. Thus, if the issue were presented today and there were no stare decisis concerns, there is little telling how the Court would resolve the issue. Justices Anthony Kennedy, Clarence Thomas, David Souter, Ruth Bader Ginsburg, and Stephen Breyer have been appointed to the Court since the decision in Morrison.

[FN42]. This was a foreseeable flaw that Justice Scalia correctly identified in his dissent. See Morrison, 487 U.S. at 730 (Scalia, J., dissenting).

[FN43]. See, e.g., CNN Capital Gang (CNN Television Broadcast, Dec. 13, 1997) (Senator Orrin Hatch questioning Attorney General Reno's decision not to appoint an independent counsel to investigate Vice President Al Gore's fundraising, calling it a "conflict of interest").

[FN44]. Some might say that we should find totally apolitical persons to serve as independent counsel. But even if that were desirable (in our democracy, one would hope, all people would be active participants in a variety of political and social causes), "[n]early everybody who is qualified to be independent counsel has some kind of political involvement in their background." Fourth (Circuit Judicial Conference, supra note 2, at 39 (comments of Special Division Judge David B. Sentelle).

[FN45]. Even with respect to ordinary cases, Eric Holder, a former United States Attorney for the District of Columbia and now Deputy Attorney General, has written that a prosecutor cannot remain publicly silent in the face of challenges to the prosecutor's ethics and motivations. Eric H. Holder & Kevin A. Ohlson, Dealing With the Media in High-Profile White Collar Crime Cases: The Prosecutor's Dilemma (on file with author).

[FN46]. In the Whitewater investigation, the independent counsel obtained the convictions of Jim Guy Tucker, James McDougal, and Susan McDougal in June 1996 despite sustained attacks on his credibility. In a subsequent August 1996 Arkansas trial of two bankers, the result was a hung jury.

[FN47]. See, e.g., Ruth Marcus, The Prosecutor: Following Leads or Digging Dirt?, WASH. POST, Jan. 30, 1998, at A1 (calling Faircloth a "leading crusader" against Fiske).

[FN48]. Edmond v. United States, 117 S.Ct. 1573, 1579 (1997) (quotations omitted). As Justice Joseph Story noted, "If [the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favur." 3 Joseph Story, Commentaries on the Constitution of the United States 375 (1833).

[FN49]. THE FEDERALIST NO. 76, at 457-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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[FN50]. Edmond, 117 S.Ct. at 1579.

[FN51]. 28 U.S.C. § 596(a)(1).

[FN52]. Id. § 515; id. § 543.

[FN53]. Morrison, 487 U.S. at 723-24 & n.4 (Scalia, J., dissenting). Justice Scalia stated that "the President must have control over all exercises of the executive power" and that "failure to accept supervision" constitutes "good cause" for removal. Id. at 724 n.4 (Scalia, J., dissenting). That, in essence, defines "good cause" such that it means little more than "at will." Although Justice Scalia disclaimed the logical conclusion of his position, it would seem that he believes, as the Court described his position, that "every officer of the United States exercising any part of [the Executive power] must serve at the pleasure of the President and be removable by him at will." Id. at 690 n.29 (majority opinion describing Justice Scalia's position).

[FN54]. Id. at 728-29 (Scalia, J., dissenting).

[FN55]. President Grant and President Truman's Attorney General also ordered dismissal of special prosecutors. See EASTLAND, supra note 22, at 14, 16.

[FN56]. See CNN Capital Gang, supra note 43 (Senator Hatch argued: "Who cares about the phone calls ... It's all the other stuff that ought to be investigated.").

[FN57]. Susan Schmidt & Roberto Suro, Troubled from the Start; Basic Conflict Impeded Justice Probe of Fundraising, WASH. POST, Oct. 3, 1997, at A1.

[FN58]. United States v. Tucker, 78 F.3d 1313, 1316-19 (8th Cir.1996).

[FN59]. That friction revealed itself, for example, in the investigation conducted by Independent Counsel Donald Smaltz.

[FN60]. Fourth Circuit Judicial Conference, supra note 2, at 91.

[FN61]. 28 U.S.C. § 594(h)(1)(B).

[FN62]. 28 U.S.C.A. § 594(h)(1) (West 1993), as amended by Pub. L. No. 103-270 § 3(o) (1994). After the 1994 revision, the statute also requires that the independent counsel submit to Congress "annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made." 28 U.S.C. § 595(a)(2).

[FN63]. 28 U.S.C. § 595(c).

[FN64]. See, e.g., The Independent Counsel Reauthorization Act of 1993: Hearing on S. 24 Before the Comm. on Governmental Affairs, 103d Cong. 49 (1993) (Professor Samuel Dash, Georgetown University Law Center, stating: "Independent counsel investigations and prosecutions carry out the responsibilities of the executive branch to enforce the Federal criminal laws. The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel.").

[FN65]. Congress has the power to provide privileges or immunities regardless whether they are constitutionally required. See Clinton v. Jones, 117 S.Ct. 1636, 1652 (1997) ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). On the other hand, Congress would not have the power to definitively say that a President is subject to indictment. The courts have the final word on the minimum level of immunity the Constitution affords the President. See id. ("If the Constitution embodied the rule

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that the President advocates, Congress, of course, could not repeal it.").

[FN66]. See U.S. CONST, art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

[FN67]. REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, supra note 3, at 122.

[FN68]. See Brief for Respondent, Cross-Petitioner at 101, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834) [hereinafter Brief for President Nixon].

[FN69]. Brief for the United States, Agnew v. United States (D. Md. 1974) (No. 73-0535).

[FN70]. Nixon v. Sirica, 487 F.2d 700, 757 (D.C. Cir.1973) (MacKinnon, J., concurring in part, dissenting in part).

[FN71]. Id.

[FN72]. Id.

[FN73]. 117 S.Ct. 1636 (1997).

[FN74]. See id. at 1639 (noting that suit was brought by "private citizen" for damages); id. at 1642 n.12 (noting that question presented involved "litigation of a private civil damages action"); id. at 1645 ("With respect to acts taken in his 'public characte '--that is official acts--the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts."); id. at 1648 n.36 (referring to "suits against the President for actions taken in his private capacity"); id. at 1650 ("We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office."); id. (referring to "burdens of private litigation"); id. at 1651 (referring to private plaintiff's "interest in bringing the case to trial"); id. at 1652 (referring to possibility that Congress could provide for "deferral of civil litigation").

[FN75]. Determining how to conduct an investigation or whether to seek an indictment is not a ministerial task, but involves the exercise of judgment and discretion. The exercise of judgment and discretion inevitably means that the decision cannot be separated, in the eyes of the public, from its political consequences.

[FN76]. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN77]. Id. at 397.

[FN78]. Id. at 398. This passage was written largely with respect to a debate over whether the Senate or the Supreme Court should try an impeachment. But the ideas and themes discussed in explaining why the Senate was superior to the Supreme Court in passing public judgment upon the conduct of the President apply, a fortiori, to a single prosecutor attempting to do so.

[FN79]. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966).

[FN80]. THE FEDERALIST NO. 65, supra note 76, at 398-99 (Alexander Hamilton).

[FN81]. THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).

[FN82]. U.S. CONST. art. II.

[FN83]. As indicated in the statutory language proposed by this article, Congress should take appropriate steps to

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ensure that the statute of limitations would not prevent prosecution of a President after he leaves office.

[FN84]. President Clinton has litigated privilege claims against both the Whitewater and Espy independent counsels. He also has raised privilege claims against the Justice Department. See S.Rep. No. 104-280, at 67-70, 82-83 (1996). The Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R.Rep. No. 104-849, at 152-53 (1996).

[FN85]. 418 U.S. 683 (1974).

[FN86]. 112 F.3d 910 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

[FN87]. 910 F.2d 843, 950-54 (D.C.Cir. 1990) (Silberman, J., concurring in part, dissenting in part).

[FN88]. 121 F.3d 729 (D.C.Cir. 1997).

[FN89]. This proposed language is premised on the assumption that a special counsel's motion to enforce a subpoena would be justiciable. The Court in Nixon so held, 418 U.S. at 697, and there is no reason to revisit that decision, particularly because the President retains authority to prevent such disputes from reaching the courts.

[FN90]. Even under the current "good cause" restriction, as Justice Scalia stated in Morrison, an inferior officer such as an independent counsel is removable for cause if he refuses to accept supervision. See Morrison, 487 U.S. at 724 n.4 (Scalia. J., dissenting).

[FN91]. Notwithstanding Nixon, it is at least theoretically conceivable that the Supreme Court might rule that the Constitution provides a greater scope of executive privileges than this section would grant. If so, then the Constitution would trump. See Clinton v. Jones, 117 S.Ct at 1652. But that is unlikely, given the clarity of Nixon.

[FN92]. 28 U.S.C. § 535(b). The subsection states in full:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless--

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

[FN93]. In re Grand Jury Subpoena, 112 F.3d at 920 (emphasis added).

[FN94]. See Petition for a Writ of Certiorari, Office of the President v. Office of Independent Counsel (No. 96-1783) cert. denied, 117 S.Ct. 22, 23 n.7 (1997).

[FN95]. 28 U.S.C. § 535 (b)(2).

[FN96]. See Honig v. Doe, 484 U.S. 305, 325 (1988) (stating a court is "not at liberty to engraft onto the statute an exception Congress chose not to create"). In general, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." Brogan v. United States, 118 S.Ct. 805, 811-12 (1998).

[FN97]. H.R.Rep. No. 83-2622, at 1 (1954) (emphasis added), reprinted in 1954 U.S.C.C.A.N. 3551, 3551.

[FN98]. Id. at 3552 (emphasis added).

[FN99]. Id. at 3553 (emphasis added). In an independent counsel investigation, the independent counsel is the official who receives information about matters within his jurisdiction. "When issuing ... subpoenas, an independent

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counsel stands in the place of the Attorney General." S.Rep. No. 100-123, at 22 (1987); see 28 U.S.C. § 594(a).

[FN100]. Lloyd N. Cutler, The Role of the Counsel to the President of the United States, 8 REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 470, 472 (1980).

[FN101]. Id.

[FN102]. Id.

[FN103]. A Conversation with Robert H. Bork, 26 D.C.B.REP. No. 3, at 9 (Dec. 1997-Jan. 1998).

[FN104]. White House Travel Office Management Review, 23 (1993) (emphases added). In addition, federal regulations require each agency to have a "designated agency ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. § 2635.107 (1997). The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. § 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." Id. (emphasis added).

[FN105]. In re Grand Jury Subpoena, 112 F.3d at 921 n.10. The Attorney General has authorized an exception to § 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. § 50.15), represent government employees in their personal capacities--for example, in civil suits alleging Bivens violations. The OLC memoranda address only the exception for these personal representations. See Office of Legal Counsel Memorandum, at 5 (Mar. 29, 1985) (analyzing duty under C.F.R. § 50.15 and U.S.C. § 535(b) of an Assistant U.S. Attorney who discovered information while representing Bivens defendants); Office of Legal Counsel Memorandum, at 1 (Apr. 3, 1979) (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); Office of Legal Counsel Memorandum, at 4 (Aug. 30, 1978) (analyzing under C.F.R. § 50.15 and U.S.C. § 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); Office of Legal Counsel Memorandum, at 1 (Nov. 30, 1976) (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages" and the employee has told the Assistant U.S. Attorney information that could incriminate the employee).

[FN106]. See 6 Opinion of the Off. of Legal Couns. 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535") (emphasis added). The OLC recognizes in the crucial distinction between representation of the personal interests of a government employee and representation of the governmental interests of a government agency. See, e.g., 4B Op. of the Off. of Legal Couns. 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[FN107]. 418 U.S. 683 (1974).

[FN108]. Id. at 706-13.

[FN109]. Id. at 687-88.

[FN110]. Brief for President Nixon, supra note 68, at 122-31. Rule 17 requires that the government demonstrate relevance and admissibility when seeking a trial subpoena. The Rule 17 standard for grand jury subpoenas is more relaxed, reflecting the different goals of grand jury investigation. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297-301 (1991).

[FN111]. Brief for President Nixon, supra note 68, at 48-86.

[FN112]. Id. at 86-87.

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[FN113]. Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir.1973).

[FN114]. Nixon, 418 U.S. at 700.

[FN115]. Id. at 708.

[FN116]. Id. at 705.

[FN117]. Id. at 708.

[FN118]. Id.

[FN119]. Id. at 710 (quoting C&S Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[FN120]. Id. at 712 n.19.

[FN121]. Id.

[FN122]. Id. at 709 (quotation marks omitted).

[FN123]. Id.

[FN124]. Id. at 712-13.

[FN125]. Id. at 714.

[FN126]. The privilege considered in Nixon was the privilege for presidential communications, not the more general executive privilege for deliberative processes. The deliberative process privilege is, of course, even less weighty than the presidential communications privilege. See In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir.1997).

[FN127]. See Files of Justice Thurgood Marshall, United States v. Nixon, 418 U.S. 683 (1974) (available at Library of Congress).

[FN128]. Id.

[FN129]. Id. This memo is very important as an historical matter. Justice White stated that President Nixon would have been entitled to withhold the tapes had some higher standard been adopted. Those who currently favor the adoption of such a higher standard must come to grips with that fact--and how it might have altered the course of Watergate.

[FN130]. Id.

[FN131]. As reported in The Brethren, Justice Powell had last-minute reservations about the legal standard and said at the conference on July 23 that he was considering a last-minute concurrence because "[t]hey were ruling that any grand jury could subpoena material from the President in a criminal investigation. That was too sweeping. They could, and they should, rule more narrowly. ..." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 409 (1979). Woodward and Armstrong report that the room "erupted" and Justice William Brennan "made an impassioned plea for unanimity." Id. Justice Powell then decided to adhere to the Chief Justice's opinion, and thus the opinion rejected a Nixon v. Sirica kind of standard and instead held that evidence meeting the requirements of Rule 17 must be produced unless there was a claim of state secrets. Id. at 410.

[FN132]. United States v. North, 910 F.2d 843, 950-53 (D.C. Cir.1990) (Silberman, J., concurring in part, dissenting in part).

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[FN133]. Id. at 951. The issue arose in connection with a trial subpoena to President Ronald Reagan sought by North. The court affirmed the District Court's denial of the subpoena, ruling that such evidence would not have been material or favorable to the defense, and the majority therefore did not reach the question of privilege. Id. at 892 n.26 (per curiam).

[FN134]. Id. at 952.

[FN135]. Id. (citation omitted). Similarly, Professor Laurence Tribe has stated: "Ostensibly, United States v. Nixon suggests that, while presidential conversations are presumptively privileged, the presumption will always be overcome by a showing that the information is relevant to a pending criminal trial in federal court." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 281 (1988) (emphasis added).

[FN136]. In re Grand Jury Subpoena, 112 F.3d 910, 919 (8th Cir.1997). In his dissent on the facts of that case, Judge Richard Kopf agreed that "[a]t this elevated level of abstraction"--namely the "public interest"--"Nixon teaches that the President's general need for confidentiality ... is outweighed by a grand jury's need for evidence of the truth." Id. at 936 (Kopf, J., dissenting).

[FN137]. Id. at 918 n.9.

[FN138]. See In re Sealed Case, 121 F.3d 729 (D.C.Cir.1997).

[FN139]. Id. at 754.

[FN140]. See Nixon, 418 U.S. at 712 n.19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information ....").

[FN141]. In re Sealed Case, 121 F.3d at 754.

[FN142]. Id.

[FN143]. Id.

[FN144]. Id.

[FN145]. Id. at 757.

[FN146]. Id. at 755. See also id. at 760 (noting, in explaining standard, that "[h]ere, unlike in the Nixon cases, the actions of White House officers do not appear to be under investigation").

[FN147]. Id. at 761.

[FN148]. Id. at 756.

[FN149]. The Court said that "[i]n practice, the primary effect of this standard will be to require a grand jury to delay subpoenaing evidence." Id. at 756 (emphasis added).
Any open-ended balancing test requiring some higher need showing would violate the Supreme Court's repeated emphasis that the criminal process should not tolerate such delays. See, e.g., United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991) ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); Branzburg v. Hayes, 408 U.S. 665, 705 (1972) (under proposed heightened relevance standard, "courts would ... be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid").

[FN150]. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quotation marks omitted).

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[FN151]. Branzburg, 408 U.S. at 691 n.29, 686.

[FN152]. Nixon, 418 U.S. at 710.

[FN153]. The Office of Legal Counsel has not issued an opinion about the application of Executive privileges in criminal proceedings, as the Eighth Circuit correctly recognized. See In re Grand Jury Subpoena, 112 F.3d 910, 921 n.10 (1997). Even for purposes of congressional inquiries, moreover, the OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Opinion of the Off. of Legal Couns. 68, 78 (1986) (emphasis added).

[FN154]. United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984) (emphases added).

[FN155]. MCCORMICK ON EVIDENCE § 87.1, 321 (J. W. Strong ed. 1992).

[FN156]. 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure § 5475, 126-27 (1986).

[FN157]. Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (1996) (Proposed Final Draft No. 1) (also stating that "unlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business").

[FN158]. In re Grand Jury Subpoena, 112 F.3d at 920.

[FN159]. Id. at 921.

[FN160]. Id.

[FN161]. See supra notes 89-91 and accompanying text.

[FN162]. The President at the time the information is sought controls the privilege. With respect to the attorney-client privilege (as opposed to the Presidential communications privilege), a President no longer in office would have no authority to assert the privilege. See CFTC v. Weintraub, 471 U.S. 343, 349 & n.5 (1985) (stating that common-law privilege for entities belongs to current management, not former management).

[FN163]. See Nixon, 418 U.S. at 712; cf. Branzburg, 408 U.S. at 691.

[FN164]. See Branzburg, 408 U.S. at 700.

[FN165]. See 4B Opinion of the Off. of Legal Couns. 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

[FN166]. The President (or relevant agency head) can require that the employee cooperate in an internal agency investigation. See 4B Opinion of the Off. of Legal Couns. 421, 427 (1980) ("The obligation of public officials to answer questions related to the performance of their public duties is well- recognized"). To be sure, an agency employee questioned by an agency attorney may refuse to answer questions out of a fear of self-incrimination, although the failure to answer questions may lead to his dismissal. See LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) ("It may well be that an agency ... would take into consideration the failure of the employee to respond.").
The government employee who does not claim the Fifth Amendment and speaks to the attorney could be investigated or prosecuted based at least in part on the communications to government attorneys (Oliver North, for example). But that is a good result: Insulating government employees from criminal investigation and prosecution has never been considered a governmental interest that justifies withholding relevant information from the federal grand jury. Indeed, the only governmental interest is precisely the opposite.

[FN167]. Morrison, 487 U.S. at 699 (Scalia, J., dissenting).

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

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

Facts:

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

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

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Federal Register
Vol. 66, No. 214
Monday, November 5, 2001

Presidential Documents

Title 3—

The President

Executive Order 13233 of November 1, 2001

Further Implementation of the Presidential Records Act

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

Section 1. *Definitions.*

For purposes of this order:

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

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

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

Sec. 2. *Constitutional and Legal Background.*

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

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

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

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

Sec. 3. *Procedure for Administering Privileged Presidential Records.*

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

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

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

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

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

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

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

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

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. *Concurrence by Incumbent President.*

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

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

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

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

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

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

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

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

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

Sec. 9. *Establishment of Procedures.*

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

Sec. 10. *Designation of Representative.*

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

Sec. 11. *Vice Presidential Records.*

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

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

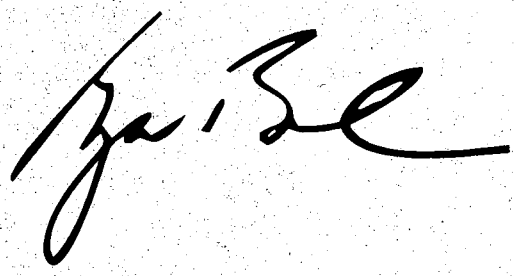
(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. *Judicial Review.*

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

Sec. 13. *Revocation.*

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



THE WHITE HOUSE,
November 1, 2001.

[FR Doc. 01–27917
Filed 11–2–01; 11:23 am]
Billing code 3195–01–P

Brett Kavanaugh – Defense of Ken Starr

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

Facts:

➢ **Many have expressed that the public criticism directed at Independent Counsel Kenneth Starr was vicious and unwarranted.**

✓ The Washington Post editorial page said of Judge Starr:

- "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

- "The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service." Editorial, Wash. Post, Oct. 20, 1999, at A28.

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr's integrity were belied by the fact that President Clinton's attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

- Rotunda stated: "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself." *Id.*

✓ In a prescient editorial published shortly after Judge Starr's appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: "If Starr's investigation turns up no evidence of wrongdoing, he

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

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

✓ The Washington Post editorial page said, upon Judge Starr's appointment, "he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno's own short list of likely candidates for independent counsel when she picked Mr. Fiske." Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr's appointment as Independent Counsel, Mark Gitenstein, former chief Democratic counsel to the Senate Judiciary Committee, said: "Starr was a good, fair judge, and I think he will be fair in this proceeding." Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative ... but he's wholly undevious and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.

✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.

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

✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.

✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

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

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

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

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

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

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

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

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

  - ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that ''it is clear that the President lied when he testified before the grand jury.''

The Washington Post, November 15, 1999

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November 15, 1999, Monday, Final Edition

SECTION: OP-ED; Pg. A23

LENGTH: 763 words

HEADLINE: To Us, Starr Is an American Hero

BYLINE: Robert J. Bittman; Brett M. **Kavanaugh;** Solomon J. Wisenberg

BODY:

Richard Cohen's Oct. 26 op-ed broadside, "So Long, Ken Starr," grossly mischaracterizes Ken Starr and his investigation. Cohen ridicules the Lewinsky case, but he ignores the following facts:

Starr uncovered a massive effort by the president to lie under oath and obstruct justice. The House impeached the president. Fifty senators voted to remove the president. Thirty-two other senators who voted to retain the president nonetheless signed a resolution that condemned Bill Clinton for giving "false or misleading testimony" and "impeding discovery of evidence in judicial proceedings" and concluded that he had "violated the trust of the American people." Judge Susan Webber Wright held the president in contempt because he intentionally provided "false, misleading and evasive answers" and "undermined the integrity of the judicial system."

Those conclusions fully vindicate Starr's findings and make Cohen's diatribes against the case ("woe is me, the Republic is in peril") look juvenile.

Cohen contends that certain information in Starr's referral to Congress should not have been made public and that Starr threw "everything out on the lawn for all the neighbors to see." But Starr submitted the report to Congress under seal. It was a bipartisan Congress that publicly released the report without even reviewing it beforehand.

Cohen argues that Starr "trapped" the president. Not so. The president "trapped" himself. Clinton knew long before his civil deposition (because Wright repeatedly so ruled) that his other sexual encounters with subordinate employees were relevant to Paula Jones's sexual harassment case. Yet the president decided to roll the dice and lie under oath and obstruct justice.

Starr did not cause this; Clinton did. Nor did Starr cause the president later to lie to the grand jury, to parse the meaning of the words "is" and "sex" and on and on. Clinton did all of this with premeditation and on his own. The word that ordinarily describes such behavior is not "trapped" but "guilty."

Cohen complains that Starr began by investigating Whitewater and "wound up" investigating the Lewinsky matter. But Janet Reno, not Starr, gave the independent counsel jurisdiction over new matters.

Cohen also notes--ominously--that Starr is a Republican. Special prosecutors traditionally have been respected lawyers of the opposite party. Archibald Cox investigated President Richard Nixon. Former senator John C. Danforth is investigating Janet Reno. The reason is simple: A decision not to indict in a politically charged case is more credible if made by a prosecutor of the opposite party. And a conviction requires that 12 citizen jurors vote for conviction, the procedural check on the "aggressive" prosecutor.

As important as what Cohen says is what he does not say. Cohen does not mention Starr's successful investigation of Madison Guaranty Savings and Loan. Starr obtained convictions of Jim and Susan McDougal, of Gov. Jim Guy Tucker (the first conviction this century of a sitting governor) and of former associate attorney general Webster Hubbell.

And Cohen ignores Starr's investigation of the Clintons' involvement in Madison and Whitewater and his investigations of the Vince Foster, travel office and FBI files issues. Why? Starr brought no criminal indictments and submitted no impeachment referrals in those matters. Starr recognized more than anyone that criminal prosecution (or an impeachment referral, in the case of the president) is not a political game--that a prosecutor should not invoke those processes unless the evidence is strong, almost overwhelming.

Cohen also skips past Starr's remarkable legal record. Starr won nearly every dispute: executive privilege, Secret Service privilege, government attorney-client privilege, jurisdictional issues, the list goes on.

Contrary to Cohen's table-thumping, the record establishes that Starr was a thorough, fair, ethical and successful prosecutor. His record is one of extraordinary accomplishment and integrity. And to us, Starr is an American hero.

Over time, fair-minded people will come to hail Starr's enormous contributions to the country and see the presidentially approved smear campaign against him for what it was: a disgraceful effort to undermine the rule of law, an episode that will forever stand, together with the underlying legal and moral transgressions to which it was connected, as a dark chapter in American presidential history.

The writers served as attorneys in the office of independent counsel Kenneth W. Starr.

LOAD-DATE: November 15, 1999

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The Washington Post, October 20, 1999

7 of 9 DOCUMENTS

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October 20, 1999, Wednesday, Final Edition

SECTION: EDITORIAL; Pg. A28

LENGTH: 542 words

HEADLINE: Mr. Starr's Departure

BODY:

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

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

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

Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right.

The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service.

LOAD-DATE: October 20, 1999

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8/17/94 PTLDOGN C07 ALLNEWS
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1994 WL 4559071
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Portland Oregonian
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Wednesday, August 17, 1994

FORUM

TAKE MY WORD, STARR WILL BE FAIR

GARRETT EPPS

Summary: But such reassurance shouldn't be needed for independent counsel

Lawyers familiar with federal ethics law were not entirely surprised Aug. 5 when a federal appellate panel refused to reappoint Robert Fiske, the special counsel chosen by Attorney General Janet Reno to investigate Whitewater and related matters.

Fiske had been appointed by the administration, thus raising appearance of a conflict of interest. As the panel -- called the Special Division -- noted, the Independent Counsel Reathorization Act "contemplates an apparent as well as an actual independence on the part of the counsel."

But many observers were stunned when the three-judge panel turned instead to former appellate judge and solicitor general Kenneth W. Starr.

Starr, a prominent Reagan and Bush supporter, has no prosecutorial experience and is deeply involved in politics. **Starr** openly considered a Republican bid to unseat **Democratic** Sen. Charles Robb of Virginia. He has publicly attacked President Clinton's position on possible presidential immunity from civil suit and even considered filing an amicus brief supporting Paula Jones in her sexual harassment suit against the president. And no one who knows Starr doubts that he would -- and should -- be on the GOP short list for the Supreme Court if the White House changes hands.

In other words, Starr does not embody what the Special Division (on which two of the three judges are Republican appointees) called "the intent of the act that the actor actor be protected against perceptions of conflicts." As a political foe of the president, Starr will be seen by many as biased.

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As E.J. Dionne of The Washington Post noted, it is as if a Democrat-dominated panel had named liberal professor Laurence Tribe to investigate Iran-Contra.

Make no mistake about my meaning. I know Starr personally. (Starr was a guest lecturer at the UO Law School in February.) Politically, we are chalk and cheese: I am a Democrat, a liberal and a supporter of the president; he is the direct opposite of all of these. But I admire him more than I can say, because at a level beyond politics, he is a fine lawyer, an honest judge and a good man.

I have not the slightest doubt that he will be fair, judicious and discreet in his conduct of the Whitewater investigation. You can take my word for it, or that of Reno herself, who seriously considered naming Starr to the office that eventually went to Fiske.

That, however, is precisely what made it a grievous mistake for the Special Division to offer this appointment and for Starr to accept it. The point of the independent counsel law is that neither Republicans like **Starr** nor **Democrats** like me should have to take someone else's word that -- despite appearances -- justice is being done in a nonpartisan, evenhanded manner.

The authors of the law knew that many administrations would conduct honest investigations of their own personnel, but they also knew that the public, sickened by Watergate and other scandals, would not believe that political appointees could investigate themselves or their superiors.

Thus was born the independent counsel, to ensure both fairness and the appearance of such. Previous counsels in high-profile cases have tended to be nonpolitical figures, often appointed relatively late in their careers, who could not credibly be suspected of a personal or partisan agenda.

If Starr's investigation turns up no evidence of wrongdoing, he may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution.

If the Whitewater investigation derails the president's agenda or prevents his re-election, Clinton's supporters will forever be convinced that they were defeated by a GOP judicial coup d'etat -- and they will note bitterly that Reno was forced to appoint Fiske in the first place because the Republicam blocked an effort to

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reauthorize appointment by the Special Division until after Fiske's probe was under way.

The effects of such a perception would be long-lasting and corrosive, with potentially grave effects on our politics and our heritage of government under law.

Only two people have the power to defuse this potential disaster. One is Reno, who under the act has the power to remove a counsel "for good cause . . . or any other condition that substantially impairs the performance" of the counsel's duties.

The law permits the counsel to challenge his removal in a different federal court than the one that appointed him; such a hearing would be interesting indeed. But given political reality, and the Clinton administration's record of support for the Independent Counsel Reauthorization Act, Reno is unlikely to fire Starr.

The other person who can act is Kenneth Starr himself. A beloved and respected figure, he has almost certainly accepted this post out of a sense of public service. Ironically, he stands to lose as much as Clinton if the process goes awry.

Garrett Epps is an assistant professor of law at the University of Oregon.

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Graphic - Drawing by MIKE RAMIREZ KENNETH W. STARR - Tainted by perception of partisanship

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8/6/94 WATIMES A6 ALLNEWS
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1994 WL 5486140
(Publication page references are not available for this document.)

The Washington Times
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Saturday, August 6, 1994

A;NATION

Starr hailed as fair, moderate

Nancy E. Roman
THE WASHINGTON TIMES

Kenneth Starr, the new Whitewater **independent counsel**, was assessed yesterday from the left and the right as a nonpartisan, fair-minded lawyer.

"As solicitor general he bent over backwards to avoid partisanship, and as a result he incurred the wrath of conservatives on more than one occasion," said Chip Mellor, president of the libertarian Institute for Justice. "In areas of civil rights, abortion, he was definitely viewed as moderate."

Mr. Starr, 48, was **appointed** to the U.S. Court of Appeals for the D.C. Circuit by President Reagan in 1983. President Bush chose him as the Justice Department's top lawyer in 1989. When Bill Clinton was elected president, Mr. Starr went into private practice in Washington.

"Starr was a good, fair judge, and I think he will be fair in this proceeding," said Mark Gitenstein, chief Democratic counsel to the Senate Judiciary Committee when Mr. Starr was nominated to the federal bench. "I didn't agree with him on a number of his decisions, but he is fair."

Mr. Gitenstein said that when Mr. Starr was in the Justice Department, they sometimes worked together. "He was a pretty straightforward guy," he said. "He's easy to work with. He'll do a good job here. The only issue is what happens to all the work that Fiske did?"

Mr. Gitenstein said Mr. Starr should give broad deference to Mr. Fiske's work. "I believe that Starr would give him that deference."

Alan Slobodin of the Washington Legal Foundation, on whose

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legal policy advisory board Mr. Starr serves, said he is an "outstanding" choice for **independent counsel**.

"He's got Olympian credentials. To say he is well-respected is understating it," he said, adding that he bases his position on Mr. Starr's tenure on the federal bench.

"He was there during the mid-'80s, when the ideological complexion was changing. He was respected by the Democratic **appointees** to the Court of Appeals," he said. "Of course, he voted more with the conservative wing of that court, but he was viewed as more of a moderate."

When Mr. Starr was nominated to be solicitor general in 1989, press accounts quoted liberal lawyers who had tried cases in his court as saying he was the "least doctrinaire" of the Reagan **appointees** to the D.C. Circuit.

Before being named a judge, Mr. Starr served as counselor to Attorney General William French Smith.

During that time he was the only political **appointee** to argue against the Justice Department's decision to support Bob Jones University's attempt to claim tax-exempt status despite its racially discriminatory policies.

Tex Lezar, former chief of staff to Mr. Starr and now the Republican nominee for lieutenant governor of Texas, described Mr. Starr as a "very straight arrow" who demands clear evidence before taking any action.

He noted that Mr. Starr has no criminal experience and has never served as a prosecutor, but he said the former solicitor general knows a lot about conflict of interest and is "perfectly capable of being that certain someone who knows when someone is gracefully ducking."

* Major Garrett contributed to this report.

****BOX

KENNETH WINSTON STARR

BORN: Vernon, Texas, July 21, 1946. Lives in McLean.

WIFE: Alice Jean Mendell

CHILDREN: Randall Postley, Carolyn Marie and Cynthia Anne

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EDUCATION: Bachelor's from George Washington University; master's from Brown University; law degree from Duke University

CAREER HIGHLIGHTS: Law clerk to U.S. Chief Justice Warren E. Burger, 1975-77; associate and partner, Gibson, Dunn & Crutcher, 1977-81; counselor to the attorney general, 1981-83; judge, U.S. Court of Appeals for the D.C. Circuit, 1983-89; U.S. solicitor general, 1989-93; partner, Kirkland & Ellis, 1993-present.

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Box, KENNETH WINSTON STARR, By The Washington Times

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8/6/94 WATIMES A6
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Citation Search Result Rank 83 of 1826 Database
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12/4/96 Seattle Times A3
1996 WL 3695264
(Publication page references are not available for this document.)

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Wednesday, December 4, 1996

NEWS

CLOSE-UP

DID PRESIDENT ORDER ATTACK ON INVESTIGATOR?

PETER BAKER
WASHINGTON POST

ATTORNEY GENERAL Janet Reno has continued to assign independent counsel Kenneth Starr new matters to investigate and has the power to fire him. But now Starr's integrity is being attacked, and the administration says it won't interfere.

WASHINGTON - Clinton strategist James Carville has launched a public campaign to discredit Kenneth Starr, the independent counsel pursuing the man Carville helped put in the White House. But Carville's not doing so on the orders of the president. Really.

Nor is President Clinton secretly encouraging him. Really. And the president couldn't stop Carville even if he tried. Really.

That, at least, is the official White House line, implausible as it seems to doubters whose business cards don't list 1600 Pennsylvania Ave. as an office address.

White House officials don't seem all that unhappy about Carville's plans to set up a grass-roots, anti-Starr organization. Clinton made perfectly clear yesterday he has no intention of calling off his political consultant; when asked if he would talk to Carville about it, he answered flatly, "No."

That and other public remarks by top aides in recent days have been taken as tacit approval of the Carville counterattack, which will include campaign-style newspaper advertisements, fund-raising appeals and opposition research.

But Carville was vague on organizational details.

Such an "all-out" assault is unprecedented in the history of

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Independent counsels, according to specialists in the field. Special prosecutors have been fired (Archibald Cox during Watergate) and come under withering partisan fire (Lawrence Walsh during Iran-contra), but they have never endured an organized public-relations attack of the likes that Carville describes.

A variety of Republican leaders, legal scholars and even some Democrats have denounced Carville's effort as everything from improper to bad political strategy.

'Incendiary device'

"This is a very, very incendiary device, and it may have incendiary consequences as yet unseen," said Joseph diGenova, a former GOP federal prosecutor who also has served as an independent counsel. DiGenova said it appeared to be an attempt to shape public perceptions to influence potential jurors. "That would be the O.J. Simpson-ing of Whitewater."

Ronald Rotunda, a University of Illinois law professor who was an assistant counsel for **Democrats** on the Senate Watergate Committee, said attacks on **Starr's** integrity are belied by the fact that Clinton's own attorney general, Janet Reno, has continued to assign him new matters to investigate and has the power to fire **Starr** if he had acted unethically. "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself," Rotunda said.

The notion that the White House is uninvolved, he added, bore little credibility: "It looks to me that Carville's got his marching orders and is carrying them out."

Carville sees clear message

Carville denied that yesterday, saying he has not spoken to Clinton about his plans, nor sought permission from the White House. But he also seemed confident he was not deviating from the president's own thoughts, pointing to a PBS interview last fall when Clinton said it was "obvious" Starr was out to get him. "He's spoken, it seems to me, pretty clearly and unambiguously," Carville said of Clinton.

Even so, White House press secretary Michael McCurry on Monday went so far as to suggest that Clinton had no power over Carville, who managed his 1992 campaign and has remained close to the president.

Arguments against Starr

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12/4/96 STLTI A3

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The thrust of Carville's case against Starr is that the former Reagan solicitor general is a partisan "right-wing" Republican with an ax to grind, and should be fired. In particular, Carville has cited Starr's legal representation of tobacco interests and his recent speech at a law school founded by Christian Coalition leader Pat Robertson.

Criticism of his plans, Carville added, is only likely to energize him. "It's okay to attack the president but it's not okay to defend the president?" he said heatedly. "I'm not playing by those rules!"

Carville previously said he wanted to go after Starr the day he was appointed but was talked out of it by the White House. Asked about that yesterday, he identified George Stephanopoulos and Mark Gearan as the Clinton aides who dissuaded him, adding that they feared that then-White House counsel Lloyd Cutler would resign if Carville followed through.

"The difference between last time and this time," Carville said, is that this time "I didn't ask anyone."

Starr's investigation

As independent counsel, Kenneth Starr is investigating:

-- Whitewater: The failed land-development project in which Bill Clinton, then governor of Arkansas, and Hillary Rodham Clinton invested.

-- Vince Foster: The apparent suicide in 1993 of the White House deputy counsel.

-- FBI files: The White House personnel security chief's improper collection of almost 900 FBI files, including those of Republicans no longer working for the White House.

-- Travel-office firings: 1993 dismissal White House travel office staff in what Republicans suspect was an effort to give jobs to Clinton friends from Arkansas.

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PHOTO; Caption: 1) JAMES CARVILLE 2) KENNETH STARR

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106TH CONGRESS
1ST SESSION

S. RES. 44

Relating to the censure of William Jefferson Clinton.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1999

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

---

RESOLUTION

Relating to the censure of William Jefferson Clinton.

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

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

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

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

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

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

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

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

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

Resolved, That—

(1) the United States Senate does hereby censure William Jefferson Clinton, President of the United States, and does condemn his wrongful conduct in the strongest terms;

(2) the United States Senate recognizes the historic gravity of this bipartisan resolution, and trusts and urges that future congresses will recognize the importance of allowing this bipartisan statement of censure and condemnation to remain intact for all time; and

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

○

H

United States District Court,
E.D. Arkansas,
Western Division.

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson, Defendants.

No. LR-C-94-290.

July 29, 1999.

After United States President was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, 36 F.Supp.2d 1118, parties submitted evidence of expenses and fees incurred by plaintiff's counsel. The District Court, Susan Webber Wright, Chief Judge, held that: (1) President would be required to pay expenses incurred by federal judge to attend tainted deposition, and (2) plaintiff's counsel were entitled to fees and expenses in amount of $79,999 and $9,485, respectively.

So ordered.

West Headnotes

[1] **Federal Civil Procedure** 1539
170Ak1539

As a sanction against United States President who was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, President would be required to pay federal judge's expenses for attending tainted deposition at President's request.

[2] **Federal Civil Procedure** 1269.1
170Ak1269.1

In proceedings to determine attorney fees and expenses that would be imposed against United States President who was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, plaintiff's counsel were not entitled to conduct limited discovery of President's attorney fees and expenses; there was no need to conduct discovery of President's fees and expenses to determine whether fees and expenses claimed by plaintiff's counsel were incurred as a result of sanctioned conduct, and resolving issue of President's contempt expeditiously and without hearings, was in the public interest.

[3] **Contempt** 70
93k70

[3] **Contempt** 74
93k74

A coercive contempt sanction, such as a fine, is designed to force the offending party to comply with a court's order, whereas a compensatory sanction is designed to compensate the non-offending party for the damage they incur as a result of the offending party's contempt.

[4] **Contempt** 49
93k49

Court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.

[5] **Federal Civil Procedure** 1278
170Ak1278

Discovery sanctions may be awarded against a party after entry of summary judgment and dismissal of a case. Fed.Rules Civ.Proc.Rules 37, 56, 28 U.S.C.A.

[6] **Contempt** 74
93k74

Sanctions for compensatory contempt are not imposed to punish the contemnor, but must be based upon evidence of actual loss.

[7] **Federal Civil Procedure** 1278
170Ak1278

As a civil contempt sanction against United States President who failed to obey discovery orders in civil lawsuit brought against him, plaintiff's counsel were entitled to attorney fees and expenses of $79,999 and $9,485, respectively, rather than requested amounts of $437,825 and $58,533; plaintiff's counsel were entitled to recover only the fees and expenses that plaintiff incurred as a result of President's willful failure to obey court's discovery orders.

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***720** Donovan Campbell, Jr., Rader, Campbell, Fisher & Pyke, Dallas, TX, Gregory S. Kitterman, Little Rock, AR, for plaintiff.

Steven H. Aden, John W. Whitehead, The Rutherford Institute, Charlottesville, VA, Daniel A. Gecker, Steven Scott Biss, Maloney, Huennekens, Parks, Gecker, Parsons, Richmond, VA, Robert Batton, Jacksonville, AR, Bill W. Bristow, Seay & Bristow, Jonesboro, AR, Stephen C. Engstrom, Wilson, Engstrom, Corum & Coulter, Little Rock, AR, Kathlyn Graves, Wright, Lindsey & Jennings, Little Rock, AR, Robert S. Bennett, Skadden, Arps, Slate, Meaghen & Flom, Washington, DC, for defendants.

MEMORANDUM AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

On April 12, 1999, this Court entered a Memorandum Opinion and Order adjudging William Jefferson Clinton, President of the United States, to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2) for his willful failure to obey certain discovery Orders of this Court in a lawsuit brought against him by Paula Corbin Jones. *See Jones v. Clinton*, 36 F.Supp.2d 1118 (E.D.Ark.1999). The Court determined that the President violated this Court's discovery Orders by giving false, misleading and evasive answers that were designed to obstruct the judicial process, and that sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. *See id.* at 1127, 1131-32, 1134. The Court ordered the President to pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders, and directed plaintiff's former counsel to submit to this Court a detailed statement of any expenses and attorney's fees incurred in connection with the matter. *Id.* at 1132, 1134-35. The Court additionally ordered the President to deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over his January 17, 1998 deposition. *Id.* [FN1] However, the Court stayed enforcement of its Order for thirty days to give the President an opportunity to file a notice of appeal or to request a hearing in which to demonstrate why he is not in civil contempt of court, why sanctions should not be imposed, or why the Court is otherwise in error in proceeding in the manner in which it has. *Id.* at 1134-35. The Court stated that should the President fail to file a notice of appeal or request a hearing within the time allowed, it would enter an Order setting forth the time and manner by which the President is to comply with the sanctions being imposed. *Id.* The President subsequently notified this Court that while he disputes allegations that he knowingly and intentionally gave false testimony under oath, he will not request a hearing or file a notice of appeal. Accordingly, the Court addresses at this time the sanctions to be imposed in accordance with the April 12th Order.

FN1. In addition, the Court referred the matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any action it deems appropriate. *Id.*

I.

On May 7, 1999, this Court received in response to its April 12th Order a statement of fees and expenses totaling $437,825.00 from the law firm of Rader, Campbell, ***721** Fisher & Pike ("RCFP") and a statement of fees and costs totaling $58,533.03 from John W. Whitehead and The Rutherford Institute (collectively, "TRI"). That same day, the President, through his attorney, Robert S. Bennett, submitted a letter to this Court stating that he would timely file a formal pleading objecting to the "excessive" amount of the claim for fees and expenses by plaintiff's attorneys--characterizing the claim as "unreasonable and inconsistent with the Court's Order and governing law"--but that he did not otherwise intend to request a hearing or file a notice of appeal with respect to the April 12th Order. *See* May 7, 1999 Letter.

On May 21, 1999, the President filed his formal response to the statements of fees and expenses submitted by plaintiff's attorneys. In his response, the President states that due to the public interest in providing an expeditious resolution to this matter, and due to the urgent duties of his office, he recognizes that it is in the best interests of the country to forego his right to a hearing under the Order. [FN2] Resp. of Pres. at 1. The President further states that while he does not concur with the findings of this Court, he will pay the $1,202.00 levied by this Court for its expenses in attending his January 17th deposition at his request, and will pay the reasonable costs incurred by plaintiff as a result of those actions

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that this Court found to be at odds with its discovery Orders--his answer to Interrogatory No. 10, submitted on December 23, 1997, and certain limited portions of his January 17th deposition testimony, insofar as either pertained to his relationship with Monica Lewinsky. *Id.* at 1-2. As in his May 7th letter, however, the President contends that the fees and expenses requested by RCFP and TRI are unreasonable in that for the most part they bear no relationship to the actions that gave rise to the April 12th Order, are "demonstrably overreaching," and, with the exception of certain fees and expenses in the range of $12,300.00 to $33,700.00, should thus be denied. *Id.* at 2-3.

FN2. The Court expressed these same concerns in its April 12th Order. *See Jones v. Clinton,* 36 F.Supp.2d at 1132-34.

RCFP and TRI each filed a reply to the President's response. RCFP asserts that the work included in their statement of fees and expenses is directly related to the President's misconduct and that the President's dishonesty caused their work, both before and after the specific instances of his misconduct referenced in this Court's April 12th Order, to be rendered useless. Reply of RCFP at 2-3. TRI, in turn, asserts that the sanctions proposed by the President, "if adopted by this Court, would do precious little to 'redress the misconduct of the President in this case,' " and would not only fail to deter others who might consider emulating the President's misconduct, "but would actually serve to create an unintended incentive for such conduct by imposing *de minimus* consequences on conduct that, in the words of [this] Court, has 'undermined the integrity of the judicial system' itself." Reply of TRI at 1-2 (quoting April 12th Order).

[1] The Court has carefully considered the pleadings submitted in response to this Court's April 12th Order (doc.#'s 488-497) and, without objection, will require that the President pay the $1,202.00 levied by this Court for its expenses in attending his January 17th deposition at his request and will require that the President pay the reasonable fees and expenses incurred by plaintiff as a result of those actions that this Court found to be at odds with its discovery Orders. The Court finds, however, that the claims for fees and expenses included in RCFP's and TRI's statements are excessive and must be reduced.

A.

[2] As a preliminary matter, the Court addresses a motion filed by RCFP and ***722** joined by TRI to conduct limited discovery of the President's attorneys' fees and expenses. RCFP seeks to determine the amount of time expended by the lawyers who represented the President in connection with his contemptible conduct, the hourly rates charged for that work, and the nature and amount of the expenses incurred in connection with that work. Mot. of RCFP at 1. RCFP states that this discovery is necessary in light of the position taken by Mr. Bennett in his May 7th letter to this Court. *Id.*

The Court denies RCFP's motion. The President does not contest RCFP's and TRI's billing rate or the amount of time spent on any given task, but simply opposes their statements insofar as he claims the fees and expenses included therein were not incurred as a result of the conduct sanctioned by this Court, or because their statements are too vague to assess any possible link between the claimed costs and the sanctioned conduct. Resp. of Pres. at 2-3. There is no need to conduct discovery of the President's attorneys' fees and expenses in order for this Court to determine whether the fees and expenses claimed by RCFP and TRI were in fact incurred as a result of the conduct sanctioned by this Court. [FN3]

FN3. RCFP states that discovery of the President's attorneys' fees and expenses will make clear the appropriate magnitude of the fees which should be awarded pursuant to this Court's April 12th Order. Reply of RCFP at 14. They state that the President's expenditure of fees may well be the best evidence of his own valuation of the case, and that a sanction amounting to a mere ten percent of that value is not out of proportion. *Id.* The Court is not, however, concerned with the amount of fees expended by the President's attorneys in defending their client, but is only concerned with the amount of reasonable fees and expenses incurred by plaintiff's former counsel as a result of the President's willful failure to obey this Court's discovery Orders as described in the April 12th Order. The Court will not base any such sanction on a percentage of the President's attorney's fees and expenses.

Moreover, this Court has determined that resolving the issue of the President's contempt expeditiously and without hearings is in the public interest, *see*

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Jones v. Clinton, 36 F.Supp.2d at 1127, 1133, and granting RCFP's motion for additional discovery would only delay its resolution. Indeed, it was in the interests of bringing this matter to a speedy closure that this Court addressed in its April 12th Order only those narrow aspects of the President's contemptuous conduct with which there was no factual dispute and which were fully apparent from the record. *See id.* at 1127, 1132-33. The Court fully recognized that the President and other individuals within the jurisdiction of this Court might have engaged in additional misconduct warranting the imposition of sanctions, including violations of the Court's Confidentiality Order on Consent of all Parties. *See id.* at 1127 n. 14, 1132-33. Ascertaining whether the President or other individuals violated the Confidentiality Order or engaged in other sanctionable misconduct, however, would require hearings and the taking of evidence. *See id.* The President's misconduct as set forth in the April 12th Order, by contrast, is fully apparent from the record and can be summarily addressed without convening evidentiary hearings. Were additional discovery on the part of RCFP and TRI allowed, the Court, in fairness, would allow the President to conduct discovery of RCFP and TRI as well. The history of this case suggests that such additional discovery, rather than being limited, would be "contentious and time-consuming." *See id.* at 1121. Given that prospect, the Court would be inclined to expand the proceedings to address possible misconduct beyond that addressed in the April 12th Order, including any possible misconduct on the part of RCFP and/or TRI.

The Court finds, however, that additional discovery and expansion of the proceedings is not necessary at this time as the record is sufficiently developed for this Court to determine whether the fees and expenses claimed by RCFP and TRI were ***723** incurred as a result of the conduct sanctioned by this Court. That being so, and in the interests of bringing this matter to a speedy closure, the Court will deny RCFP's motion to conduct limited discovery.

B.
1.

[3][4][5] The Court now turns to the central issue at hand: determining whether the fees and expenses included in the statements of RCFP and TRI are within the scope of this Court's April 12th Order. There are two kinds of civil contempt sanctions a court can impose: coercive and compensatory. *Klett v. Pim*, 965 F.2d 587, 590 (8th Cir.1992) (citations omitted). A coercive sanction, such as a fine, is designed to force the offending party to comply with a court's order, whereas a compensatory sanction is designed to compensate the non-offending party for the damage they incur as a result of the offending party's contempt. *Id. See also Hartman v. Lyng*, 884 F.2d 1103, 1106 (8th Cir.1989) (a court's civil contempt power serves two purposes: to effectuate compliance with a court's order or process, and to compensate individuals from harm incurred by noncompliance); *Thompson v. Cleland*, 782 F.2d 719, 721 (7th Cir.1986) (" '[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained' ") (quoting *United States v. United Mine Workers*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947)); *In re Kave*, 760 F.2d 343, 351 (1st Cir.1985) (civil contempt sanctions can include a conditional fine to induce the purging of contemptuous conduct and "a *compensatory* fine to make whole the aggrieved party for damages caused by the contemnor's conduct") (emphasis in original). The matter of the President's contempt involves compensatory rather than coercive sanctions as the Court is not seeking to coerce the President into compliance with any pending Court order--the underlying action having been dismissed [FN4]--and sanctions are being imposed, not only to deter others who might consider emulating the President's misconduct, but to compensate the plaintiff by requiring that the President pay her any reasonable fees and expenses caused by his willful failure to obey this Court's discovery Orders. *See Jones v. Clinton*, 36 F.Supp.2d at 1131-32, 1134-35. *See also Lyng*, 884 F.2d at 1106 (a compensatory sanction "serves to make reputation to the injured party, restoring that party to the position it would have held had the court's order been obeyed") (citation omitted). Accordingly, this Court must determine the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders. [FN5]

FN4. As the Court noted in its April 12th Order, "[a] Court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Jones v. Clinton*, 36 F.Supp.2d at 1125 n. 12 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). In this regard, and contrary to the assertions of certain commentators, discovery sanctions under Fed.R.Civ.P. 37 may be awarded against a party after entry

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of summary judgment and dismissal of a case pursuant to Fed.R.Civ.P. 56. *See Heinrichs v. Marshall and Stevens Inc.*, 921 F.2d 418, 420-21 (2nd Cir.1990). Indeed, "[g]iven the Supreme Court's approval of post-judgment sanctions under Rule 11, and the support in the circuits for the practice under Rule 37, the question of post-judgment sanctions under Rule 37 is virtually moot." Stephen R. Bough, *Spitting in a Judge's Face: The 8th Circuit's Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 S.D.L.Rev. 36, 43 (1998) (footnote omitted).

FN5. The President argues that TRI's statement should be rejected in its entirety as TRI's role in this litigation was to raise funds and coordinate public relations for plaintiff, TRI did not enter an appearance until the appeal of this Court's dismissal of the case (although TRI was shown as "of counsel" on plaintiff's pleadings), TRI's statement was untimely, and the information contained in TRI's statement is "extremely vague." Resp. of Pres. at 8-9. Although the Court will not reject TRI's statement, the Court will consider any vagueness of TRI's statement, as it will with RCFP's statement, in determining the reasonable fees and expenses that plaintiff incurred as a result of the President's misconduct.

*724 2.

This Court found that the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky--specifically, his answer to Interrogatory No. 10, submitted on December 23, 1997, and certain limited portions of his January 17th deposition testimony--were in violation of this Court's discovery Orders ruling that plaintiff was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. *See Jones v. Clinton*, 36 F.Supp.2d at 1127. Notwithstanding the narrow and specific nature of the misconduct referenced in the April 12th Order, RCFP and TRI include in their respective statements claims for fees and expenses which clearly cannot be said to have been caused by the misconduct upon which this Court's April 12th Order is based. These include fees and expenses associated with various Court proceedings and conferences; fees and expenses associated with the investigation by the Office of the Independent Counsel ("OIC") of the Lewinsky matter and OIC's involvement in this civil case; fees and expenses associated with this Court's evidentiary ruling excluding the Lewinsky evidence from trial and plaintiff's mandamus petition seeking to reverse that ruling; fees and expenses associated with various press conferences, researching and reviewing media reports, and reviewing correspondence; and fees and expenses associated with examining the Starr Report.

Both RCFP and TRI appear to justify the breadth of the fees and expenses included in their statements by arguing, at least in part, that sanctions may be imposed to punish the President's misconduct. RCFP argues, for example, that the President's willful failure to follow this Court's discovery Orders "made a mockery" of both his deposition and all of the proceedings and orders leading up to the deposition, and that he should therefore be made to pay for all of the work done and expenses incurred in the course of events leading up to his deposition and, in particular, all efforts to discover facts concerning Monica Lewinsky. Reply of RCFP at 2-4. Similarly, TRI asserts that the contemptuous conduct of the President was a "substantial factor" in each of the events for which costs and/or attorney's fees are being sought, and, as previously noted, cautions this Court against imposing *de minimis* consequences on conduct that undermined the integrity of the judicial system. Reply of TRI at 2-3.

[6] The Court rejects RCFP's and TRI's apparent understanding of the basis upon which compensatory sanctions may be imposed. Regardless of whether the President's failure to follow this Court's discovery Orders "made a mockery" of the proceedings or even was a "substantial factor" in the events for which fees and expenses are being sought, sanctions for compensatory contempt are not imposed to punish the contemnor, *see Lyng*, 884 F.2d at 1106, but must be based upon evidence of actual loss. *Law v. NCAA*, 134 F.3d 1438, 1443 (10th Cir.1998). *See also Burke v. Guiney*, 700 F.2d 767, 770 (1st Cir.1983) (a compensatory fine for civil contempt requires proof of damages). Avoiding imposition of compensatory sanctions that may be characterized as "*de minimus*" simply is not a consideration in determining whether actual loss has been shown.

The Court also rejects RCFP's argument that because this Court properly could have imposed the sanction

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of entering judgment against the President on the ***725** basis of his contempt of court, [FN6] plaintiff's counsel would have been justified in seeking compensation for all of their labor and reimbursement for all of the expenses incurred following the President's false answer to Interrogatory No. 10, submitted on December 23, 1997. *See* Reply of RCFP at 12-13. Specifically, RCFP argues that upon the service of the President's false response to plaintiff's interrogatories, he had a continuing obligation as an officer of the Court and a party subject to the Court's discovery orders to disclose the falsity of his response, and that judgment could have been entered against the President upon such disclosure. *Id.* Such a judgment, argues RCFP, could have been entered against the President upon his disclosure of the falsity of his response and would have obviated the need for any further legal services to be rendered or expenses incurred by plaintiff's counsel. *Id.* RCFP's argument, however, overlooks the probability that any damages awarded to plaintiff as a result of a judgment entered against the President for his civil contempt would not have been based on any fees and expenses incurred by her counsel as a result of the conduct described in this Court's April 12th Order, but would have been damages that plaintiff herself could prove at a subsequent hearing, *i.e.,* damages for alleged deprivation of her constitutional rights and privileges, damages for alleged conspiracy to deprive her of her equal protection and privileges of the laws, and damages for alleged intentional infliction of emotional distress (Counts I-III of plaintiff's amended complaint). Even in the unlikely event that the Court would forego such a hearing on damages, the amount of the judgment would be no greater than the specific amount stated in plaintiff's amended complaint, which is $525,000. [FN7] Because the parties have already settled this case for $850,000, it is appropriate to limit fees and expenses to those incurred as a result of the misconduct upon which the Court's April 12th Order is based and not engage in speculation concerning what the Court might have ordered had its grant of summary judgment to defendants been reversed on appeal and the case remanded.

FN6. This Court noted in its April 12th Order that the Court would have considered rendering a default judgment against the President pursuant to Fed.R.Civ.P. 37(b)(2) had this Court's grant of summary judgment to defendants been reversed on appeal and the case remanded. *See Jones v. Clinton,* 36 F.Supp.2d at 1131.

FN7. Plaintiff's initial complaint sought $700,000. Following the entry of this Court's Memorandum Opinion and Order granting in part and denying in part the President's motion for judgment on the pleadings, *see Jones v. Clinton,* 974 F.Supp. 712 (E.D.Ark.1997), and following the entry of new counsel for plaintiff in this case, plaintiff filed an amended complaint (with leave of this Court) in which she sought $525,000 [doc. #176]. The Court recognizes that plaintiff's amended complaint seeks damages in an amount to be determined by a jury and that the $525,000 figure represents the minimum sought by plaintiff for the conduct referenced in Counts I-Ill of the amended complaint.

[7] There is no need to burden today's Memorandum and Order with an exhaustive, entry-by-entry review of the fees and expenses claimed by RCFP and TRI in determining the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders. The parties have addressed RCFP's and TRI's statements by establishing general categories of time entries, and this Court will address those statements in the same manner. [FN8]

FN8. The Court has engaged in a painstaking review of each time entry and claim for costs set forth in RCFP's and TRI's respective statements in determining whether the fees and expenses claimed therein were caused by the discovery violations referenced in the Court's April 12th Order. All claims for fees and expenses not specifically mentioned in today's Memorandum and Order have been carefully considered by the Court and are hereby denied.

a.

The Court will disallow fees and expenses incurred prior to December 23, ***726** 1997. Work done prior to that date *a fortiori* was not caused by the President's discovery violations on December 23, 1997, and January 17, 1998.

b.

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The Court will disallow fees and expenses associated with the hearing in Pine Bluff, Arkansas on January 12, 1998. This hearing was convened by the Court on its own initiative primarily to address the President's upcoming deposition. Monica Lewinsky's name was mentioned only briefly during the hearing in response to this Court's query regarding witnesses plaintiff anticipated calling at trial, and a wide variety of topics were addressed, including the possibility of settlement. This hearing did not result from the discovery violations referenced in the Court's April 12th Order.

c.

The Court will allow a portion of the fees and expenses associated with the President's January 17th deposition. The President objects to such an award, arguing that he would have been deposed regardless of any discovery violations and that plaintiff thus would have incurred fees and expenses associated with the deposition irrespective of any misconduct on his part. While that may be true, the President's failure to follow this Court's discovery Orders resulted in plaintiff's counsel devoting extra time, effort, and expense to certain topics that likely would have been unnecessary had he been truthful. Plaintiff therefore incurred fees and expenses in connection with the President's deposition as a result of his discovery violations.

The Court does find, however, that fees and expenses should be limited to time spent asking questions about Ms. Lewinsky. In this regard, the President claims, and the Court agrees, that approximately 20% of the President's deposition concerned Ms. Lewinsky. Plaintiff's counsel do not contest this percentage, but merely argue that the President's falsehoods infected the entire record with doubt and that plaintiff therefore is entitled to reimbursement for all fees and expenses associated with the deposition. As previously noted, however, compensatory sanctions must be based on evidence of actual loss, *see* NCAA, 134 F.3d at 1443, and the Court finds that plaintiff's counsel have established evidence of actual loss, at most, with respect to no more than 20% of their claim for fees and expenses associated with the deposition. [FN9] Accordingly, as so reduced, RCFP is entitled to $5,233.00 for fees and expenses associated with the President's deposition, and TRI is entitled to $3,136.58 for its expenses. [FN10]

FN9. RCFP and TRI argue that the President is being required to reimburse this Court the entire amount of costs incurred in attending his January 17th deposition, not just 20%, and that plaintiff likewise should be reimbursed for all fees and expenses incurred in connection with the deposition. The Court disagrees. The President was noticed for deposition prior to the actions which gave rise to the April 12th Order, and plaintiff's counsel would have incurred fees and expenses in connection with the deposition regardless of any misconduct on the part of the President. This Court, on the other hand, would not have incurred any expenses in connection with the deposition had the President not requested that the Court preside over the proceedings at which he ultimately disobeyed this Court's oral ruling that certain questions be answered. *See Jones v. Clinton,* 36 F.Supp.2d at 1127. Thus, the Court deems its expenses incurred in connection with the President's misconduct at his deposition to be the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over the proceedings. As for awarding plaintiff even 20%, this apportionment, as correctly noted by the President, reflects an assumption highly favorable to plaintiff that all of the Lewinsky matter was violative of this Court's discovery Orders.

FN10. The President argues that plaintiff's counsel has included fees for six attorneys to attend his deposition, even though only one RCFP attorney questioned the President, and that fees for such duplicative services should he disallowed. The Court notes, however, that the President himself had five attorneys--including the White House Counsel--in attendance at the deposition. Given the unique circumstances of this case, this Court does not find it unreasonable that plaintiff had more than one attorney in attendance.

*727 d.

The Court will disallow fees and expenses associated both with plaintiff's motion for this Court to reconsider its ruling excluding the Lewinsky evidence at trial and her subsequent petition for a writ of mandamus with the Court of Appeals for the Eighth Circuit seeking to overturn that ruling. [FN11]

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The Court excluded the Lewinsky evidence from trial, not in response to any misconduct on the part of the President, but in response to a motion by OIC for limited intervention and stay of discovery in this civil case. *See Jones v. Clinton,* 993 F.Supp. 1217 (E.D.Ark.1998) (Order denying motion to reconsider ruling excluding Lewinsky evidence from trial). [FN12] Thus, the fees and expenses associated with attempts by plaintiff's counsel to overturn this Court's Lewinsky ruling were not caused by the President's willful failure to obey this Court's discovery Orders and, therefore, are not compensable.

FN11. RCFP later withdrew this petition following this Court's grant of summary judgment to defendants on April 1, 1998.

FN12. OIC argued in its motion that counsel for plaintiff were deliberately shadowing the grand jury's investigation of the Lewinsky matter and that "the pending criminal investigation is of such gravity and paramount importance that this Court would do a disservice to the Nation if it were to permit the unfettered--and extraordinarily aggressive--discovery efforts currently underway to proceed unabated." *Id.* at 1218 (quoting OIC Motion, at 2-3). This Court made the decision to disallow discovery as to Ms. Lewinsky and to exclude evidence concerning her from trial because its admission would frustrate the timely resolution of this case and cause undue expense and delay, the substantial interests of the Presidency militated against any undue delay that would be occasioned by allowing plaintiff to pursue the Lewinsky matter, and the government's criminal proceedings (to which this Court generally must yield in civil matters) could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *Id.* at 1219-20. The Court noted that evidence of the Lewinsky matter, even assuming it to be very favorable to plaintiff, was not essential to the core issues in this case of whether plaintiff herself was the victim of *quid pro quo* sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress. *Id.* at 1222. *See also Jones v. Clinton,* 36 F.Supp.2d at 1122 n. 7.

RCFP, however, argues that if the President had told the truth on January 17, 1998, their discovery related to Ms. Lewinsky would then have been completed and OIC's motion would never have been filed. Reply of RCFP, at 6. They argue that this Court then would not have been asked to stay discovery related to Ms. Lewinsky because very little, if any, additional discovery related to her would have been sought, and this Court would not have had occasion to consider at that stage excluding the evidence at trial. *Id.*

While the Court does not question RCFP's representations as made in hindsight, the Court is hard pressed to conclude that plaintiff, given the intensity and contentiousness with which discovery was then being conducted, would not at that time have proceeded with depositions of Linda Tripp, Betty Currie, Vernon Jordan, and other witnesses in an effort to confirm or learn additional details of the relationship between Ms. Lewinsky and the President and, perhaps, to establish or discount through these witnesses the existence of any other relationships that might be relevant to the issues in the case. Moreover, even had the President told the truth with respect to Ms. Lewinsky, there is nothing in the record before the Court to indicate that Ms. Lewinsky would not at that time have continued to stand by her affidavit denying sexual relations between herself and the President, thus necessitating additional related discovery by plaintiff. [FN13] The ***728** Court simply cannot infer that OIC would not have intervened in this case had the President acknowledged a relationship between himself and Ms. Lewinsky on January 17th and that additional related discovery on the part of the plaintiff would thereby have ceased. [FN14] Such would require speculation and involves events that are not of record in this case. *See* n. 13, *supra.* Accordingly, the Court disallows fees and expenses associated with the attempts by plaintiff's counsel to overturn this Court's Lewinsky ruling. [FN15]

FN13. Not included in the record of this case are many materials, including the transcript of Ms. Lewinsky's grand jury testimony and transcripts of depositions generated in the course of this litigation, that might reveal additional instances of misconduct other than those described in the Court's April 12th Order. Such materials are not normally filed of record and, thus, are not part of the official record to be considered by this Court. Indeed, because such materials are not normally filed of

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record, the transcript of the President's January 17th deposition had not been filed of record until just recently. In this regard, the Court, prior to considering the issue of the President's possible contempt following his August 17, 1998 address to the Nation and prior to issuing its April 12th Order, had to expand the record by first obtaining, and then filing of record, the following items: (1) President Clinton's Responses to Plaintiff's Second Set of Interrogatories; (2) President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories; (3) the redacted transcript of the January 17, 1998 deposition of President Clinton; (4) the transcript of the August 17, 1998 videotaped grand jury testimony of President Clinton; and (5) the transcript of President Clinton's August 17, 1998 televised address to the Nation. *See* Order of April 12, 1999 [doc.#478]. While the Court certainly could further expand the record of this case and convene hearings to address other possible instances of misconduct beyond those upon which the April 12th Order is based, the Court, in the interests of the Presidency and in order to bring this matter to a speedy closure, declines to do so.

FN14. The Court notes that OIC was given authorization to investigate the President's conduct in this case prior to the January 17th deposition.

FN15. Likewise, the Court will disallow fees and expenses associated with responding to OIC subpoenas.

e.

The Court will allow fees and expenses associated with preparing to depose Ms. Lewinsky, attempting to substantiate the Lewinsky allegations, responding to her motion for a protective order, and traveling to Washington, D.C. for her deposition. The President acknowledges that fees and expenses incurred by plaintiff in seeking Lewinsky evidence subsequent to the actions upon which the Court's April 12th Order is based and prior to the decision by this Court to exclude that evidence from trial fall within the Court's Order. The Court agrees and, therefore, RCFP is entitled to $12,316.00 for fees and expenses associated with these activities, and TRI is entitled to $5,545.85 for its fees and expenses.

f.

The Court will allow fees and expenses associated with the motion for summary judgment and the subsequent appeal to the Eighth Circuit following this Court's grant of summary judgment to defendants, but only to the extent that plaintiff's brief on summary judgment and her appeal dealt with the President's falsehoods and alleged obstruction of justice concerning Monica Lewinsky. Unlike the matter involving this Court's evidentiary ruling excluding the Lewinsky evidence from trial, this Court has no difficulty in concluding that these fees and expenses would not have been incurred had the President not willfully failed to obey this Court's discovery Orders. [FN16] Accordingly, RCFP is entitled ***729** to $27,687.37 for fees and expenses associated with the motion for summary judgment and subsequent appeal, and TRI is entitled to $802.50 for its fees and expenses.

FN16. RCFP and TRI have included many general time entries with respect to the work spent on the motion for summary judgment and subsequent appeal that do not specify which hours were spent for which activities. The Court recognizes, however, that plaintiff's counsel were not anticipating at the time they recorded these time entries that they would later be asked to segregate the time spent as a result of the President's misconduct. Accordingly, rather than disallow these time entries in their entirety, the Court has reduced the total number of hours claimed in these time entries to a number of hours that this Court deems reasonable for work spent on that compensable portion of the time entry. Thus, for example, where a time entry claims compensation for, say, six hours spent drafting a response to the President's motion for summary judgment, the Court, notwithstanding RCFP's assertion that all of the time entries dealt with the President's falsehoods and alleged obstruction of justice, has reduced the hours claimed for that activity to a number that this Court would deem reasonable for time spent only on that portion of the response dealing with the President's falsehoods and alleged obstruction of justice concerning Ms. Lewinsky. While this process might not be

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exact, the Court believes it represents a fair and expeditious solution to determining the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders.

g.

The Court will allow fees and expenses associated with researching contempt and spoilation issues following the President's August 17, 1998 televised Address to the Nation, and in responding to this Court's request for a transcript of the President's deposition. Although RCFP never filed a motion for contempt following the President's August 17th Address, the fees and expenses associated with these activities would have been unnecessary had the President followed this Court's discovery Orders. Accordingly, RCFP is entitled to $22,235.25 for fees and expenses associated with these activities. [FN17]

FN17. TRI does not appear to claim any fees and expenses with respect to these activities.

h.

Finally, the Court finds that RCFP is entitled to $12,527.50 for fees and expenses associated with reviewing and responding to this Court's April 12th Order requiring plaintiff's former counsel to submit a statement of reasonable fees and expenses. [FN18]

FN18. Again, TRI does not appear to claim any fees and expenses with respect to these activities.

III.

The Court takes no pleasure in imposing contempt sanctions against this Nation's President and, no doubt like many others, grows weary of this matter. Nevertheless, the Court has determined that the President deliberately violated this Court's discovery Orders, thereby undermining the integrity of the judicial system, and that sanctions must be imposed to redress the President's misconduct and to deter others who might consider emulating the President's misconduct. *See Jones v. Clinton*, 36 F.Supp.2d at 1131-32, 1134. Accordingly, the Court hereby orders the following:

1. The President shall deposit the sum of $1,202.00 into the registry of this Court within sixty (60) days of the date of entry of this Memorandum and Order.

2. The President shall pay RCFP the sum of $79,999.12 within sixty (60) days of the date of entry of this Memorandum and Order.

3. The President shall pay TRI the sum of $9,484.93 within sixty (60) days of the date of entry of this Memorandum and Order.

IT IS SO ORDERED this 29th day of July 1999.

57 F.Supp.2d 719

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United States District Court,
E.D. Arkansas,
Western Division.

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson, Defendants.

No. LR-C-94-290.

April 12, 1999.

Following settlement of former state employee's sexual harassment action against President and the United States Senate's acquittal of President of Articles of Impeachment, the District Court sua sponte raised issue of President's contempt. The District Court, Susan Webber Wright, Chief Judge, held that: (1) court had power to hold President in civil contempt; (2) President was in contempt of court; and (3) President was liable for plaintiff's reasonable expenses caused by President's willful failure to obey discovery orders and expenses incurred by court in traveling to President's tainted deposition.

Judgment entered.

West Headnotes

[1] Damages 50.10
115k50.10

Under Arkansas law, tort of outrage requires that plaintiff prove that: (1) defendant intended to inflict emotional distress or knew or should have known that emotional distress was likely result of his conduct; (2) conduct was extreme and outrageous and utterly intolerable in civilized community; (3) defendant's conduct was cause of plaintiff's distress; and (4) plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it.

[2] United States 26
393k26

There was no constitutional barrier to federal district court holding President of the United States in civil contempt of court and imposing sanctions for his actions undertaken in his role as civil litigant in civil case that did not relate to his duties as President, but rather involved actions taken by President before his term of office began.

[3] United States 26
393k26

Necessary incident of federal court's power to determine legality of President's unofficial conduct includes power to address unofficial conduct which threatens integrity of proceedings before court.

[4] Federal Civil Procedure 2757
170Ak2757

Federal courts have inherent power necessary to exercise all other powers, including ability to dismiss actions, assess attorney fees, and to impose monetary or other sanctions appropriate for conduct which abuses judicial process.

[5] Contempt 70
93k70

In selecting contempt sanctions, court must use least possible power adequate to end proposed.

[6] Federal Civil Procedure 2756.1
170Ak2756.1

Federal district court has power to conduct independent investigation in order to determine whether it has been victim of fraud.

[7] Contempt 44
93k44

Court may make adjudication of contempt and impose contempt sanction even after action in which contempt arose has been terminated.

[8] Federal Civil Procedure 2827
170Ak2827

Court generally may act sua sponte in imposing sanctions.

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[9] Contempt 30
93k30

Federal court has inherent power to protect its integrity and prevent abuses of judicial process by holding party in contempt and imposing sanctions for violations of court's orders.

[10] Contempt 60(3)
93k60(3)

To hold party in civil contempt, clear and convincing evidence must show that court fashioned clear and reasonably specific order, and that party violated that order.

[11] Federal Civil Procedure 1278
170Ak1278

When discovery order has been violated which could be adequately sanctioned under rules, court ordinarily should turn to its inherent powers to impose sanctions only as secondary measure. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[12] Federal Civil Procedure 1456
170Ak1456

President of United States violated court orders allowing plaintiff who alleged that she was sexually harassed by President to discover information regarding any individuals with whom President had or proposed to have sexual relations and who were state or federal employees, by giving false, misleading, and evasive deposition testimony regarding whether he had ever been alone with or engaged in sexual relations with certain White House intern, and violation amounted to civil contempt. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.

[13] Federal Civil Procedure 1452
170Ak1452

[13] Federal Civil Procedure 1538
170Ak1538

Production order is generally needed to trigger rule authorizing discovery sanctions. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[14] Federal Civil Procedure 1452
170Ak1452

[14] Federal Civil Procedure 1538
170Ak1538

Federal district court's order ruling on plaintiff's motion to compel President to respond to interrogatories and court's oral ruling at President's deposition requiring President to answer questions posed by plaintiff's counsel were production orders, as required for application of rule authorizing discovery sanctions. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[15] Federal Civil Procedure 1453
170Ak1453

[15] Federal Civil Procedure 1539
170Ak1539

President's violation of court's discovery orders in sexual harassment suit warranted imposition of civil contempt sanctions, requiring President to pay plaintiff any reasonable expenses, including attorney fees, caused by President's willful failure to obey discovery orders and to reimburse district court for its expenses in traveling to Washington D.C. at President's request to preside at his tainted deposition. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.

[16] Attorney and Client 32(3)
45k32(3)

Arkansas Supreme Court has exclusive jurisdiction over conduct of Arkansas attorneys and has power to make rules regulating practice of law and professional conduct of attorneys of law. Ark.Const.Amend. No. 28.

[17] Federal Civil Procedure 2756.1
170Ak2756.1

Federal district court's referral to State Supreme Court Committee on Professional Conduct of matter regarding alleged professional misconduct of President of United States, who was licensed attorney in Arkansas, did not relinquish federal district court's jurisdiction to address matter and issue sanctions.

[18] Federal Civil Procedure 2756.1
170Ak2756.1

Authority of federal district court to sanction attorneys is independent of, and in addition to, power of review possessed by state disciplinary authorities.

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[19] Federal Civil Procedure 1456
170Ak1456

[19] Federal Civil Procedure 1542
170Ak1542

District court would utilize summary civil contempt procedures, rather than criminal contempt proceeding, to address United States President's failure to disclose his relationship with White House intern as ordered by court; court could expeditiously resolve matter and prevent any double jeopardy issues from arising by focusing on undisputed matters that were contained in record. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.; Fed.Rules Cr.Proc.Rule 42, 18 U.S.C.A.

***1119** Gregory S. Kitterman, Little Rock, AR, for Paula Corbin Jones.

Kathlyn Graves, Wright, Lindsey & Jennings, Little Rock, AR, Stephen C. Engstrom, ***1120** Wilson, Engstrom, Corum & Coulter, Little Rock, AR, Robert S. Bennett, Skadden, Arps, Slate, Meaghan & Flom, Washington, DC, for William Jefferson Clinton.

Bill W. Bristow, Seay & Bristow, Jonesboro, AR, Robert Batton, Municipal Judge, Jacksonville, AR, for Danny Ferguson.

MEMORANDUM OPINION AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

What began as a civil lawsuit against the President of the United States for alleged sexual harassment eventually resulted in an impeachment trial of the President in the United States Senate on two Articles of Impeachment for his actions during the course of this lawsuit and a related criminal investigation being conducted by the Office of the Independent Counsel ("OIC"). The civil lawsuit was settled while on appeal from this Court's decision granting summary judgment to defendants and the Senate acquitted the President of both Articles of Impeachment. Those proceedings having concluded, the Court now addresses the issue of contempt on the part of the President first raised in footnote five of the Court's Memorandum and Order of September 1, 1998. *See Jones v. Clinton*, 12 F.Supp.2d 931, 938 n. 5 (E.D.Ark.1998). For the reasons that follow, the Court hereby adjudges the President to be in contempt of court for his willful failure to obey this Court's discovery Orders.

I.

[1] Plaintiff Paula Corbin Jones filed this lawsuit seeking civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged actions beginning with an incident in a hotel suite in Little Rock, Arkansas on May 8, 1991, when President Clinton was Governor of the State of Arkansas. Plaintiff was working as a state employee on the day in question and claimed that Ferguson persuaded her to leave the registration desk she was staffing and visit Governor Clinton in a business suite at the hotel. She claimed the Governor made boorish and offensive sexual advances that she rejected, [FN1] and that her superiors at work subsequently dealt with her in a hostile and rude manner and punished her in a tangible way for rejecting those advances. [FN2]

FN1. Although the President's alleged conduct was certainly "outrageous" as that term is commonly understood, plaintiff failed to establish that the President's alleged conduct met the requirements of the *tort of outrage* which, under Arkansas law, requires that a plaintiff prove that: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized community; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it. *See Jones v. Clinton*, 990 F.Supp. 657, 676 (E.D.Ark.1998).

FN2. Additional detail on the factual background of this case can be found in the Court's Memorandum Opinion and Order of April 1, 1998. *See Jones v. Clinton*, 990 F.Supp. 657.

Plaintiff's complaint was filed on May 6, 1994. On August 10, 1994, the President filed a motion to dismiss the complaint without prejudice on grounds of immunity and to toll any statutes of limitations until he is no longer President, thereby allowing plaintiff to refile her suit after he is out of office. On

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December 28, 1994, this Court denied the President's motion to dismiss on immunity grounds and ruled that discovery in the case could proceed, but concluded that any trial should be stayed until such time as the President is no longer in office. *See* Jones v. Clinton, 869 F.Supp. 690 (E.D.Ark.1994). Both parties appealed. On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed this Court's Order denying the President's motion to dismiss on immunity grounds and allowing discovery to proceed, but reversed this Court's Order staying the trial of this matter for the duration of President Clinton's term in office. *See* Jones v. Clinton, 72 F.3d 1354 (8th Cir.1996). The President subsequently filed a petition for certiorari with the Supreme Court of the United States, which was granted, *see* Clinton v. Jones, 518 U.S. 1016, 116 S.Ct. 2545, 135 L.Ed.2d 1066 (1996), and on May 27, 1997, the Supreme Court handed down an opinion holding that there is no constitutional impediment to allowing plaintiff's ***1121** case to proceed while the President is in office. *See* Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

Following remand of the case to this Court, the President, joined by Ferguson, filed a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). By Memorandum Opinion and Order dated August 22, 1997, this Court granted in part and denied in part the President's motion. *See* Jones v. Clinton, 974 F.Supp. 712 (E.D.Ark.1997). The Court dismissed plaintiff's defamation claim against the President, dismissed her due process claim for deprivation of a property interest in her State employment, and dismissed her due process claims for deprivation of a liberty interest based on false imprisonment and injury to reputation, but concluded the remaining claims in plaintiff's complaint stated viable causes of action. *See id.* The Court thereupon issued a Scheduling Order setting forth a deadline of January 30, 1998, for the completion of discovery and the filing of motions.

Discovery in this case proved to be contentious and time-consuming. During the course of discovery, over 50 motions were filed, the Court entered some 30 Orders, [FN3] and telephone conferences were held on an almost weekly basis to address various disputes and resolve motions. In addition, the Court traveled to Washington, D.C. at the request of the President to preside over his civil deposition on January 17, 1998. It was at a hearing on January 12, 1998, to address issues surrounding the President's deposition and at the deposition itself that the Court first learned of Monica Lewinsky, a former White House intern and employee, and her alleged involvement in this case.

FN3. Included in these Orders was a Confidentiality Order on Consent of all Parties. The Court entered this Order on October 30, 1997, due to the salacious nature of much of the discovery and the media's intense and often inaccurate coverage of this case. *See* Jones v. Clinton, 12 F.Supp.2d at 935-36. The Court took this action to help insure that a fair and impartial jury could be selected in the event this matter went to trial by limiting prejudcial pre-trial publicity and to protect the interests of the various Jane Does in maintaining privacy. *Id.* at 936- 37.

At his deposition, the President was questioned extensively about his relationship with Ms. Lewinsky, this Court having previously ruled on December 11, 1997, that plaintiff was "entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame [of May 8, 1986, up to the present] state or federal employees." *See* December 11, 1997 Order, at 3. [FN4] Based on that ruling, this Court overruled objections during the deposition from the President's attorney, Robert S. Bennett, that questions concerning Ms. Lewinsky were inappropriate areas of inquiry and required that such questions be answered by the President. *See* Pres. Depo. at 53-55, 66, 78. Having been so ordered, the President testified in response to questioning from plaintiff's counsel and his own attorney that he had no recollection of having ever been alone with Ms. Lewinsky and he denied that he had engaged in an "extramarital sexual affair," in "sexual relations," or in a "sexual relationship" with Ms. Lewinsky. [FN5] *Id.* at 52-53, 56-59, 78, 204. An affidavit submitted by Ms. Lewinsky in support of her motion to quash a subpoena for her testimony and made a part of the record of the President's deposition likewise denied that she and the President had engaged in a sexual relationship. ***1122** When asked by Mr. Bennett whether Ms. Lewinsky's affidavit denying a sexual relationship with the President was a "true and accurate statement," the President answered, "That is absolutely true." Pres. Depo. at 204.

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FN4. The Court's December 11th Order ruled on plaintiff's motion to compel responses to her second set of interrogatories, granting in part and denying in part the motion. However, the Court also addressed in the Order the President's upcoming deposition and concluded that for purposes of the deposition, not only was plaintiff entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees, but that the Court would possibly permit plaintiff to question the President with regard to matters that fell outside that time frame if she had an independent basis for doing so. *See* December 11, 1997 Order, at 4.

FN5. At the request of plaintiff's counsel, the term "sexual relations" was defined as follows during the deposition: "For the purposes of this deposition, a person engages in 'sexual relations' when the person knowingly engages in or causes ... contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person.... 'Contact' means intentional touching, either directly or through clothing." *See* Depo. Ex. 1.

The President's denial of a sexual relationship with Ms. Lewinsky at his deposition was consistent with his answer of "None" in response to plaintiff's Interrogatory No. 10, which requested the name of each and every federal employee with whom he had sexual relations when he was President of the United States. *See* Pres. Clinton's Resp. to Pl.'s Second Set of Int. at 5; Pres. Clinton's Supp. Resp. to Pl.'s Second Set of Int. at 2. This interrogatory was answered on December 23, 1997, after this Court had entered its December 11th Order ruling on plaintiff's motion to compel responses to her second set of interrogatories and finding that plaintiff was entitled to such information. See December 11, 1997 Order, at 3, 6. [FN6]

FN6. The President's answer to this interrogatory was made a part of the record of the President's deposition. There was no formal definition of the term "sexual relations" with respect to plaintiff's interrogatory or the President's answer.

One day prior to the President's deposition, and unknown to this Court, the Special Division of the United States Court of Appeals for the District of Columbia Circuit granted a request from Attorney General Janet Reno to expand the jurisdiction of Independent Counsel Kenneth W. Starr and entered an Order authorizing the Independent Counsel "to investigate ... whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton.*" *In re Madison Guaranty Savings & Loan Ass'n,* Div. No. 94-I, 1998 WL 472444 (D.D.C. Jan. 16, 1998). A short time later, the President's relationship with Ms. Lewinsky and OIC's investigation of that relationship broke in the national media.

On the afternoon of January 28, 1998, with less than 48 hours remaining in the period for conducting discovery, OIC filed with this Court a motion for limited intervention and stay of discovery in this civil case. OIC argued that counsel for plaintiff were deliberately shadowing the grand jury's investigation of the matter involving Ms. Lewinsky and that "the pending criminal investigation is of such gravity and paramount importance that this Court would do a disservice to the Nation if it were to permit the unfettered-- and extraordinarily aggressive--discovery efforts currently underway to proceed unabated." Motion of OIC, at 2-3. This Court convened a telephone conference the following morning and, after eliciting the views of the parties and OIC, entered an Order granting in part and denying in part OIC's motion. *See Jones v. Clinton,* 993 F.Supp. 1217 (E.D.Ark.1998) (Order denying plaintiff's motion for reconsideration). In essence, the Court concluded that the parties could continue with discovery in the short time that remained of those matters not involving Ms. Lewinsky, but that any discovery that did involve Ms. Lewinsky would not be allowed to go forward and, further, that any evidence concerning Ms. Lewinsky would be excluded from the trial of this matter. *Id.* at 1218-19. [FN7]

FN7. In so ruling, and contrary to numerous assertions, this Court did not rule that

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evidence of the Lewinsky matter was irrelevant or immaterial to the issues in plaintiff's case. Indeed, the Court specifically acknowledged that such evidence might have been relevant to plaintiff's case and, as she argued, "might possibly have helped her establish, among other things, intent, absence of mistake, motive, and habit on the part of the President." 993 F.Supp. at 1222 (citing Fed.R.Evid. 404(b), 406). At the time, however, the Court anticipated that the President and Ms. Lewinsky would both deny a sexual relationship and that plaintiff would attempt to rebut their denials with extrinsic evidence that could be inadmissable under Fed.R.Evid. 608(b). To stay discovery so that plaintiff could explore such evidence would have required extensive additional delay. In that regard, this Court made the decision to disallow discovery as to Ms. Lewinsky and to exclude evidence concerning her from trial, not because the Court considered such evidence to be irrelevant or immaterial, but because its admission would frustrate the timely resolution of this case and cause undue expense and delay, the substantial interests of the Presidency militated against any undue delay that would be occasioned by allowing plaintiff to pursue the Lewinsky matter, and the government's criminal proceedings (to which this Court generally must yield in civil matters) could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *Id.* at 1219-20. The Court noted that evidence of the Lewinsky matter, even assuming it to be very favorable to plaintiff, was "not essential to the *core issues* in this case of whether plaintiff *herself* was the victim of *quid pro quo* sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress." *Id.* at 1222 (emphasis in original).

***1123** Following the completion of discovery, the President and Ferguson each filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56. By Memorandum Opinion and Order dated April 1, 1998, this Court granted the President's and Ferguson's motions for summary judgment and entered judgment dismissing this case. *See Jones v. Clinton,* 990 F.Supp. 657 (E.D.Ark.1998). The Court concluded that there were no genuine issues for trial in this case and that defendants were entitled to judgment as a matter of law with respect to plaintiff's claims that she was subjected to *quid pro quo* and hostile work environment sexual harassment, that the defendants conspired to deprive her of her civil rights, and that she suffered emotional distress so severe in nature that no reasonable person could be expected to endure it. *Id.* The plaintiff appealed. Meanwhile, OIC's investigation of the President continued.

On August 17, 1998, the President appeared before a grand jury in Washington, D.C., as part of OIC's criminal investigation and testified about his relationship with Ms. Lewinsky and his actions during this civil lawsuit. That evening, the President discussed the matter in a televised address to the Nation. In his address, the President stated that although his answers at his January 17th deposition were "legally accurate," he did not volunteer information and that he did indeed have a relationship with Ms. Lewinsky that was inappropriate and wrong. *See* Pres. Addr., 1998 WL 14394084. The President acknowledged misleading people, in part because the questions posed to him "were being asked in a politically inspired lawsuit which has since been dismissed," and because he "had real and serious concerns about an Independent Counsel investigation that began with private business dealings 20 years ago...." *Id.* It was during the President's televised address that the Court first learned the President may be in contempt. *See Jones v. Clinton,* 12 F.Supp.2d at 938 n. 5. [FN8]

FN8. In addressing the President's objections to the unsealing of the transcript of his deposition, this Court stated in footnote five as follows: "Although the Court has concerns about the nature of the President's January 17th, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt."

On September 9, 1998, the Independent Counsel, having concluded there was substantial and credible information that the President committed acts that may constitute grounds for impeachment, submitted his findings from his investigation of the Lewinsky matter to the United States House of Representatives

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pursuant to 28 U.S.C. § 595(c). The House of Representatives thereupon commenced impeachment proceedings, ultimately passing two Articles of Impeachment against the President, one alleging perjury in his August 17th testimony before the grand jury and the other alleging obstruction of justice in this civil case. The matter then proceeded to trial in the United States Senate.

On November 13, 1998, while the impeachment proceedings were taking place in the House of Representatives, the plaintiff reached an out-of court settlement for $850,000.00 and withdrew her appeal of this Court's April 1st decision granting summary judgment to defendants. *See Jones v. Clinton,* 161 F.3d 528 (8th Cir.1998). Thereafter, on February 12, 1999, the Senate acquitted the President of both Articles of Impeachment.

Following the acquittal of the President, this Court held a telephone conference on February 16, 1999, to address the remaining issues before this Court, including the issue of attorney's fees and the issue of whether the President should be subject to contempt proceedings. *See* February 16, 1999 Order, at 2. [FN9] The Court explained to the parties that it had previously declined to address the issue of the President's contempt due to the fact that this case was on appeal at the time and Congress was conducting impeachment proceedings against the President. *See id.* at 3. [FN10] The Court explained that had this ***1124** Court's grant of summary judgment to defendants been reversed and the case remanded, there would have been available certain sanctions that are unavailable otherwise. *Id.* The Court further explained that even though this litigation begat the controversy that was the subject of the President's impeachment trial in the Senate, the interests protected by the contempt authority of the Court are significantly different from the interests protected by the impeachment process. *Id.* In essence, stated the Court, the contempt authority protects the integrity of a court's proceedings and provides a means of enforcement of its orders, while impeachment is a constitutional process in which the proper inquiry is the President's fitness to serve in office. *Id.* Given this distinction, the Court determined that it should defer to Congress and its constitutional duties prior to this Court addressing the President's conduct in this civil case.

FN9. On March 4, 1999, an agreement was reached as to allocation of the $850,000.00 settlement, thus rendering moot all issues concerning attorneys' fees. *See* March 4, 1999 Order.

FN10. After becoming aware of the President's possible contempt on August 17th, the Court learned through published reports that the House of Representatives may conduct proceedings to consider evidence of possible impeachable offenses against the President (proceedings of which in fact began on September 9th with the submission of the Independent Counsel's report to the House of Representatives). Those reports, and the fact that the matter was on appeal at the time, led to this Court's decision as stated in footnote five of the Court's September 1st Memorandum and Order to defer addressing at that time the matter of the President's contempt.

As the Court explained to the parties, however, it is now time to address the issue of the President's contempt as all other proceedings that heretofore have precluded this Court from addressing the issue have concluded. *Id.* [FN11] Accordingly, it is that issue to which the Court now turns.

FN11. The Court informed the parties that a member of the House Managers who prosecuted the impeachment trial against the President contacted the undersigned in early January of this year to let me know that he was considering calling me as a witness for the impeachment trial. I objected and was never subpoenaed or otherwise asked to testify. Later, a representative of the House Managers requested and, with my permission, received an affidavit concerning the President's deposition from my law clerk, Barry W. Ward, who attended the President's deposition. The Court allowed the parties an opportunity to request that I recuse from deciding the remaining issues in this case because of the House Manager's contact with me or because of Mr. Ward's affidavit, but none did so.

II.

[2] The threshold question in this matter is whether a President of the United States can be held in civil

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contempt of court and thereby sanctioned. Although federal courts possess the authority to impose sanctions for civil contempt pursuant to the Federal Rules of Civil Procedure and their inherent authority, *see* Fed.R.Civ.P. 37(b)(2) (providing that a court may enter an order treating as a contempt of court the failure of a party to obey the court's orders); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (noting that the power to punish for contempts is inherent in all courts), no court has ever held a President in contempt of court. *See Franklin v. Massachusetts*, 505 U.S. 788, 827, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (Scalia, J., concurring). *See also United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (noting that the issue of whether a President can be cited for contempt could engender protracted litigation). Nevertheless, this Court has considered the matter and finds no constitutional barrier to holding the President in civil contempt of court in this case and imposing sanctions.

This lawsuit involved private actions allegedly taken by the President before his term of office began, and the contumacious conduct on the part of the President was undertaken in his role as a litigant in a civil case and did not relate to his duties as President. Both the Court of Appeals for the Eighth Circuit and the Supreme Court held in this case that the Constitution does not place the President's unofficial conduct beyond judicial scrutiny. In so ruling, the Court of Appeals specifically rejected the President's argument that "because a federal court will control the litigation, the Third Branch necessarily will interfere with the Executive Branch through the court's scheduling orders *and its powers to issue contempt citations and sanctions.* " *Jones v. Clinton*, 72 F.3d at 1361 (emphasis added). Likewise, the Supreme Court explained that " '[it] is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States,' " ***1125** *Clinton v. Jones*, 520 U.S. at 705, 117 S.Ct. 1636 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)), and noted that "[i]f the judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct." *Id.*

[3][4] Although not expressly addressed by the Supreme Court, a necessary incident of the power to determine the legality of the President's unofficial conduct includes the power to address unofficial conduct which threatens the integrity of the proceedings before the court. The sanctioning provisions in the Federal Rules of Civil Procedure vest federal courts with the power to address conduct which threatens the integrity of the judicial process, *see, e.g.*, Fed.R.Civ.P. 11 (providing that sanctions may be appropriate where a claim is presented for an improper purpose) and 37 (sanctions for failure to cooperate with discovery), and the existence in the federal courts of an inherent power " 'necessary to the exercise of all others' " is likewise firmly established and "include[s] the ability to dismiss actions, assess attorneys' fees, and to impose monetary or other sanctions appropriate 'for conduct which abuses the judicial process.' " *Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir.) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812); *Chambers*, 501 U.S. at 44-45, 111 S.Ct. 2123), *cert. denied*, 510 U.S. 828, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993). *See also Spallone v. United States*, 493 U.S. 265, 276, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) (noting the axiom that courts have inherent power to enforce compliance with their lawful orders through civil contempt).

[5] Certainly the Court recognizes that significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties. *See Clinton v. Jones*, 520 U.S. at 708, 117 S.Ct. 1636. No such sanctions will be imposed, however. Throughout the history of this case, this Court has attempted to apply the law to the President in the same manner as it would apply the law to any other litigant, keeping in mind the "high respect that is owed to the office of the Chief Executive" and the Supreme Court's directive that such respect "inform the conduct of the entire proceeding...." *See id.* at 707, 117 S.Ct. 1636. In that regard, this Court will not impose greater sanctions against the President for his contumacious conduct in this case than would be imposed against any other litigant and member of the bar who engaged in similar misconduct. Moreover, this Court is aware that it is obliged to use the least possible power adequate to the end proposed in selecting contempt sanctions, *see Spallone*, 493 U.S. at 276, 110 S.Ct. 625, and will base the imposition of sanctions on a principle of proportionality, recognizing that the President's contumacious conduct occurred in a case that was both dismissed on summary judgment as lacking in merit and in which the plaintiff was made whole, having agreed to a settlement in excess of that prayed for in her

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complaint.

[6][7][8] In sum, the Court finds that the power to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process. [FN12] That established, the Court now turns to the central issue of the President's contempt.

> FN12. Every district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123. Although this civil action has been terminated, "[a] court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). In addition, a court generally may act *sua sponte* in imposing sanctions. *Chambers*, 501 U.S. at 42 n. 8, 111 S.Ct. 2123.

A.

[9][10][11] As noted earlier, a federal district court has two principal sources of authority for finding a party in civil contempt of its discovery orders: Fed.R.Civ.P. 37(b)(2) and the court's inherent power. *See, e.g.,* ***1126***Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C.Cir.1998); *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir.1993); *Cobell v. Babbitt*, 37 F.Supp.2d 6, 9 (D.D.C.1999). Pursuant to Rule 37(b)(2), a court may hold a party in contempt of court for failing to obey an order to provide discovery and may impose several specific, nonexclusive sanctions to address such misconduct, "the parameters of the available measures being 'such orders in regard to the failure as are just.' " *Cobell*, 37 F.Supp.2d at 9-10 (quoting Fed.R.Civ.P. 37(b)(2)). However, when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap. *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1474 (D.C.Cir.1995) (citing *Chambers*, 501 U.S. at 46, 111 S.Ct. 2123). In this regard, a court has the "inherent power to protect [its] integrity and prevent abuses of the judicial process" by holding a party in contempt and imposing sanctions for violations of the court's orders. *Cobell*, 37 F.Supp.2d at 9 (quoting *Webb*, 146 F.3d at 971). When the source of the civil contempt is a failure to comply with a discovery order, the analysis and available remedies under Fed.R.Civ.P. 37 and the court's inherent power are essentially the same. *Id.* at 9-10. *Cf. Dillon v. Nissan Motor Corp.*, 986 F.2d 263, 268-69 (8th Cir.1993) (noting the comparability of sanctions under Fed.R.Civ.P. 37 and sanctions under the court's inherent power); *Gates Rubber Co. v. Bando Chem. Ind., Ltd.*, 167 F.R.D. 90, 107 (D.Co.1996) (noting that "Rule 37 and the inherent powers of the court may be different routes by which to reach a result, but the analysis of the criteria along the way can be exactly the same"). Two requirements must be met before a party may be held in civil contempt: the court must have fashioned an Order that is clear and reasonably specific, and the party must have violated that Order. *Cobell*, 37 F.Supp.2d at 9 (citations omitted). Generally, these two requirements must be shown by clear and convincing evidence. *Id.* Although these requirements apply whether the court is proceeding under Fed.R.Civ.P. 37 or its inherent power, *see id.* a court ordinarily should turn to its inherent powers only as a secondary measure when a discovery order has been violated. *Id.* at 10. *See also Chambers*, 501 U.S. at 50, 111 S.Ct. 2123 (noting that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power"). Accordingly, this Court addresses the President's contumacious conduct under Fed.R.Civ.P. 37(b)(2), finding that rule sufficient in its scope to redress the abuse of the judicial process that occurred in this case.

1.

Fed.R.Civ.P. 37(b)(2) sets forth a broad range of sanctions that a district court may impose upon parties for their failure to comply with the court's discovery orders. The Rule provides that if a party fails to obey an order to provide or permit discovery, the court "may make such orders in regard to the failure as are just" and, among others, impose the following sanctions: (1) the court may order that the matters regarding which the order was made or any other designated facts be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) the court may refuse to allow the disobedient party to support or oppose designated claims or defenses, or prohibit that party from introducing designated matters in evidence; (3) the court may strike any pleadings or

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parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render a judgment of default against the disobedient party; and (4) the court may, in lieu of any of the foregoing sanctions or in addition thereto, enter an order treating as a contempt of court the failure of the party to obey the court's orders. Fed.R.Civ.P. 37(b)(2). In addition to those sanctions, the Rule provides:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order ... to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially ***1127** justified or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(b)(2).

a.

[12][13][14] On two separate occasions, this Court ruled in clear and reasonably specific terms that plaintiff was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. *See* December 11, 1997 Order, at 3; Pres. Depo. at 53-55, 66, 78. [FN13] Notwithstanding these Orders, the record demonstrates by clear and convincing evidence that the President responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process. The President acknowledged as much in his public admission that he "misled people" because, among other things, the questions posed to him "were being asked in a politically inspired lawsuit, which has since been dismissed." Although there are a number of aspects of the President's conduct in this case that might be characterized as contemptuous, the Court addresses at this time only those matters which no reasonable person would seriously dispute were in violation of this Court's discovery Orders and which do not require a hearing, namely the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky. [FN14]

FN13. As a general matter, a production order is needed to trigger Rule 37(b). *See, e.g., Shepherd,* 62 F.3d at 1474; *Kropp v. Ziebarth,* 557 F.2d 142, 146 n. 7 (8th Cir.1977). Here, the Court's December 11th Order ruling on plaintiff's motion to compel and addressing aspects of the President's deposition constitutes a production order within the meaning of Rule 37(b), as does the Court's oral ruling at the President's deposition that the Lewinsky matter was, consistent with the December 11th Order, a proper subject of inquiry, and that the President was required to answer such questions from plaintiff's counsel. *Cf. Jones v. Uris Sales Corp.,* 373 F.2d 644, 647-48 (2nd Cir.1967) (proceedings before district court during which the judge issued an oral order requiring compliance with the subpoena provided a proper basis for Rule 37(b)(2) sanction).

FN14. Other possible contumacious conduct on the part of the President that the Court does not address at this time includes his possible violation of this Court's admonition not to discuss the deposition with anyone. At the conclusion of the President's deposition, the Court stated as follows: "Before he leaves, I want to remind him, and everyone else in the room, that this case is subject to a Protective Order ... and therefore all parties present, including Secret Service agents, videographers, court reporters and the witness are not to say anything whatsoever about the questions they were asked, the substance of the deposition, the length of it, objections, recess, any details, whether the President did well or did not do well, whether he is credible or not credible, [or] whether he admitted or denied any specific allegations...." Pres. Depo. at 212-13. This admonition was an oral reiteration of the Court's October 30th Confidentiality Order on Consent of all Parties and constituted an expansion of the Order to persons present at the deposition who would otherwise not have been subject to its provisions. While the President may have violated the Confidentiality Order, *see, e.g.,* Pres. GJ Test. at 54-58 (wherein the President testified that he approached his secretary the day after the deposition in order to ascertain information regarding some of the questions that were asked of him by plaintiff's counsel), the record in this case suggests that there were violations of the Confidentiality Order attributable to other individuals within the jurisdiction of

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this Court as well. Ascertaining whether the President or other individuals violated the Confidentiality Order--either with respect to the deposition or otherwise--would require hearings and the taking of evidence. For reasons to be stated, the Court determines that such hearings are not in the best interests of the President or this Court. *See* Section II(B), *infra.*

i.

At his January 17th deposition, the President responded to a series of questions regarding whether he and Ms. Lewinsky had ever been alone together by maintaining that he could not recall being alone with her. The President testified as follows:

Q. Mr. President, before the break, we were talking about Monica Lewinsky. At any time were you and Monica Lewinsky together alone in the Oval Office?

A. I don't recall, but as I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. I typically worked some on the weekends. Sometimes they'd bring me things on the weekends. She--it seems to me she brought things to me once or twice on the weekends. In that case, whatever ***1128** time she would be in there, drop it off, exchange a few words and go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do some work on one of the days of the weekends in the afternoon.

Q. So I understand, your testimony is that it was possible, then, that you were alone with her, but you have no specific recollection of that ever happening?

A. Yes, that's correct. It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there. That's possible.

* * * * * *

Q. Do you ever recall walking with Monica Lewinsky down the hallway from the Oval Office to your private kitchen there in the White House?

A.... [M]y recollection is that, that at some point during the government shutdown, when Ms. Lewinsky was still an intern but was working the chief staff's office because all the employees had to go home, that she was back there with a pizza that she brought to me and to others. I do not believe she was there alone, however. I don't think she was. And my recollection is that on a couple of occasions after that she was there but my secretary, Betty Currie, was there with her. She and Betty are friends. That's my, that's my recollection. And I have no other recollection of that.

* * * * * *

Q. At any time were you and Monica Lewinsky alone in the hallway between the Oval office and this kitchen area?

A. I don't believe so, unless we were walking back to the back dining room with the pizza. I just, I don't remember. I don't believe we were alone in the hallway, no.

* * * * * *

Q. At any time have you and Monica Lewinsky ever been alone together in any room in the White House?

A. I think I testified to that earlier. I think that there is a, it is--I have no specific recollection, but it seems to me that she was on duty on a couple of occasions working for the legislative affairs office and brought me some things to sign, something on the weekend. That's--I have a general memory of that.

Pres. Depo. at 52-53, 56-59.

At his August 17th appearance before the grand jury, the President directly contradicted his deposition testimony by acknowledging that he had indeed been alone with Ms. Lewinsky on a number of occasions during which they engaged in "inappropriate intimate contact." Pres. GJ Test. at 9-10. He stated he also was alone with her "from time to time" when there was no "improper contact" occurring. *Id.* at 134. The President began his testimony by reading a statement which reads in part as follows:

When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse. They did not constitute sexual relations as I understood that term to be defined at my January 17th, 1998 deposition. But they did involve inappropriate intimate contact. These inappropriate encounters ended, at my insistence, in early 1997.

Id. at 9-10. The President then testified as follows in response to questions regarding whether he and Ms. Lewinsky had ever been alone together:

Q. Let me ask you, Mr. President, you indicate in your statement that you were alone with Ms. Lewinsky. Is that right?

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A. Yes, sir.
Q. How many times were you alone with Ms. Lewinsky?
A. Let me begin with the correct answer. I don't know for sure. But if you would like me to give an educated guess, I will do that, but I do not know for sure. And I will tell you what I think, based on what I remember. But I can't be held to a specific time, because I don't have records of all of it.
Q. How many times do you think?
A. Well, there are two different periods here. There's the period when she worked in the White House until April of '96. And ***1129** then there's the period when she came back to visit me from February of '97 until late December '97.
Based on our records--let's start with the records, where we have the best records and the closest in time. Based on our records, between February and December, it appears to me that at least I could have seen her approximately nine times. Although I do not believe I saw her quite that many times, at least it could have happened.
There were--we think there were nine or 10 times when she was in, in the White House when I was in the Oval Office when I could have seen her. I do not believe I saw her that many times, but I could have. * * * I remember specifically, I have a specific recollection of two times. I don't remember when they were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone.
And I am frankly quite sure--although I have no specific memory, I am quite sure there were a couple of more times, probably two times more, three times more. That's what I would say. That's what I can remember. But I do not remember when they were, or at what time of day they were, or what the facts were. But I have a general memory that would say I certainly saw her more than twice during that period between January and April of 1996, when she worked there.

Id. at 30-32. In addition, the President recalled a specific meeting on December 28, 1997, less than three weeks prior to his January 17th deposition, at which he and Ms. Lewinsky were alone together. *Id.* at 34. The President went on to acknowledge that he tried to conceal his "inappropriate intimate relationship" with Ms. Lewinsky by not telling anyone about the relationship and by "do[ing] it where nobody else was looking at it," stating that he would have to be an "exhibitionist not to have tried to exclude everyone else." *Id.* at 38, 54. The President testified as follows in response to a question regarding how many times that occurred:

Well, if you go back to my statement, I remember there were a few times in '96, I can't say with any certainty. There was once in early '97. After she left the White House, I do not believe I ever had any inappropriate contact with her in the rest of '96. There was one occasion in '97 when, regrettably, that we were alone together for a few minutes, I think about 20 minutes, and there was inappropriate contact. And after that, to the best of my memory and belief, it did not occur again.

Id. at 38-39.

ii.

With respect to whether he and Ms. Lewinsky had engaged in sexual relations, the President testified at his January 17th deposition as follows:

Q. Did you have an extramarital sexual affair with Monica Lewinsky?
A. No.
Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
A. It's certainly not the truth. It would not be the truth.
Q. I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?
Mr. Bennett: I object because I don't know that he can remember -
The Court: Well, it's real short. He can--I will permit the question and you may show the witness definition number one.
A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

Pres. Depo. at 78.

The President confirmed these denials in response to questioning from his attorney regarding Ms. Lewinsky's affidavit and whether he and Ms. Lewinsky ever had a "sexual relationship":

Q. In paragraph eight of her affidavit, she says this, "I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship." ***1130** Is that a true and accurate statement as far as you know it?
A. That is absolutely true.

Id. at 204.

Consistent with his denial at his deposition of a sexual relationship with Ms. Lewinsky, the President

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had earlier answered "None" in response to plaintiff's Interrogatory No. 10, which stated as follows:

> Please state the name, address, and telephone number of each and every [federal employee] with whom you had sexual relations when you [were] ... President of the United States.

See Pres. Clinton's Resp. to Pl.'s Second Set of Int. at 5; Pres. Clinton's Supp. Resp. to Pl.'s Second Set of Int. at 2. As previously noted, this interrogatory was answered without regard to a formal definition of the term "sexual relations" after this Court had entered its December 11th Order ruling that plaintiff was entitled to such information.

At his August 17th grand jury appearance, the President directly contradicted his deposition testimony by acknowledging "inappropriate intimate contact" with Ms. Lewinsky on numerous occasions. Pres. GJ Test. at 9-10, 38-39, 54. When asked by a grand juror what he meant by "inappropriate contact," the President stated, "What I meant was, and what they can infer that I meant was, that I did things that were--when I was alone with her, that were inappropriate and wrong." *Id.* at 92-93. The President repeatedly refused to provide answers to questions regarding specific sexual activity between himself and Ms. Lewinsky, instead referring to his statement acknowledging "inappropriate intimate contact" and stating that "sexual relations" as defined by himself and "most ordinary Americans" means, for the most part, only intercourse. *Id.* at 12, 22-24, 92-94, 102-03, 110-11, 139, 168. Nevertheless, the President, while claiming that he did not engage in intercourse with Ms. Lewinsky and did not engage in any other contact with her that would fall within the definition of "sexual relations" used at his deposition, acknowledged that the nature of his "inappropriate intimate contact" with Ms. Lewinsky was such that he would have been an "exhibitionist" had it been viewed by others. *Id.* at 10, 12, 54, 96. The President went on to state that he did not believe he violated the definition of sexual relations he was given "by directly touching those parts of her body with the intent to arouse or gratify." *Id.* at 139, 168.

b.

It is difficult to construe the President's sworn statements in this civil lawsuit concerning his relationship with Ms. Lewinsky as anything other than a willful refusal to obey this Court's discovery Orders. Given the President's admission that he was misleading with regard to the questions being posed to him and the clarity with which his falsehoods are revealed by the record, [FN15] there is no need to engage in an extended analysis of the President's sworn statements in this lawsuit. Simply put, the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false, notwithstanding tortured definitions and interpretations of the term "sexual relations." [FN16]

FN15. Indeed, even though the President's testimony at his civil deposition was entirely consistent with Ms. Lewinsky's affidavit denying "sexual relations" between herself and the President, the President's attorney later notified this Court pursuant to his professional responsibility that portions of Ms. Lewinsky's affidavit were reported to be "misleading and not true" and that this Court should not rely on Ms. Lewinsky's affidavit or remarks of counsel characterizing that affidavit. *See* Letter of September 30, 1998. The President's testimony at his deposition that Ms. Lewinsky's denial in her affidavit of a "sexual relationship" between them was "absolutely true" likewise was "misleading and not true."

FN16. The President seemed to accept OIC's characterization of his improper contact with Ms. Lewinsky as "some kind of sex" and as a "physically intimate" relationship. Pres. GJ Test. at 123, 136. Although the President did not disclose any specific sexual acts between himself and Ms. Lewinsky, he did state that oral sex performed by Ms. Lewinsky on himself would not constitute "sexual relations" as that term was defined by plaintiff at his deposition. *Id.* at 93, 100, 102, 104- 05, 151-52, 168. It appears the President is asserting that Ms. Lewinsky could be having sex with him while, at the same time, he was not having sex with her.

Certainly the President's aggravation with what he considered a "politically inspired ***1131** lawsuit" may well have been justified, although the Court makes no findings in that regard. Even assuming that to be so, however, his recourse for the filing of an improper claim against him was to move for the imposition of sanctions against plaintiff. *See, e.g., Clinton v. Jones*, 520 U.S. at 708-09, 117 S.Ct. 1636 (noting the

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availability of sanctions for litigation directed at the President in his unofficial capacity for purposes of political gain or harassment). The President could, for example, have moved for sanctions pursuant to Fed.R.Civ.P. 11 if, as he intimated in his address to the Nation, he was convinced that plaintiff's lawsuit was presented for an improper purpose and included claims "based on 'allegations and other factual contentions [lacking] evidentiary support' or unlikely to prove well-grounded after reasonable investigation." *Id.* at 709 n. 42, 117 S.Ct. 1636 (quoting Fed.R.Civ.P. 11(b)(1), (3)). The President never challenged the legitimacy of plaintiff's lawsuit by filing a motion pursuant to Rule 11, however, and it simply is not acceptable to employ deceptions and falsehoods in an attempt to obstruct the judicial process, understandable as his aggravation with plaintiff's lawsuit may have been. "A lawsuit is not a contest in concealment, and the discovery process was established so that 'either party may compel the other to disgorge whatever facts he has in his possession.' " *Southern Ry. Co. v. Lanham,* 403 F.2d 119, 130 (5th Cir.1968) (quoting *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

In sum, the record leaves no doubt that the President violated this Court's discovery Orders regarding disclosure of information deemed by this Court to be relevant to plaintiff's lawsuit. The Court therefore adjudges the President to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2).

2.

[15] The Court now turns to the issue of appropriate sanctions. Several of the sanctions contemplated by Fed.R.Civ.P. 37(b)(2) are unavailable to this Court as the underlying lawsuit has been terminated. The Court cannot, for example, order that the matters upon which the President gave false statements be taken as established, nor can the Court render a default judgment against the President, both of which the Court would have considered had this Court's grant of summary judgment to defendants been reversed and remanded. Moreover, as the Court earlier noted, the determination of appropriate sanctions must take into account that this case was dismissed on summary judgment as lacking in merit--a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky [FN17]--and that plaintiff was made whole, having settled this case for an amount in excess of that prayed for in her complaint. Nevertheless, the President's contumacious conduct in this case, coming as it did from a member of the bar and the chief law enforcement officer of this Nation, was without justification and undermined the integrity of the judicial system. "[O]ur adversary system depends on a most jealous safeguarding of truth and candor," *United States v. Shaffer Equip. Co.,* 11 F.3d 450, 463 (4th Cir.1993), and "[t]he system can provide no harbor for clever devises to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." *Id.* at 457-58. Sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who, having observed the President's televised address to the Nation in which his defiance of this Court's discovery Orders was revealed, might themselves consider emulating the President of the United States by willfully violating discovery orders of this and other courts, thereby engaging in conduct that undermines the integrity of the judicial system. *See National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (noting that "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to ***1132** flout other discovery orders of other district courts" if contumacious conduct was left unaddressed) (per curiam); *Roadway Express v. Piper,* 447 U.S. 752, 763-64, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (noting that Rule 37 sanctions must be applied diligently, both to penalize those whose conduct warrants sanctions and to deter those who might be tempted to sanctionable conduct in the absence of such a deterrent). Accordingly, the Court imposes the following sanctions:

> FN17. The Court noted that whether other women may have been subjected to workplace harassment does not change the fact that plaintiff has failed to demonstrate that she "*herself* was the victim of alleged *quid pro quo* or hostile work environment sexual harassment, [that] the President and Ferguson conspired to deprive *her* of her civil rights, or [that] *she* suffered emotional distress so severe in nature that no reasonable person could be expected to endure it." *Jones v. Clinton,* 990 F.Supp. at 678-79 (emphasis in original).

First, the President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders.

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Plaintiff's former counsel are directed to submit to this Court a detailed statement of any expenses and attorney's fees incurred in connection with this matter within twenty (20) days of the date of entry of this Memorandum Opinion and Order.

Second, the President shall reimburse this Court its expenses in traveling to Washington, D.C. at his request to preside over his tainted deposition. The Court therefore will direct that the President deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. [FN18]

FN18. The undersigned and Mr. Ward departed Little Rock, Arkansas for Washington, D.C. on January 16, 1998, and returned to Little Rock on January 18, 1998. Total expenses were incurred in accordance with the rules and regulations set forth in the *Guide to Judiciary Policies and Procedures,* Volumes I and III. In this respect, air fare was $216.00 per ticket and subsistence was $374.00 each. Remaining expenses totaled $ 22.00.

[16][17][18] In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any disciplinary action it deems appropriate for the President's possible violation of the Model Rules of Professional Conduct. [FN19] Relevant to this case, Rule 8.4 of the Model Rules provides that it is professional misconduct for a lawyer to, among other things, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or to "engage in conduct that is prejudicial to the administration of justice." The President's conduct as discussed previously arguably falls within the rubric of Rule 8.4 and involves matters that the Committee on Professional Conduct may deem appropriate for disciplinary action. [FN20]

FN19. The Committee on Professional Conduct acts as an arm of the Arkansas Supreme Court in matters relating to the supervision and licensing of Arkansas attorneys, of which the President is one, and that Court has exclusive jurisdiction over the conduct of Arkansas attorneys and has the power to make rules regulating the practice of law and the professional conduct of attorneys of law. *See* Neal v. Wilson, 920 F.Supp. 976, 987- 88 (W.D.Ark.1996), *aff'd,* 112 F.3d 351 (8th Cir.1997). In that regard, the Arkansas Supreme Court has adopted the American Bar Association's Model Rules of Professional Conduct as the State of Arkansas's code of professional responsibility. *See In re Arkansas Bar Ass'n,* 287 Ark. 495, 702 S.W.2d 326 (1985).

FN20. In referring this matter to the Committee on Professional Conduct, this Court does not thereby relinquish jurisdiction to address the matter itself and issue sanctions. Rather than having been displaced, the authority of this Court to sanction attorneys is independent of, and in addition to, the power of review possessed by the Committee on Professional Conduct. *See* Harlan v. Lewis, 982 F.2d at 1261 (noting that "[a] district judge must have the power to deal with conduct of attorneys in litigation without delegating this responsibility to state disciplinary mechanisms," and that "[s]tate disciplinary authorities may act in such cases if they choose, but this does not limit the power or responsibility of the district court").

B.

[19] In addressing only the President's sworn statements concerning his relationship with Ms. Lewinsky, this Court is fully aware that the President may have engaged in other contumacious conduct warranting the imposition of sanctions. *See* n. 13, *supra.* The Court determines, however, that this matter can be summarily addressed by focusing on those specific instances of the President's misconduct with which there is no factual dispute and which primarily occurred directly before the Court. While hearings might have been necessary were there an issue regarding the President's willfulness in failing to obey the Court's discovery Orders, the circumstances surrounding the President's failure to disclose his relationship with Ms. Lewinsky as ordered by this Court are undisputed and contained within the record. The President has essentially admitted that he intended to mislead plaintiff in her efforts *1133 at gaining information deemed by this Court to be relevant, and hearings would not assist the Court in addressing the President's misconduct

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regarding his failure to obey this Court's discovery Orders. Thus, no possible prejudice to the President can result from this Court utilizing summary procedures rather than convening hearings. Indeed, it is in the best interests of the President and this Court that this matter be expeditiously resolved. Hearings to address other possible instances of misconduct on the part of the President could possibly be quite extensive and would require the taking of evidence, including, if necessary, testimony from witnesses.

This is not to say that the Court considers other instances of possible Presidential misconduct in this case unworthy of the Court's attention. In fact, the Court fully considered addressing all of the President's possible misconduct pursuant to the criminal contempt provisions set forth in Fed.R.Crim.P. 42, but determines that such action is not necessary at this time for two primary reasons. [FN21]

> FN21. Under 18 U.S.C. § 401, federal courts possess the power to impose sanctions for criminal contempt committed in or near the presence of the court. When invoking this power, courts must follow one of two procedures set forth in Fed.R.Crim.P. 42. Pursuant to Rule 42(a), a court may punish direct contempt, *i.e.,* that contempt which occurs within the "actual presence" of the court, in a summary fashion. For conduct beyond the scope of Rule 42(a), such as indirect contempts that occur out of court, Rule 42(b) requires such other criminal contempts to be prosecuted upon notice and a hearing. *See Schleper v. Ford Motor Co.,* 585 F.2d 1367, 1372 (8th Cir.1978).

First, the summary adjudication procedures delineated in Rule 42(a) are most likely inapplicable in this case since the power summarily to convict and punish for contempt of court under that rule generally "rests on the proposition that a hearing to determine guilt of contempt is not necessary when contumacious conduct occurs in the actual presence of a judge who observes it, and when immediate action is required to preserve order in the proceedings and appropriate respect for the tribunal." *Smith v. Smith,* 145 F.3d 335, 342- 43 (5th Cir.1998) (quoting *In re Chaplain,* 621 F.2d 1272, 1275 (4th Cir.), *cert. denied,* 449 U.S. 834, 101 S.Ct. 106, 66 L.Ed.2d 40 (1980)). Here, the Court was not aware of any of the instances of the President's possible misconduct until well after this case had been dismissed on summary judgment, and immediate action was not required to preserve order in the proceedings. *See International Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 832-33, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (noting that "[s]ummary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts," and that "[if] a court delays punishing a direct contempt until the completion of trial, for example, due process requires that the contemnor's rights to notice and a hearing be respected").

Second, resolving the matter expeditiously and without hearings pursuant to Rule 42(b) is in the best interests of both the President and this Court. Were the Court to delve into conduct which arguably was contumacious but which is not fully apparent from the record, this Court, as previously noted, would be required to hold hearings and take evidence, including, if necessary, testimony from witnesses. Such hearings could possibly last several weeks and might require referral of the matter to a prosecutor. *See United States v. Neal,* 101 F.3d 993, 997-98 (4th Cir.1996) (noting that when contumacious conduct occurs out of the presence of the court or does not interfere with ongoing proceedings immediately before the court, contempt power does not permit a judge to dispense with a prosecutor altogether and fill the role himself). Because much of the President's conduct has been or is being investigated by OIC, and in order to prevent any potential double jeopardy issues from arising, *see, e.g., United States v. Dixon,* 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (noting that protection of the double jeopardy clause applies to nonsummary criminal contempt prosecutions), this Court will forego proceeding under Fed.R.Crim.P. 42 and address the President's contempt by focusing on those undisputed matters that are capable of being summarily addressed pursuant to Fed.R.Civ.P. 37(b)(2). *See Bagwell,* 512 U.S. at 833, 114 S.Ct. 2552 (noting that certain indirect contempts are appropriate ***1134** for imposition through civil proceedings, including contempts impeding the courts ability to adjudicate the proceedings before it and those contempts involving discrete, readily ascertainable acts). [FN22]

> FN22. In electing to proceed under Fed.R.Civ.P. 37(b)(2), the Court also avoids any constitutional issues that might arise

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from addressing the matter in a criminal context. As noted in Section II of this Memorandum Opinion and Order, the Supreme Court essentially resolved the question of whether a President can be cited for civil contempt by holding, in a *civil* proceeding, that the Constitution does not place the President's unofficial conduct beyond judicial scrutiny. *See* Clinton v. Jones, 520 U.S. at 705, 117 S.Ct. 1636. Criminal contempt, however, "is a *crime* in the ordinary sense," *see* Bagwell, 512 U.S. at 826, 114 S.Ct. 2552 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)) (emphasis added), and the question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case. Such issues could engender protracted litigation, *see United States v. Nixon*, 418 U.S. at 692, 94 S.Ct. 3090, and consume the resources of both the President and this Court.

Nevertheless, the Court will convene a hearing at the request of the President should he desire an opportunity in which to demonstrate why he is not in civil contempt of court, why sanctions should not be imposed, or why the Court is otherwise in error in proceeding in the manner in which it has. In that regard, the Court will stay enforcement of this Memorandum Opinion and Order for thirty (30) days from the date of its entry in which to give the President an opportunity to request a hearing or file a notice of appeal. In addition, the Court will entertain any legitimate and reasonable requests from the President for extensions of time in which to address the matter. Should the President fail to request a hearing or file a notice of appeal within the time allowed, the Court will enter an Order setting forth the time and manner by which the President is to comply with the sanctions herein imposed. Should the President succeed in obtaining a hearing, however, whether at his request or by way of appeal, any interests in an expeditious resolution of this matter and in sparing the President and this Court the turmoil of evidentiary hearings will no longer be a consideration. Accordingly, the President is hereby put on notice that this Court will take evidence at any future hearings--including, if necessary, testimony from witnesses--on all matters concerning the President's conduct in this lawsuit which may warrant a finding of civil contempt. [FN23]

FN23. The scheduling of any hearings would, of course, be considerate to the President's schedule and his conducting the duties of his office. The Court is particularly mindful of the crisis in Yugoslavia and recognizes that the President must not be distracted in his attention to that situation or other issues of immense importance.

III.

The Court takes no pleasure whatsoever in holding this Nation's President in contempt of court and is acutely aware, as was the Supreme Court, that the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." Clinton v. Jones, 520 U.S. at 697, 117 S.Ct. 1636. As noted earlier, however, this Court has attempted throughout this case to apply the law to the President in the same manner as it would apply the law to any other litigant, keeping in mind the duties and status of the Presidency and the "high respect" that is to be accorded his office. *See* Clinton v. Jones, 520 U.S. at 707, 117 S.Ct. 1636. In that regard, there simply is no escaping the fact that the President deliberately violated this Court's discovery Orders and thereby undermined the integrity of the judicial system. Sanctions must be imposed, not only to redress the President's misconduct, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. Accordingly, the Court adjudges the President to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2) for his willful failure to obey this Court's discovery Orders and hereby orders the following:

1. The President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders. Plaintiff's former counsel are directed to submit to this Court a detailed statement of any expenses and attorney's ***1135** fees incurred in connection with this matter within twenty (20) days of the date of entry of this Memorandum Opinion and Order.

2. The President shall deposit into the registry of this Court the sum of $ 1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over his

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January 17th deposition.

In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any action it deems appropriate.

The Court will stay enforcement of this Memorandum Opinion and Order for thirty (30) days from the date of its entry in order to allow the President an opportunity to request a hearing or file a notice of appeal. Should the President fail to timely request a hearing or file a notice of appeal, the Court will enter an Order setting forth the time and manner by which the President is to comply with the sanctions herein imposed.

IT IS SO ORDERED this 12th day of April 1999.

36 F.Supp.2d 1118, 79 Fair Empl.Prac.Cas. (BNA) 1561

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C

Supreme Court of the United States

In the Matter of DISCIPLINE OF Bill CLINTON.

No. D-2270.

Oct. 1, 2001.

Bill Clinton, of New York, New York, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

122 S.Ct. 36 (Mem), 534 U.S. 806, 151 L.Ed.2d 254, 1 Cal. Daily Op. Serv. 8542

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Counsel's Office, White House

Friedrich, Dabney Langhorne - Nominations Files

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Brett Kavanaugh Binder [2]

III. Elian Gonzales

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

- Mr. Kavanaugh was asked to represent, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court.

- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he were returned.

  - ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States… may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

  - ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

  > "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

  > "The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate

human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

No. 99-2079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ELIAN GONZALEZ, A MINOR, BY AND THROUGH LAZARO GONZALEZ, AS NEXT FRIEND, OR ALTERNATIVELY, AS TEMPORARY LEGAL CUSTODIAN,

Petitioner,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 26, 2000

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QUESTIONS PRESENTED

1. The Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a)(1), provides that "any alien" may "apply" for asylum and receive an asylum hearing. In contrast to the Eleventh Circuit's ruling in this case, at least five other courts of appeals – the D.C., Second, Third, Fourth, and Fifth Circuits – have held that this statute creates a liberty or property interest in petitioning for asylum that cannot be deprived without due process. The first question presented is whether an alien has a liberty or property interest in petitioning for asylum that cannot be deprived without due process – namely, a hearing and an opportunity to be heard.

2. The Refugee Act of 1980 provides, with exceptions not applicable here, that "any alien" may "apply" for asylum and receive an asylum hearing. *See* 8 U.S.C. § 1158(a)(1). Elian Gonzalez is an alien and has applied for asylum. The 1998 INS *Guidelines for Children's Asylum Claims* recognize the right of minor aliens to apply for asylum and receive asylum hearings. The second question presented is whether the INS's refusal to grant Elian Gonzalez an asylum hearing violates the plain meaning of 8 U.S.C. § 1158(a)(1).

3. The court of appeals accorded *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), deference to opinion letters and an informal memorandum of the INS. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court held that *Chevron* deference does not extend to informal agency action such as opinion letters. Contrary to the Eleventh Circuit, the D.C. Circuit recently suggested that *Christensen* may preclude courts from extending *Chevron* deference to opinion letters issued in an informal adjudication. The third question presented is whether *Chevron* deference applies to opinion letters issued in an informal adjudication.

4. The fourth question presented is whether the court of appeals otherwise erred in upholding the INS's decision not to hold an asylum hearing for Elian Gonzalez. *See infra* n.11.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this Petition are as listed in the caption of the case, with the following parties as additional Respondents:

Doris Meissner, Commissioner, United States Immigration and Naturalization Service;

Robert Wallis, District Director, United States Immigration and Naturalization Service;

United States Immigration and Naturalization Service;

United States Department of Justice.

Pursuant to Supreme Court Rule 29.6, Petitioner states that the Petitioner is not a nongovernmental corporation and therefore has nothing to disclose under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ... iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 6

JURISDICTION 6

PROVISIONS INVOLVED 6

STATEMENT OF THE CASE 7

A. Background 7

B. The INS's Administrative Process 7

C. Litigation in the District Court 9

D. Litigation in the Eleventh Circuit 10

REASONS FOR GRANTING THE WRIT 13

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER ALIENS SEEKING ASYLUM HAVE PROCEDURAL DUE PROCESS RIGHTS, AND THE ELEVENTH CIRCUIT'S DECISION DENYING SUCH RIGHTS IS ERRONEOUS 13

A. The Circuits Are Divided On the Question Whether the Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Creates Procedural Due Process Rights 14

B. Even in the Absence of Any Statutorily Created Interest, Refugees in the United States Who Apply for Asylum Possess an *Inherent* Liberty Interest in Seeking Asylum That Is a Protected Interest Under the Due Process Clause 19

C. The INS's Procedures in This Case Did Not Satisfy Due Process 21

II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AN ASYLUM HEARING FOR "ANY ALIEN" WHO "APPLIES" FOR ASYLUM, AND ELIAN GONZALEZ IS AN ALIEN WHO HAS APPLIED FOR ASYLUM 24

III. CONTRARY TO THIS COURT'S RECENT DECISION IN *CHRISTENSEN*, THE COURT OF APPEALS ERRONEOUSLY EXTENDED *CHEVRON* DEFERENCE TO THE INS's OPINION LETTERS AND MEMORANDUM 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page(s)**

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 26

Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection, 208 F.3d 1 (1st Cir. 2000) 29

Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984) 17

Bates v. United States, 522 U.S. 23 (1997) 26

Bishop v. Wood, 426 U.S. 341 (1976) 15

Board of Regents v. Roth, 408 U.S. 564 (1972) 13, 20

Califonia Dental Ass'n v. FTC, 526 U.S. 756 (1999) 24

Central Bank of Denver v. First Interstate Bank, 511 U.S. 1164 (1994) 27

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 120 S. Ct. 1655 (2000) ..... *passim*

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 24

DeSilva v. DiLeonardi, 125 F.3d 1110 (7th Cir. 1997) 18

Doherty v. INS, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992) 31

EEOC v. Arabian-American Oil Co., 499 U.S. 244 (1991) 30

FDIC v. Meyer, 510 U.S. 471 (1994) 25

Goldberg v. Kelly, 397 U.S. 254 (1970) 13, 15

Goss v. Lopez, 419 U.S. 565 (1975) 15

Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982) 18

Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., No. 99-579, 2000 WL 742912, (June 12, 2000) 24, 27

Hewitt v. Helms, 459 U.S. 460 (1983) 16

Independent Ins. Agents of Ameica v. Hawke, 211 F.3d 638 (D.C. Cir. 2000) 5, 29

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) ... 4, 26, 27

INS v. Phinpathya, 464 U.S. 183 (1984) 25

Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) ..... *passim*

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951) 20

Kentucky Dep't of Corrections v. Thompson,
490 U.S. 454 (1989) 13

Landon v. Plasencia,
459 U.S. 21 (1982) 19, 21

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 15

Maldonado-Perez v. INS,
865 F.2d 328 (1989) 16

Marincas v. Lewis,
92 F.3d 195 (3d Cir. 1996) 16

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 2

Mathews v. Eldridge,
424 U.S. 319 (1976) 22

Meachum v. Fano,
427 U.S. 215 (1976) 3, 15, 16

Medina v. California,
505 U.S. 437 (1992) 21

Morrisey v. Brewer,
408 U.S. 471 (1972) 20

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Auto. Ins. Co.,
463 U.S. 29 (1983) 30

Parham v. J.R,
442 U.S. 584 (1979) 3, 22

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 23

Plyler v. Doe,
457 U.S. 202 (1982) 17, 20

Polovchak v. Meese,
774 F.2d 731 (7th Cir. 1985) 18

Reno v. Flores,
507 U.S. 292 (1993) 22

Russello v. United States,
464 U.S. 16 (1983) 26

Selgeka v. Carroll,
184 F.3d 337 (4th Cir. 1999) 3, 16

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 2, 19

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 19

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 13, 22

United States v. Johnson,
120 S.Ct. 1114 (2000) 25

United States v. Ron Pair Enters., Inc.,
489 U.S. 235 (1989) 24

Vitek v. Jones,
445 U.S. 480 (1980) 13

Yiu Sing Chen v. Sava,
708 F.2d 869 (2d Cir. 1983) 17

Statutes

8 U.S.C. § 1101(a)(3) 4

8 U.S.C. § 1158(a) 1, 2, 10

8 U.S.C. § 1158(a)(1) 9, 14

8 U.S.C. § 1158(a)(2) 14, 21

8 U.S.C. § 1158(b) 14, 25

8 U.S.C. § 1182(a)(9)(B)(iii)(I) 28

8 U.S.C. § 1229 26

8 U.S.C. § 1231(b)(3) 21

28 U.S.C. § 1254(1) 6

28 U.S.C. § 1291 6

28 U.S.C. § 1331 6

28 U.S.C. § 1361 6

28 U.S.C. § 1346 6

28 U.S.C. § 2201 6

Regulations and Guidance

8 C.F.R. § 208.9(a) 14

8 C.F.R. § 236.3(f) 4

8 C.F.R. § 236.8(f) 27

1998 INS *Guidelines for Children's Aylum Claims* 3, 23, 28

International Law

United Nations Protocol Relating to the Status
of Refugees, Jan. 31, 1967, 19 U.S.T. 6223,
T.I.A.S. No. 6577 20

Miscellaneous

American Heritage Dictionary 89 (3d ed. 1996) 25

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INTRODUCTION

This petition raises three primary legal issues that boil down to a single straightforward question: Can the INS deprive an alien child of his statutory and constitutional right to apply for asylum without conducting *any* hearing of *any* kind – or *even interviewing the child himself*? The INS contends that it is not required to conduct any hearing, or even interview an alien child seeking asylum, if the child's parent wants to return the child to his former country. The INS advances this position even though a hearing or interview, if conducted, necessarily could reveal evidence that the child faces a risk of persecution in returning to his former country.

The INS's procedural approach is dramatically inconsistent with the Due Process Clause of the Fifth Amendment (which requires a hearing before a "person," including a child, is deprived of a liberty interest) and with the Refugee Act of 1980 (which expressly provides that "any alien," which on its face includes an alien child, may "apply" for asylum and receive an asylum hearing). *See* 8 U.S.C. § 1158(a).

As the Lawyers' Committee for Human Rights explained in its amicus brief in the court of appeals, moreover, "[t]he implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus Brief of Lawyers' Committee for Human Rights, at 19. The Lawyers' Committee pointed out the example of a young Togolese girl who applied for asylum, but whose parents "demand[ed] that the Attorney General dismiss their daughter's asylum claim [so] that she be returned to Togo" – where "she would be forced" to endure severe physical abuse. *Id.* In such a case, as the Lawyers' Committee explained, the INS's position would not require an asylum hearing (or even an interview of the girl).[2]

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[2] The INS may try to discount such examples, but it cannot. Without a hearing or even an interview, the INS cannot plausibly claim

(continued...)

In this case, no one can say for sure what would happen at the asylum hearing – whether INS immigration officials would find that Elian Gonzalez has a risk of persecution if he returns to Cuba. The court of appeals frankly acknowledged that "*we expect that a reasonable adjudicator might find that [Elian's] fears were 'well founded.*'" Pet. App. 30a-31a n.26 (emphasis added). In any event, predictions and debate about the possible *substantive* outcome of the asylum hearing are speculative and misplaced, for the question here concerns the *process* that the INS must employ to make the asylum determination.

In an immigration case decided nearly a half-century ago, Justice Jackson posed the question at the heart of this case: "[D]oes it matter what the procedure is?" *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (opinion of Jackson, J., joined by Frankfurter, J.). He responded to his own question that "[o]nly the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty." *Id.*

This case is about "procedural fairness and regularity": the procedures to which alien children seeking asylum are entitled under the Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a), and under the Fifth Amendment to the United States Constitution. Our petition raises three primary questions.

First, the *constitutional* question raised by the petition is whether aliens seeking asylum have due process rights in

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[2] (...continued)
that it will discover the facts that could demonstrate a well founded fear of persecution. That is precisely why a hearing is central to the notion of procedural due process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

connection with an asylum application. Relying on its 16-year-old precedent in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit held that aliens seeking admission to this country (including aliens seeking asylum) have *no due process rights whatsoever.* In the Eleventh Circuit's view, such aliens possess neither an *inherent* liberty interest under the Due Process Clause in seeking asylum, nor an interest created by the Refugee Act of 1980. The D.C., Second, Third, Fourth, and Fifth Circuits have reached the opposite conclusion, holding that the Refugee Act of 1980 gives aliens seeking asylum an interest in petitioning for asylum that thereby triggers at least the basic due process rights. *See, e.g., Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum v. Fano*, 427 U.S. 215 (1976)] envision.").

The circuit split on the due process issue is deep, it is recognized by scholars and commentators, and it is ripe for resolution by this Court. The issue is important to the rights of aliens (including the thousands of alien children in this country) and to the Government's administration of the asylum process. And resolution of the due process question is critical to the outcome of this case: If aliens seeking asylum have due process rights, then alien children seeking asylum are, of course, also entitled to due process in seeking asylum (which, at a minimum, would entail an interview and some kind of hearing for a child asylum applicant). *See, e.g., Parham v. J.R*, 442 U.S. 584 (1979); *cf.* INS *Guidelines for Children's Asylum Claims* 19 (Dec. 10, 1998) (discussing how to interview minor children who apply for asylum and may "lack . . . maturity").

Second, apart from any requirements dictated by the Constitution, the Refugee Act of 1980 grants alien children who apply for asylum the right to an asylum hearing. The plain language of the statute requires an asylum hearing for "any alien" who has "applied" for asylum. The statutory language is clear and unambiguous. An alien child is plainly included in the

broad term "any alien," and Elian Gonzalez has in fact applied for asylum under any plausible definition of the term. The INS's Guidelines themselves recognize, moreover, that even very young children may apply for asylum. The INS's contrary interpretation adopted in this case flouts the statutory text and is therefore not entitled to *Chevron* deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987); *id.* at 453 (Scalia, J.) ("INS's interpretation is clearly inconsistent with the plain meaning" and thus entitled to no deference).

While the plain language is controlling, it bears emphasis that the plain language is fully consistent with sound policy for resolution of asylum applications submitted by minors. Indeed, before this case, the INS's *Guidelines* and the INS's most closely analogous regulation provided that alien children applying for asylum should receive an asylum hearing. *See* 8 C.F.R. § 236.3(f). In short, "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents. So, too . . . do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

Third, the petition raises an important additional question regarding the scope of *Chevron* deference. The court of appeals erroneously extended *Chevron* deference to the INS's interpretation although it was set forth in an internal INS memorandum and three opinion letters. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court squarely held that *Chevron* deference does not apply to an agency interpretation of a statute that is "contained in an opinion letter," as opposed to an interpretation "arrived at after, for example, a *formal* adjudication or notice-and-comment rulemaking." *Id.* at 1662 (emphasis added). The Court added – unequivocally – that "[i]nterpretations such as those in opinion letters, . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* The court of appeals

in this case thus erroneously accorded *Chevron* deference to precisely the kinds of *informal* agency interpretations (opinion letters in an "informal adjudication," *see* Pet. App. 147a-48a) that, under *Christensen*, are not entitled to *Chevron* deference.

Even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* may prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000). While the divergence is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring issue warrants review and clarification. That is particularly true in this case given that the court of appeals' *Chevron* error undeniably affected its resolution of this case. *See, e.g.*, Pet App. 13a-26a, 32a.

In an ordinary case, then, certiorari would be warranted based on (i) the importance of these legal issues, (ii) the deep circuit split on the due process issue, (iii) the court of appeals' clear error in failing to heed the plain language of the statute, (iv) the court's error applying *Christensen*, and (v) the confusion in the lower courts on the *Chevron/Christensen* issue.

This is no ordinary case, to be sure, and that raises the question whether this is an appropriate case for this Court to resolve those important and recurring legal issues. We think so. Indeed, even absent the important legal issues at the heart of this petition, there is plainly a national need that *this individual case* be decided *correctly* and *be decided by this Court*. The extraordinary importance of *this individual case* – to the United States (with its myriad congressional denunciations of Cuba's gross human rights abuses), to the Cuban-American community, to the American citizenry more broadly, and to the Gonzalez family – is too obvious to require extended discussion. That factor alone justifies this Court's review. Only this Court has

the constitutional stature and moral authority to render the final word that will stand the test of time in this divisive, difficult, and nationally momentous matter.

The petition should be granted. The importance of this case – particularly when coupled with the significance of the underlying constitutional and statutory issues, the circuit splits and confusion, and the court of appeals' errors – demonstrates the compelling need for this Court's review.

In order to ensure expedition in this case, we respectfully request that the Court grant certiorari during the summer. If so, counsel for petitioner will work with counsel for respondents to devise and propose an expedited briefing and argument schedule that would result in oral argument, if possible, no later than October 2000.

OPINIONS BELOW

The district court's opinion is reported at 86 F. Supp.2d 1167 and is reprinted at Pet. App. 47a-108a.

The Eleventh Circuit's opinion granting an injunction pending appeal is unreported and is reprinted at Pet. App. 33a-46a. The Eleventh Circuit's opinion on the merits, which is not yet reported, is reprinted at Pet. App. 1a-32a. The Eleventh Circuit's opinion denying the petition for rehearing is unreported and is reprinted at Pet. App. 146a-150a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361, and 2201. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set forth in an addendum at the end of this brief.

STATEMENT OF THE CASE

A. Background

Petitioner Elian Gonzalez was born in December 1993 to Elizabeth Brotons and Juan Miguel Gonzalez. In the pre-dawn hours of November 22, 1999, when Elian was nearly six years old, his mother and twelve other Cuban nationals boarded a small motorboat and attempted to reach the United States. The next day, the boat capsized in windy conditions and rough seas. Eleven of the passengers died, including Elian's mother. Elian survived by clinging to an inner tube. Pet. App. 3a.

Two days later, two fisherman rescued Elian. Elian later was taken into INS custody and brought to a hospital in Miami to recuperate from his ordeal. Elian's great uncle, Lazaro Gonzalez, contacted the INS and visited the boy in the hospital. Upon Elian's release, the INS paroled Elian into his great uncle's care, and Elian went to live with his great uncle. Pet. App. 3a-4a.

Soon thereafter, Lazaro Gonzalez filed an asylum application on Elian's behalf, which was followed by a similar application signed by Elian himself. Lazaro Gonzalez filed a third application after a Florida state court judge, in a now-dissolved order, granted Lazaro temporary custody of Elian. Each application stated that petitioner Elian Gonzalez "is afraid to return to Cuba" on account of a well-founded fear of persecution. For support, the applications stated that many members of Elian's family have been persecuted by the Castro regime by being imprisoned and harassed. The applications also stated that Elian, if returned to Cuba, would be used as a propaganda tool for the Castro government and would be involuntarily indoctrinated. Pet. App. 4a.

B. The INS's Administrative Process

Through Cuban officials, Juan Miguel Gonzalez eventually expressed his views that he wanted his son returned

to him. In December 1999, INS officials conducted interviews of Juan Miguel Gonzalez and of Lazaro Gonzalez (with Lazaro's daughter Marisleysis). *The INS never interviewed Elian Gonzalez about the asylum applications, whether he had a fear of persecution, or whether there was a possible conflict of interest between him and his father.* Pet. App. 5a.

On January 5, 2000, the Executive Associate Commissioner of the INS for Field Operations sent virtually identical letters to Lazaro Gonzalez and his attorneys. *See* Pet. App. 132a-135a, 136a-139a. The letters stated that INS Commissioner Doris Meissner had concluded that the asylum applications filed by and on behalf of Elian Gonzalez were void and required no further consideration. The letters further stated that "we have determined that Mr. [Juan Miguel] Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters." *Id.* at 133a, 137a.

One week later, on January 12, 2000, Attorney General Janet Reno sent a letter to Lazaro Gonzalez's attorneys. *See* Pet. App. 140a-145a. The Attorney General stated that she was unaware of "any basis for reversing Commissioner Meissner's decision that Juan Gonzalez – Elian's father – has the sole authority to speak for his son on immigration matters." *Id.* at 141a.

After this litigation commenced, the INS produced a copy of a legal memorandum written by the General Counsel of the INS for Commissioner Meissner (and signed "approved" by the Commissioner). Pet. App. 109a-131a. The memorandum states that "*a child's right to seek asylum independent of his parents is well established* . . . . While Section 208(a)(2) of the

INA describes certain exceptions to this right, those exceptions are not applicable to this case. *There are no age-based restrictions on applying for asylum.* Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances *even a very young child* may be considered for a grant of asylum." *Id.* at 123a-124a (emphasis added).

Despite this analysis, the memorandum concluded that "[t]he INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature." Pet. App. 131a.

C. Litigation in the District Court

On January 19, 2000, petitioner filed a complaint in the United States District Court for the Southern District of Florida for injunctive and mandamus relief to compel the INS to adjudicate his asylum application as required by the Refugee Act of 1980 and the INS's implementing regulations. The complaint contended that the INS's actions in the case had violated Elian's constitutional, statutory, and regulatory rights. Pet. App. 60a-61a.

On January 27, 2000, the INS moved to dismiss, and on March 21, 2000, the district court granted the INS's motion. Citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the district court concluded that petitioner had no due process rights in connection with the asylum process. Pet. App. 90a. The decision in *Jean* had held that, in connection with the asylum process, excludable aliens have no *inherent* due process rights, nor any procedural due process rights created as a result of the statutory entitlement to seek asylum provided by 8 U.S.C. § 1158(a)(1).

As to the statutory claim, the district court acknowledged that 8 U.S.C. § 1158(a)(1) states that "[a]ny alien . . . may apply for asylum." Pet. App. 92a-93a. Although

recognizing that Congress has carved out specific rules for children in other immigration statutes (but not here) and that Congress had created several other exceptions to the asylum application process (none covering applications by children), the court stated that the phrase "any alien" was ambiguous as to whether it covered alien children. *Id.* at 100a-105a. The district court concluded, therefore, that the INS was entitled to *Chevron* deference in refusing to process Elian Gonzalez's asylum application. *Id.* at 105a.

D. Litigation in the Eleventh Circuit

1. On April 19, 2000, the Eleventh Circuit issued an opinion granting an injunction pending appeal. The injunction prevented Elian Gonzalez from departing the United States and required the Government to take steps to prevent his departure while the appeal was pending. Pet. App. 46a.

In granting the injunction, the court of appeals stated that "Plaintiff has made a 'substantial case on the merits' of his appeal." Pet. App. 36a. The court stated:

> The statute in this case seems pretty clear. Section 1158(a)(1) provides that "[a]ny alien . . . irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of "[a]ny alien." *See* 8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." We, therefore, question the proposition that, as a matter of law, Plaintiff (unless his father consents) cannot exercise the statutory right to apply for asylum. . . . Congress's provision for "any alien" is not uncertain in meaning just because it is broad.

Id. at 39a. The court of appeals noted that "the INS cannot properly infringe on the plain language of the statute or the clear congressional purpose underlying it." *Id.* at 40a. The court also pointed out that the "[t]he existing INS regulations do

envision situations where a minor may act on his own behalf in immigration matters . . . [and] under some circumstances, may seek asylum against the express wishes of his parents. Also, the INS *Guidelines for Children's Asylum Claims* . . . envision that young children will be active and independent participants in the asylum adjudication process." *Id.* at 40a-41a (footnotes omitted).

As to Elian's case, the court stated that "[n]ot only does it appear that Plaintiff might be entitled to apply personally for asylum, it appears that he did so. . . . Plaintiff – although a young child – has expressed a wish that he not be returned to Cuba. He personally signed an application for asylum. Plaintiff's cousin, Marisleysis Gonzalez, notified the INS that Plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview Plaintiff about his own wishes." Pet. App. 43a-44a.

2. Although it granted the injunction, on June 1, 2000, addressing the appeal on the merits, the court of appeals affirmed the district court. Pet. App. 1a-32a. First, as to the due process claim, the court ruled that it was constrained by its *en banc* decision in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), to rule that Elian Gonzalez had no procedural due process rights in connection with his application for asylum, whether through an inherent liberty interest or a liberty interest created by the Refugee Act of 1980. Pet. App. 8a.

On the statutory question, the INS had contended in the court of appeals that a child cannot ordinarily "apply" for asylum over the objection of his parent, that Elian Gonzalez thus had not really "applied" for asylum, and that the asylum applications were void. The court of appeals stated that the statute provides that "any alien" may "apply" for asylum and that the INS is required to adjudicate any such application. Pet. App. 11a-12a. But the court of appeals ultimately concluded that the statutory term "apply" was ambiguous and the court

thus extended *Chevron* deference to the INS's interpretation of the statute. *Id.* at 13a-26a. The court made clear, however, that the INS's interpretation was merely "within the outside border of reasonable choices." *Id.* at 32a; *see also id.* at 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect").

3. On June 14, 2000, petitioner filed a petition for rehearing and rehearing *en banc*. On the *Chevron* issue, petitioner emphasized that the panel's decision was inconsistent with this Court's recent decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), handed down on May 1, 2000. Specifically, petitioner pointed out that the Court in *Christensen* held that *Chevron* deference does not extend to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines," 120 S. Ct. at 1662, and that the INS's interpretations in this case were contained in opinion letters and an internal memorandum – precisely the kinds of *informal* agency actions that *Christensen* said do not warrant deference.

The court of appeals denied the petition for *en banc* review, and the panel issued an opinion. The court distinguished *Christensen* on the ground that the agency decisionmaking in this case was an "*informal* adjudication." Pet. App. 147a. The panel said it would not interpret *Christensen* to apply to opinion letters in informal agency adjudications. *Id.* at 149a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER ALIENS SEEKING ASYLUM HAVE PROCEDURAL DUE PROCESS RIGHTS, AND THE ELEVENTH CIRCUIT'S DECISION DENYING SUCH RIGHTS IS ERRONEOUS.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const. amend. v. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth] Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). If a person's liberty or property interest is at stake, the "Constitution's command of due process" ordinarily requires "prior notice and a hearing" before a deprivation of that interest. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

A person's liberty or property interests stem from one of two sources. *First*, federal statutes may create liberty or property interests that cannot be deprived without procedural due process. *See Vitek v. Jones*, 445 U.S. 480, 488-91 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970). *Second*, individuals have certain "core" liberty or property interests that cannot be deprived without procedural due process. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (protected liberty interests "may arise from two sources – the Due Process Clause itself and the laws" of the federal government or States).[3]

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[3] The Court has extended "the same procedural protections to statutorily created rights as to 'core' rights." Tribe, *American Constitutional Law* 710 (2d ed. 1988).

In this case, both sources apply. First, as most courts of appeals other than the Eleventh Circuit have held, the Refugee Act of 1980 gives aliens seeking asylum a liberty or property interest in applying for asylum that cannot be deprived without due process. Second, even apart from the statute, aliens seeking asylum possess a core liberty interest in seeking asylum that cannot be deprived without due process.

Resolution of the due process issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question. Elian Gonzalez never received a hearing (the central requirement of due process); indeed, the INS never even interviewed him in connection with his asylum application.

A. The Circuits Are Divided on the Question Whether the Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Creates Procedural Due Process Rights.

The Refugee Act of 1980 established a uniform right for aliens to seek asylum:

> Any alien who is physically present in the United States or who arrives in the United States . . . , *irrespective of such alien's status*, may apply for asylum in accordance with this section . . . .

8 U.S.C. § 1158(a)(1) (emphasis added). Except in certain statutorily specified circumstances not applicable here, an alien who applies for asylum must receive a hearing. *See* 8 U.S.C. § 1158(a)(2). INS regulations extensively set forth the procedures governing asylum applications and, consistent with the statute, state that "[t]he Service shall adjudicate the claim of each asylum applicant whose application is complete." 8 C.F.R. § 208.9(a).

By its plain terms, the Refugee Act grants all aliens an entitlement to apply for asylum. This Court's precedents

establish that this entitlement qualifies as a protected interest under the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (statutory "right to use . . . adjudicatory procedures" is a "property" right triggering appropriate procedural protections under Due Process Clause); *see also Meachum v. Fano*, 427 U.S. 215, 226 (1976); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). As a result, the Government may not deprive an asylum applicant of his entitlement to seek asylum without providing certain procedural due process protections.

This Court has never directly addressed the question whether the Refugee Act of 1980 creates a liberty or property interest for purposes of the procedural protections of the Due Process Clause. Confusion reigns in the lower courts, however, and the courts of appeals are deeply divided on the issue. "The constitutional standards to be applied to exclusion cases, wherein the government has refused to admit into the country persons from other nations who have arrived at United States borders, are less than clear." 3 Rotunda and Nowak, *Treatise on Constitutional Law* 65 n.102 (1999) (citing cases on split); *see also* Jones, *The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees*, 21 Hastings Const. L.Q. 1071, 1093 (1994) ("a split has developed among lower courts as to the extent to which unadmitted foreigners have due process rights"); Miller, *Aliens' Right to Seek Asylum*, 22 Vand. L. J. Transnational Law 187, 204 (1989) ("the circuits are split as to whether aliens have due process rights").

Since 1980, the D.C., Second, Third, Fourth, and Fifth Circuits (and arguably the Seventh) have properly concluded that the entitlement to seek asylum granted by the Refugee Act triggers corresponding procedural due process rights in connection with asylum-related proceedings. We will briefly chronicle the leading circuit decisions.

In *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999), the Fourth Circuit held that the statutory right to seek asylum also created a constitutional right to due process in asylum-related proceedings. *See id.* ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum*] envision.").[4]

The Third Circuit similarly has held that the Refugee Act creates such a protected liberty interest. *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).[5] As a result, there are "minimum due process rights required by fairness to which all asylum applicants are entitled." *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) and *Meachum*, 427 U.S. 215). The court added that "[p]recisely what minimum procedures are due under a statutory right depends on the circumstances of the particular situation." *Marincas*, 92 F.3d at 203. The court explained, in addition, that other "[c]ourts have recognized that aliens seeking asylum are entitled to some due process protection." *Id.* at 203 n.8 (citing Second Circuit cases).

The D.C. Circuit likewise has squarely concluded that an alien has "a Fifth Amendment procedural due process right to petition the government for political asylum." *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (1989). That due process right requires – at a "minimum" – "some form of meaningful or fair hearing." *Id.*

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[4] The Fourth Circuit rejected any suggestion that an alien seeking asylum has an *inherent* constitutional liberty interest in connection with the asylum process, as opposed to a statutorily created interest that triggers procedural due process protections. *See* 184 F.3d at 342 ("Aliens have no *independent* constitutional rights in an asylum procedure.") (emphasis added).

[5] The Third Circuit, too, stated that aliens have no *inherent* constitutionally protected liberty interest in seeking admission, but do have a *statutorily created* entitlement that triggers procedural due process.

The Second Circuit similarly has held: "In the absence of protected interests which originate in the Constitution itself, constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit." *Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir. 1984); *see also Yiu Sing Chen v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983) ("refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned" may enjoy due process protection).[6]

The Fifth Circuit also has reached the same result: "Besides protected interests which originate in the Constitution itself, the Supreme Court has also recognized that constitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government and creating a substantive entitlement to a particular governmental benefit. In this case we conclude that Congress and the executive have created, at a minimum, *a constitutionally protected right to petition our government for*

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[6] The question of entitlement is based on the language of the statute, which grants an asylum hearing to "any alien" who is physically present in the United States. Such aliens are indisputably "persons" for purposes of the Due Process Clause. "Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). There would be no basis, therefore, for trying to draw a line between excludable and deportable aliens in determining whether *the statute* creates an entitlement that triggers procedural due process. *See generally* Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 Yale L.J. 639, 658 (1989). Even were such a line drawn, the majority of these cases concern excludable aliens (the category historically held to have fewer *inherent* constitutional rights), yet the courts granted due process rights.

political asylum." *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1036-38 (5th Cir. Unit B 1982) (emphasis added).

Finally, the Seventh Circuit has indicated that both a minor child applying for asylum and his parents have due process rights in connection with the minor's asylum hearing. *See Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). Although the case concerned the due process rights of parents to be informed of their child's asylum application, the decision was premised on and assumed the due process right of the child to seek asylum over his parent's objection and to receive procedural due process protections. *Accord DeSilva v. DiLeonardi*, 125 F.3d 1110, 1115 (7th Cir. 1997).

In contrast to those decisions, the Eleventh Circuit had previously held (and held again in this case) that the Refugee Act of 1980 does *not* create an entitlement to seek asylum that is thereby protected by the Due Process Clause. In its 8-4 *en banc* decision in *Jean v. Nelson*, the Eleventh Circuit held that the Refugee Act grants aliens no entitlement to seek asylum – and that aliens therefore possess *no due process rights* in connection with asylum proceedings. Judge Kravitch dissented for four judges, stating that "the Refugee Act of 1980 does create at a minimum a *constitutionally protected right* to petition our government for political asylum" – an entitlement that carries with it certain procedural due process rights for aliens seeking asylum. 727 F.2d at 989 (quotation omitted) (emphasis added).

This circuit split is deep, it is ripe, it is recognized by scholars and commentators, and it is obviously of critical importance to aliens who seek asylum and to the Government's immigration policies. The Government takes the view that the Eleventh Circuit's decision in *Jean v. Nelson* is correct and that excludable aliens seeking asylum have no due process rights. It is our submission, by contrast, that the D.C., Second, Third, Fourth, Fifth, and Seventh Circuits have correctly concluded

that the Refugee Act of 1980 creates an interest in seeking asylum that triggers procedural protections under the Due Process Clause. As the lopsided nature of the split would suggest, the Eleventh Circuit – the court that decided *this case* – has decided the issue erroneously. This Court should grant certiorari to resolve the split. As we will explain in Section I.C below, moreover, resolution of this issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question.

B. Even in the Absence of Any Statutorily Created Interest, Refugees in the United States Who Apply for Asylum Possess an *Inherent* Liberty Interest in Seeking Asylum That Is a Protected Interest Under the Due Process Clause.

In the 1950s, this Court ruled that aliens seeking admission to this country possess no *inherent* liberty interest in admission that would trigger procedural due process rights. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *see also Landon v. Plasencia*, 459 U.S. 21 (1982). That is a different question, of course, from whether there is a statutorily created liberty interest. For that reason, these decisions in no way affect or diminish our argument that the Refugee Act creates a liberty or property interest for purposes of procedural due process.

That said, and even assuming these 1950s-era decisions are correct (which is a dubious proposition[7]), the cases do not

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[7] These decisions have been described as "patently preposterous," Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. 1362, 1392-96 (1953), and among "the most shocking decisions the Court has ever rendered," 2 Davis, *Administrative Law*

(continued...)

speak directly to the distinct question whether that *subset* of unadmitted aliens who are *seeking asylum* have an inherent liberty interest in seeking asylum that triggers procedural protections under the Due Process Clause. Contrary to the Eleventh Circuit's *other* holding in *Jean*, we submit that aliens seeking asylum do possess such an interest.

Because the existence of the statutorily created liberty interest means that the Court need not reach this alternative ground for finding a liberty interest, we touch upon it only briefly. "Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The Court has long rejected the concept that "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.* "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

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[7] (...continued)
Treatise 358 (1979). In his separate opinion in *Jean*, Justice Marshall stated that "excludable aliens do, in fact, enjoy Fifth Amendment protections" and "the principle that unadmitted aliens have no constitutionally protected rights defies rationality." 472 U.S. at 873, 874. Indeed, any other conclusion, Justice Marshall pointed out, would mean that courts could not intervene even if the Government were to "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens." *Id.* at 874. We agree with Justice Marshall that those decisions are wrongly decided and, if necessary, should be overruled. That said, the Court need not come near reaching that question to resolve this case in our favor.

The scope of "liberty" encompassed by the Due Process Clause plainly must include the interest of a "person" in this country to *petition for asylum*. This Court has long held that aliens subject to *deportation* have due process rights. *See Landon v. Plasencia*, 459 U.S. at 32-33. There is no plausible distinction – for purposes of determining whether procedural due process *applies* – between an alien subject to *deportation* and an unadmitted alien *seeking asylum*. Indeed, the alien seeking asylum is seeking to avoid persecution, which on its face is a more weighty interest than merely avoiding deportation. What is more, Congress itself has eliminated the distinction between excludable and deportable aliens in both the Refugee Act, *see* 8 U.S.C. § 1158(a)(1), and in the relevant 1996 amendments now codified at 8 U.S.C. § 1229 *et seq*.

In short, regardless of any *statutorily created* liberty interest, we submit that the right of a "person" within the territory of the United States to seek asylum because of a well founded fear of persecution by returning to his former country is an inherent liberty interest that triggers procedural due process protections.

C. The INS's Procedures in This Case Did Not Satisfy Due Process.

We acknowledge, of course, that this Court generally does not grant certiorari to resolve a circuit split if resolution of the legal issue could not affect the outcome of the case at hand. In this case, however, a ruling that aliens seeking asylum have a liberty interest under the Due Process Clause would alter the outcome of this case – and require the INS to hold a hearing before depriving Elian Gonzalez of his right to seek asylum.

The reason is straightforward: As the Court stated in *United States v. James Daniel Good Real Property*, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. 43, 53 (1993). This core

principle of due process applies to children in matters that affect children's rights. *See Parham v. J.R.*, 442 U.S. 584 (1979).

The question here, then, is what process – what kind of hearing – is necessary to satisfy the due process rights of a child who has applied for asylum. Given the child's extraordinarily important interest in an accurate assessment, the proper rule is that a child who seeks to apply for asylum has a due process right to an asylum hearing (an asylum hearing where, to be sure, the parents are entitled to be heard as well). *Cf. Reno v. Flores*, 507 U.S. 292, 309 (1993) ("At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge.").[7]

Holding an asylum hearing protects the alien's weighty interest in obtaining asylum, but does not unduly burden any parental interest. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). After all, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason a parent would have for returning the child to such persecution. In other words, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.[8] In short, by following the

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[7] Even if a child is not *automatically* entitled to an asylum hearing when the child seeks asylum over the objection of a parent, the child clearly still possesses a due process right *to a fair hearing* to determine the parent's ability to represent the child's best interests in any asylum proceedings.

[8] If a parent somehow made a convincing case that a child facing persecution should nonetheless be returned to his former country, the (continued...)

statute, the INS not only will comply with due process requirements, it will reach the best result for the child.

The suggestion that a minor's liberty interests evaporate when a parent seeks to exercise control over the minor has been rejected time and again by this Court. To take just one example, in *Parham v. J.R.*, the Court found that a child has a due process interest in avoiding institutional commitment – notwithstanding the desires of the parent – and "that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder.'" 442 U.S. at 606. The Court added that the inquiry "*must also include an interview with the child.*" *Id.* at 607[9] (emphasis added).[9]

In this case, whatever the *minimum* elements of due process might be for alien children in asylum proceedings, the INS did not come anywhere close. It did not hold an asylum hearing. In fact, it did not hold *any hearing at all* to determine, for example, whether Elian's father represented Elian's best interests. Indeed, *the INS agents never even interviewed Elian Gonzalez* as part of the INS's supposed "assessment" of the matter. Nor did the INS ask Elian (or even Juan Miguel Gonzalez, for that matter) a single question about possible harm to Elian should he return to Cuba, or provide any opportunity for consideration of objective evidence on that subject. The INS's ad hoc and haphazard procedures fell woefully short of due process.

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[8] (...continued)
Attorney General may have authority to consider the parent's view, subject to constitutional and statutory constraints. *See* 8 U.S.C. §§ 1158(b), 1231(b)(3).

[9] *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (child's exercise of constitutional right cannot be controlled or thwarted by her parent).

The Court should grant certiorari to resolve the split on the due process issue and reverse the judgment of the court of appeals.

II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AN ASYLUM HEARING FOR "ANY ALIEN" WHO "APPLIES" FOR ASYLUM, AND ELIAN GONZALEZ IS AN ALIEN WHO HAS APPLIED FOR ASYLUM.

The Refugee Act of 1980 provides for an asylum hearing for "any alien" who has "applied" for asylum. The phrase "any alien" by its terms includes any child, and Elian Gonzalez has in fact "applied" for asylum by any plausible definition of that term. While a parent's views can and should be heard at a child's asylum hearing, the statute leaves no room for the INS simply to refuse outright to hold *a hearing*.

This Court has emphasized repeatedly that statutory analysis "begins with the language of the statute. And where the statute provides a clear answer, it ends there as well." *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 2000 WL 742912, at *9, No. 99-579 (U.S. June 12, 2000); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotation omitted).

Because the statutory text is plain, there is no basis for extending *Chevron* deference to the INS's contrary interpretation. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 766 (1999) ("[w]e have no occasion to review the call for deference here, the interpretation urged in respondent's brief

being clearly the better reading of the statute under ordinary principles of construction.").

The INS claims that the term "apply" is undefined and ambiguous. But an undefined term is interpreted in accord "with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *see also INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("assume that the legislative purpose is expressed by the ordinary meaning of the words used") (internal quotation omitted). The term "apply" is ordinarily defined to mean "[t]o request or seek assistance, employment, or admission." American Heritage Dictionary 89 (3d ed. 1996); *see also* Black's Law Dictionary 96 (7th ed. 1999) ("[t]o make a formal request or motion"). Under any remotely plausible definition of the term "apply," Elian Gonzalez has applied for asylum.

The INS's supposed statutory construction of the word "apply" is, in reality, a rather transparent plea for the courts to recognize or create an implicit exception to the statute in cases involving minors who apply for asylum (at least in cases where the parent objects). The INS seeks, in effect, to superimpose a parental consent requirement onto the statute. But the statutory text contains no such exception. The omission of such an exception is significant, particularly given that Section 1158(a)(2) of the statute – entitled "Exceptions" – sets forth three specific exceptions to the right to apply for asylum. *See* 8 U.S.C. § 1158(a)(2). The fact that Congress specified various exceptions (and did so in 1996) to the right to apply for asylum, but did not provide any exception for applications by children, strongly buttresses the natural reading of the text. *See United States v. Johnson*, 120 S.Ct. 1114, 1118 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also Andrus v. Glover*

Constr. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent.").

Nor can the INS claim that this was some kind of congressional mistake or mere oversight. As the 1998 INS *Guidelines for Children's Asylum Claims* state, "[d]uring the last 10 years, the topic of child asylum seekers has received increasing attention from the international community." INS *Guidelines* at 1.

In addition, Congress specified special rules for children in different provisions of the statute. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). Again, the fact that Congress spoke specifically to children in one portion of the statute, but not in the asylum provision, buttresses the textual interpretation that the term "any alien" includes alien children and that alien children thus may "apply" for asylum. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term 'refugee,' [in the 1980 amendments to the Immigration and Naturalization Act] certainly indicate that Congress intended the two standards to differ").

The INS's contrary argument, accepted by the court of appeals under *Chevron*, ultimately seems premised on the notion that it would somehow be "bad policy" or "absurd" to apply the plain language here. *See Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring). As to the INS's naked policy arguments, the plain language of the statute controls. *See*

Harris, 2000 WL 742912, at *9 (U.S. June 12, 2000) (party and amici "submit that the policy consequences . . . could be devastating . . . . We decline these suggestions to depart from the text of § 502(a)(3)."); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act.").

Nor can the INS squeeze this case into the rare case where the effect of implementing the ordinary meaning of the text would cause a "patent absurdity." *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring). In fact, the plain language of the text is entirely consistent with the INS *Guidelines for Children's Asylum Claims*, with the most closely analogous INS regulation, with international law principles, and with common sense.

As the court of appeals recognized, the INS *Guidelines for Children's Asylum Claims* "envision that young children will be active and independent participants in the asylum adjudication process." Pet. App. 41a. In addition, INS regulations actually "contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents." *Id.*[10] Not only do "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents, [but] [s]o, too . . . do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

In short, all relevant legal sources to which this Court might look to determine whether the plain language of the statute reflects sensible policy strongly confirm application of the plain language in this case. By contrast, the INS has not uncovered any support in the relevant body of legal materials

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[10] *See* 8 C.F.R. § 236.3(f), quoted in full in addendum.

for its decision to flat-out refuse an asylum hearing for a minor alien who has applied for asylum.

The final point in assessing whether the plain language constitutes sensible policy is perhaps the most decisive. Holding an asylum hearing as the statute dictates is plainly the best way to protect the child's rights and preserve the integrity of the Refugee Act, while not unduly burdening the parental or government interests at stake. As we stated above, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason for a parent to return the child to such persecution. To reiterate, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.

In short, the plain language and structure of the statute mandate an asylum hearing for Elian Gonzalez and demonstrate that the INS violated the statute. Because of the unique importance of this particular case, and the need that it be resolved both correctly and by this Court, this statutory issue warrants certiorari.

III. CONTRARY TO THIS COURT'S RECENT DECISION IN *CHRISTENSEN*, THE COURT OF APPEALS ERRONEOUSLY EXTENDED *CHEVRON* DEFERENCE TO THE INS's OPINION LETTERS AND MEMORANDUM.

This Court's recent decision in *Christensen v. Harris County* established a simple and unambiguous prohibition on extending *Chevron* deference to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines." 120 S. Ct. 1655, 1662 (2000). The Court observed that under *Chevron* "a court must give effect to an agency's regulation

containing a reasonable interpretation of an ambiguous statute." *Id.* But the Court emphasized that it was "confront[ing] an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.*

The court of appeals' decision in this case is in conflict with the decision in *Christensen*. The INS internal memorandum and letters are the kinds of agency statements that the *Christensen* Court held are not entitled to *Chevron* deference. And even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* would prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000); *cf. Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection*, 208 F.3d 1, 4-6 (1st Cir. 2000) (refusing to grant *Chevron* deference to an opinion letter issued by the EPA to resolve a matter referred to that agency under the doctrine of primary jurisdiction). While this divergence of interpretation is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring and important issue warrants review and clarification, particularly given that it altered the result in this case.

The court of appeals made clear that, freed from *Chevron*, it likely would have interpreted the statute differently than did the INS. *See* Pet. App. 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect."); *id.*

("The final aspect of the INS policy also worries us some."); *id.* at 32a ("The policy decision that the INS made was within the outside border of reasonable choices.").[11]

The court of appeals also stated that the level of deference it applied in this case "was strengthened" by the "foreign policy implications of the administrative decisions dealing with immigration." Pet. App. 147a. The court's reference to foreign policy implications in an asylum case was plain error. As the Second Circuit has rightly explained, "[C]ongress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum." *Doherty v. INS*, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992).

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[11] In order to preserve them for review on the merits, we also raise several other issues. First, the INS's ultimate interpretation was the product of an insufficiently explained change in interpretation. The INS's multiple and shifting interpretations – shifts that occurred without sufficient explanation – preclude the courts from granting deference to the INS's final interpretation. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Second, the INS's policy was adopted some 20 years after the statute was enacted, which also diminishes any deference owed to it. *See EEOC v. Arabian-American Oil Co.*, 499 U.S. 244 (1991). Third, the INS's ultimate interpretation is equivalent to a litigating position, and it is black-letter law that agency interpretations developed as litigating positions similarly warrant no deference under *Chevron*. *See* Pet. App. 40. Finally, the INS's application of its policy in this case – particularly its failure to interview Elian Gonzalez and to allow presentation of objective evidence about his risk of persecution – was arbitrary and capricious under the Administrative Procedure Act.

Respectfully submitted,

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June 26, 2000

H
Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.

Elian GONZALEZ, a minor, by and through Lazaro Gonzalez, as next friend, or, alternatively, as temporary legal custodian, Plaintiffs-Appellants,
v.
Janet RENO, Attorney General of the United States; Doris Meissner, Commissioner, United States Immigration and Naturalization Service; Robert Wallis, District Director, United States Immigration and Naturalization Service; United States Immigration and Naturalization Service; and United States Department of Justice, Defendants-Appellees, Juan Miguel Gonzalez, Intervenor.

No. 00-11424.

June 1, 2000.

Six-year-old alien, whose mother had died during their trip aboard small boat from Cuba to Florida, brought suit, by and through his great uncle as his next friend, alleging that Immigration and Naturalization Service (INS) and others denied him due process and violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file personally for asylum against wishes of his Cuban father. The United States District Court for the Southern District of Florida, No. 00-00206-CV-KMM, K. Michael Moore, J., 86 F.Supp.2d 1167, dismissed action. Alien appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) INS did not violate alien's due process rights; (2) District Court was not required to appoint guardian ad litem to represent alien's interests; (3) policies upon which INS relied in determining that alien lacked capacity to file personally for asylum were entitled to some deference; (4) INS policies under which six-year-old aliens necessarily lacked sufficient capacity to assert asylum claims on their own, and under which a six-year-old alien was required to be represented by some adult in applying for asylum, were reasonable interpretations of asylum statute; (5) policy under which ordinarily a parent, even one outside United States, and only a parent, could act for his or her six-year old child who was in this country with respect to asylum was reasonable interpretation of asylum statute; (6) INS policy under which parent's residence in communist-totalitarian state was no special circumstance, sufficient in and of itself, to justify consideration of asylum claim by parent's six-year-old child, presented by child's relative in this country, against wishes of parent, was reasonable interpretation of asylum statute; and (7) INS did not act arbitrarily or abuse its discretion in rejecting alien's applications as void.

Affirmed.

West Headnotes

[1] **Aliens** 54.3(1)
24k54.3(1) Most Cited Cases

Court of Appeals had subject-matter jurisdiction over minor alien's appeal of district court decision dismissing his action alleging that Immigration and Naturalization Service (INS) denied him due process and violated immigration statute by dismissing his asylum applications as legally void, based on its conclusion that alien lacked capacity to file personally for asylum against wishes of his father. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[2] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

[2] **Constitutional Law** 274.3
92k274.3 Most Cited Cases

Immigration and Naturalization Service (INS) did not violate due process rights of six-year-old alien in dismissing his asylum applications as legally void, based on its conclusion that alien lacked capacity to file personally for asylum against wishes of his Cuban father. U.S.C.A. Const.Amend. 5.

[3] **Infants** 78(1)
211k78(1) Most Cited Cases

District court was not required to appoint guardian ad

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litem to represent interests of six-year-old alien in his action alleging that Immigration and Naturalization Service (INS) violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file for asylum against wishes of his Cuban father, inasmuch as alien was ably represented in district court by his great uncle as next friend. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[4] Infants 82
211k82 Most Cited Cases

Court of Appeals would not remove six-year-old alien's great uncle as alien's next friend to substitute alien's father, in alien's action alleging that Immigration and Naturalization Service (INS) violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file for asylum against wishes of his Cuban father, inasmuch as great uncle, aided by seasoned lawyers, had completely and steadfastly pressed alien's claimed rights in district court and Court of Appeals. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[5] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

In considering claim that Immigration and Naturalization Service (INS) violated immigration statute by dismissing asylum claim, Court of Appeals was required to begin with examination of scope of statute itself. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[6] Statutes 219(2)
361k219(2) Most Cited Cases

In a review of an agency's construction of statute which it administers, first is the question whether Congress has spoken directly to the precise question at issue; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

[7] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Six-year-old alien was eligible to apply for asylum, inasmuch as statute providing that "[a]ny alien . . . may apply for asylum" meant exactly what it said. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[8] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

When an alien applies for asylum within the meaning of the asylum statute, the Immigration and Naturalization Service (INS), under the statute itself and INS regulations, must consider the merits of the alien's asylum claim. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1); 8 C.F.R. § 208.9(a).

[9] Statutes 188
361k188 Most Cited Cases

In reading statutes, the Court of Appeals considers not only the words Congress used, but the spaces between those words.

[10] Constitutional Law 72
92k72 Most Cited Cases

[10] Statutes 219(1)
361k219(1) Most Cited Cases

Where a statute is silent on an issue, Congress has left a gap in the statutory scheme, from which springs executive discretion, and, as a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute, to choose how to fill such gaps.

[11] Constitutional Law 60
92k60 Most Cited Cases

That Congress has left a gap in a statutory scheme does not mean that Congress has done something wrong; Congress may commit something to the discretion of other branches of government.

[12] Constitutional Law 74
92k74 Most Cited Cases

When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute; however, where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch, then the gaps should not be filled by federal judges.

[13] Constitutional Law 74

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92k74 Most Cited Cases

Where congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency rather than by federal courts.

[14] Aliens 39
24k39 Most Cited Cases

The authority of the executive branch to fill gaps in statutory schemes is especially great in the context of immigration policy.

[15] Aliens 39
24k39 Most Cited Cases

The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials, such as the Immigration and Naturalization Service (INS), in matters touching upon foreign affairs.

[16] Constitutional Law 72
92k72 Most Cited Cases

Respect for the authority of the executive branch in foreign affairs is a well- established theme in our law, and the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress.

[17] Statutes 219(1)
361k219(1) Most Cited Cases

The proper review by the Court of Appeals of the exercise by the executive branch of its discretion to fill gaps in statutory schemes must be very limited.

[18] Constitutional Law 72
92k72 Most Cited Cases

That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy.

[19] Administrative Law and Procedure 310
15Ak310 Most Cited Cases

Executive agencies must comply with the procedural requirements imposed by statute.

[20] Administrative Law and Procedure 416.1
15Ak416.1 Most Cited Cases

Agencies must respect their own procedural rules and regulations.

[21] Administrative Law and Procedure 303.1
15Ak303.1 Most Cited Cases

The policy selected by an agency must be a reasonable one in light of the statutory scheme.

[22] Administrative Law and Procedure 760
15Ak760 Most Cited Cases

Although the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness, the courts cannot properly reexamine the wisdom of an agency-promulgated policy.

[23] Aliens 44
24k44 Most Cited Cases

Because the law, particularly the asylum statute, was silent about validity of six-year-old alien's purported asylum applications, it fell to Immigration and Naturalization Service (INS) to make discretionary policy choice with respect to that issue. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[24] Aliens 44
24k44 Most Cited Cases

Policies upon which Immigration and Naturalization Service (INS) relied in determining that six-year-old alien lacked capacity to file personally for asylum against wishes of his Cuban father were entitled to some deference in alien's action alleging that INS violated immigration statute by dismissing his asylum applications as legally void, notwithstanding that such policies were developed in course of administrative proceedings, rather than during rulemaking, and that such policies might not harmonize perfectly with earlier INS interpretative guidelines, inasmuch as policies were not after-the-fact rationalization; policies were not contradicted by any statutory provision, regulatory authority, or prior agency adjudication. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

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[25] Administrative Law and Procedure 753
15Ak753 Most Cited Cases

An after-the-fact rationalization of agency action, that is, an explanation developed for the sole purpose of defending in court the agency's actions, is usually entitled to no deference from the courts.

[26] Aliens 44
24k44 Most Cited Cases

Interpretative guidelines issued by Immigration and Naturalization Service (INS) do not have the force and effect of law.

[27] Aliens 44
24k44 Most Cited Cases

That an Immigration and Naturalization Service (INS) policy has been developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does render the policy altogether unworthy of deference.

[28] Aliens 44
24k44 Most Cited Cases

That an Immigration and Naturalization Service (INS) policy may not be a longstanding one affects only the degree of deference required, and does not render the policy altogether unworthy of deference.

[29] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policies under which six-year-old aliens necessarily lacked sufficient capacity to assert asylum claims on their own, and under which a six-year-old alien was required to be represented by some adult in applying for asylum, were reasonable interpretations of asylum statute. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[30] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

The Immigration and Naturalization Service (INS) is not required, as a matter of law, to individually assess each alien minor's mental capacity to determine if they have the capacity to assert asylum claims on their own; rather, absolute line-drawing based on age is an acceptable approach. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[31] Aliens 54(1)
24k54(1) Most Cited Cases

Although the Immigration and Naturalization Service (INS) is not required to let six-year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[32] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policy under which ordinarily a parent, even one outside United States, and only a parent, could act for his or her six-year old child who was in this country with respect to asylum was reasonable interpretation of asylum statute; although policy gave paramount consideration to primary role of parents in upbringing of their children, it recognized that special circumstances might exist rendering a parent an inappropriate representative for child. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[33] Infants 81
211k81 Most Cited Cases

Although the common practice in courts seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be next friend of his or her child as a matter of right.

[34] Parent and Child 2.5
285k2.5 Most Cited Cases
(Formerly 285k2(2))

Because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children, even where the parent is not generally unfit, is not without limits.

[35] Aliens 44
24k44 Most Cited Cases

[35] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Because Congress has decided that any alien may apply for asylum, Congress has charged the

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Immigration and Naturalization Service (INS), when the INS promulgates policy and fills gaps in the statutory scheme, with facilitation, not hindrance, of that legislative goal. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[36] Aliens 54.3(1)
24k54.3(1) Most Cited Cases

Considering the principles of judicial deference to executive agencies, Court of Appeals could not disturb policy of Immigration and Naturalization Service (INS) just because it might be imperfect.

[37] Aliens 54.3(1)
24k54.3(1) Most Cited Cases

Court of Appeals could not invalidate policy of Immigration and Naturalization Service (INS) merely because Court personally might have chosen another.

[38] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policy, under which parent's residence in communist-totalitarian state was no special circumstance, sufficient in and of itself, to justify consideration of asylum claim by parent's six-year-old child, presented by child's relative in this country, against wishes of parent, was reasonable interpretation of asylum statute; policy took some account of possibility of government coercion, and policy implicated foreign affairs, requiring special deference. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[39] Constitutional Law 72
92k72 Most Cited Cases

In no context is the executive branch entitled to more deference than in the context of foreign affairs.

[40] Aliens 54.3(3)
24k54.3(3) Most Cited Cases

Appropriate standard of review of decision of Immigration and Naturalization Service (INS) to treat asylum applications filed by six-year-old alien against wishes of his father as legally void was "arbitrary, capricious, or abuse of discretion" standard, not "facially legitimate and bona fide reason" standard. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[41] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) did not act arbitrarily or abuse its discretion in rejecting as void application for asylum signed and submitted by six-year-old alien himself against his Cuban father's wishes, inasmuch as INS's per se rule prohibiting six-year-old children from personally filing asylum applications against their parents' wishes was entitled to deference. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[42] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) did not act arbitrarily or abuse its discretion in rejecting as void application for asylum submitted on behalf of six-year-old alien, against wishes of alien's Cuban father, by alien's great uncle as next friend; INS was not clearly wrong in determining that father was not operating under coercion by Cuban government or that, if he was, his interests were aligned with Cuban government, and INS's determination that asylum claim probably lacked merit was not clearly inaccurate, given lack of INS or judicial decisions where person in similar circumstances established well-founded fear of persecution. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[43] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Congress largely has left the task of defining with precision the phrase "well- founded fear of persecution," found in statute defining "refugee" for asylum purposes, to the Immigration and Naturalization Service (INS). Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[44] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Political conditions which affect the populace as a whole or in large part are generally insufficient to establish persecution of an asylum applicant. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

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[45] **Aliens 53.10(3)**
24k53.10(3) Most Cited Cases

The Immigration and Naturalization Service is not required to treat education and indoctrination as synonymous with persecution in asylum proceedings. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[46] **Aliens 53.10(3)**
24k53.10(3) Most Cited Cases

Not all exceptional treatment is "persecution" for purposes of an asylum claim. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[47] **Constitutional Law 70.1(1)**
92k70.1(1) Most Cited Cases

[47] **Constitutional Law 72**
92k72 Most Cited Cases

It is the duty of Congress and the executive branch, as policymakers, to exercise political will, and, although courts should not be unquestioning, they should respect the other branches' policymaking powers.

[48] **Federal Courts 1.1**
170Bk1.1 Most Cited Cases

The judicial power is a limited power, and it is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

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Mark D. Beckett, Martin N. Flics, Jeffrey Alan Tochner, Latham & Watkins, New York City, Amicus Curiae for Lawyers Committee for Human Rights, Women's Commission for Refugee Women and Children, Florida Immigrant Advocacy Center, United States Representative from the 18th, Children and Family Justice Center.

Appeal from the United States District Court for the Southern District of Florida.

*1344 Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

EDMONDSON, Circuit Judge:

This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government: a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion.

Elian Gonzalez ("Plaintiff"), a six-year-old Cuban child, arrived in the United States alone. His father in Cuba demanded that Plaintiff be returned to Cuba. Plaintiff, however, asked to stay in the United States; and asylum applications were submitted on his behalf. The Immigration and Naturalization Service ("INS")--after, among other things, consulting with Plaintiff's father and considering Plaintiff's age--decided that Plaintiff's asylum applications were legally void and refused to consider their merit.

Plaintiff then filed this suit in federal district court, seeking on several grounds to compel the INS to consider and to determine the merit of his asylum applications. The district court dismissed Plaintiff's suit. *Gonzalez ex rel. Gonzalez v. Reno*, 86 F.Supp.2d 1167, 1194 (S.D.Fla.2000). Plaintiff appeals, [FN1] and we affirm.

FN1. Several defendant-appellees are involved in this appeal. All these defendants are part of the executive branch of our government. For the sake of simplicity, we refer to the defendants collectively as the "INS."

I.

In December 1993, Plaintiff was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. When Plaintiff was about three years old, Juan

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Miguel and Elizabeth separated. Elizabeth retained custody of Plaintiff after the separation. Juan Miguel, however, continued to have regular and significant contact with his son. Plaintiff, in fact, attended school in the district where his father lived and often stayed at Juan Miguel's home.

In November 1999, Elizabeth decided to leave Cuba and to take her son to the United States. In the pre-dawn hours of 22 November, Plaintiff and Elizabeth, along with twelve other Cuban nationals, left Cuba aboard a small boat. The next day, the boat capsized in strong winds and rough seas off the coast of Florida. Eleven of the passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

Two days later, Plaintiff was rescued at sea by Florida fishermen and was taken to a hospital in Miami for medical treatment. While Plaintiff was receiving medical treatment, the INS was contacted by Plaintiff's great-uncle: Miami resident Lazaro Gonzalez. INS officials decided, upon Plaintiff's release from the hospital, not to remove Plaintiff immediately to Cuba. Instead, the INS deferred Plaintiff's immigration inspection and paroled Plaintiff into Lazaro's custody and care.

Soon thereafter, Lazaro filed an application for asylum on Plaintiff's behalf with the INS. This application was followed shortly by a second application signed by Plaintiff himself. A third asylum application was filed by Lazaro on Plaintiff's behalf in January 2000, after a state court awarded temporary custody of Plaintiff to Lazaro. [FN2] The applications were prepared by a Miami lawyer.

> FN2. A Florida state court since has dismissed Lazaro's petition for custody of Plaintiff. *See In re the Matter of Lazaro Gonzalez,* No. 00- 00479-FC-28 (Fla. 11th Cir.Ct.2000).

The three applications were substantially identical in content. The applications stated that Plaintiff "is afraid to return to Cuba ." The applications claimed that Plaintiff had a well-founded fear of persecution because many members of Plaintiff's family had been persecuted by the Castro government in Cuba. In particular, ***1345** according to the applications, Plaintiff's stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of Plaintiff's great-uncles also had been imprisoned for their political acts. Plaintiff's mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if Plaintiff were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.

Plaintiff's father, however, apparently did not agree that Plaintiff should remain in the United States. Soon after Plaintiff was rescued at sea, Juan Miguel sent to Cuban officials a letter, asking for Plaintiff's return to Cuba. The Cuban government forwarded this letter to the INS.

Because of the conflicting requests about whether Plaintiff should remain in the United States, INS officials interviewed both Juan Miguel and Lazaro. An INS official, on 13 December, met with Juan Miguel at his home in Cuba. At that meeting, Juan Miguel made this comment:

> [Plaintiff], at the age of six, cannot make a decision on his own .... I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family .... As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Juan Miguel denied that Lazaro was authorized to seek asylum for Plaintiff; Juan Miguel also refused to consent to any lawyer representing Plaintiff. Juan Miguel assured the INS official that his desire for Plaintiff's return to Cuba was genuine and was not coerced by the Cuban government.

One week later, INS officials in Miami met with Lazaro, Marisleysis Gonzalez (Plaintiff's cousin), and several lawyers representing Plaintiff. At that meeting, the parties discussed Juan Miguel's request. Lazaro contended that Juan Miguel's request for Plaintiff's return to Cuba was coerced by the Cuban government. [FN3] INS officials also inquired about the legal basis for Plaintiff's asylum applications; Lazaro replied this way: "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there." Plaintiff's lawyers told the INS again of the persecution of Plaintiff's relatives in Cuba because of their political opposition to the Castro government.

> FN3. As proof of this contention, Lazaro told INS officials that, before Plaintiff was discovered at sea, Juan Miguel telephoned

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> Lazaro and asked Lazaro to take care of Plaintiff if Plaintiff made it to the United States. Lazaro stated that, after Plaintiff's rescue, Juan Miguel's demeanor had changed noticeably and that, according to Juan Miguel's neighbors in Cuba, Juan Miguel was "[g]etting extra protection" from Cuban authorities.

On 31 December, an INS official again met with Juan Miguel in Cuba to investigate further Lazaro's claim that Juan Miguel's request had been coerced. [FN4] At that meeting, Juan Miguel repeated that he desired Plaintiff's return to Cuba. Juan Miguel also reasserted that he was under no undue influence from any individual or government. The INS official--taking Juan Miguel's demeanor into account--determined that Juan Miguel, in fact, genuinely desired his son's return to Cuba.

> FN4. To reduce third parties' opportunities to eavesdrop upon the meeting, this interview was held at the residence of a United Nations official near Havana. Also, some of the interview was conducted in writing to prevent eavesdropping.

The INS Commissioner, on 5 January 2000, rejected Plaintiff's asylum applications as legally void. The Commissioner--concluding that six-year-old children lack the capacity to file personally for asylum against the wishes of their parents--determined that Plaintiff could not file his own asylum applications. Instead, according to ***1346** the Commissioner, Plaintiff needed an adult representative to file for asylum on his behalf. The Commissioner--citing the custom that parents generally speak for their children and finding that no circumstance in this case warranted a departure from that custom--concluded that the asylum applications submitted by Plaintiff and Lazaro were legally void and required no further consideration. Plaintiff asked the Attorney General to overrule the Commissioner's decision; the Attorney General declined to do so.

Plaintiff then, by and through Lazaro as his next friend, filed a complaint in federal district court seeking to compel the INS to consider the merits of his asylum applications. In his complaint, Plaintiff alleged, among other things, that the refusal to consider his applications violated 8 U.S.C. § 1158 and the Fifth Amendment Due Process Clause. The district court rejected both claims and dismissed Plaintiff's complaint. Plaintiff appeals. [FN5]

> FN5. During the pendency of this appeal, the INS revoked Plaintiff's parole and removed Plaintiff from Lazaro's custody. The INS then paroled Plaintiff into the custody of Juan Miguel, who had traveled to the United States to reclaim his son. After Juan Miguel came to the United States, we permitted Juan Miguel to intervene in this case.
>
> To ensure that Plaintiff would not be returned to Cuba, depriving Plaintiff of a day in court and depriving this Court of jurisdiction over Plaintiff's appeal, we enjoined Plaintiff's removal from the United States pending appeal. Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.

II.

[1][2][3][4] On appeal, Plaintiff argues that the district court erred (1) by dismissing Plaintiff's claim under 8 U.S.C. § 1158, (2) by dismissing Plaintiff's due process claim, and (3) by failing to appoint a guardian ad litem to represent Plaintiff's interests. [FN6] We have reviewed carefully the record and the briefs filed by all parties. We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion. *See* *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir.1984) (en banc) ("Aliens seeking admission to the United States ... have no constitutional rights with regard to their applications ...."), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). Plaintiff's guardian ad litem claim, because Plaintiff was ably represented in district court by his next friend, also lacks merit and similarly does not warrant extended discussion. *See* Fed.R.Civ.P. 17(c) (providing for appointment of guardian ad litem in discretion of district court); *see also* *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir.1958) (noting that guardian ad litem may be unnecessary where child already represented adequately by next friend). We, accordingly, affirm the district court's dismissal of the constitutional claim and the district court's refusal to appoint a guardian ad litem. [FN7] We now turn, however, to a more difficult question: the district court's dismissal of Plaintiff's statutory claim.

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FN6. The INS contended in district court that the district court lacked subject-matter jurisdiction over Plaintiff's suit. The district court, however, rejected this argument and concluded that subject-matter jurisdiction did exist. The INS has not renewed its jurisdictional contention on appeal.
We, however, are mindful of our own jurisdictional limits. So, we have considered our subject-matter jurisdiction over this appeal. We conclude that this Court does have subject-matter jurisdiction over Plaintiff's appeal.

FN7. Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff's next friend and to substitute Plaintiff's father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff's next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff's claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor's motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

III.

Plaintiff contends that the district court erred in rejecting his statutory claim ***1347** based on 8 U.S.C. § 1158. Section 1158 provides that "[a]ny alien ... may apply for asylum." 8 U.S.C. § 1158(a)(1). Plaintiff says that, because he is "[a]ny alien," he may apply for asylum. Plaintiff insists that, by the applications signed and submitted by himself and Lazaro, he, in fact, did apply for asylum within the meaning of section 1158. In addition, Plaintiff argues that the summary rejection by the INS of his applications as invalid violated the intent of Congress as set out in the statute.

The INS responds that section 1158 is silent about the validity of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the wishes of the child's parent. The INS argues that, because the statute does not spell out how a young child files for asylum, the INS was free to adopt a policy requiring, in these circumstances, that any asylum claim on Plaintiff's behalf be filed by Plaintiff's father. As such, the INS urges that the rejection of Plaintiff's purported asylum applications as legally void was lawful. According to the INS, because the applications had no legal effect, Plaintiff never applied at all within the meaning of the statute.

Guided by well-established principles of statutory construction, judicial restraint, and deference to executive agencies, we accept that the rejection by the INS of Plaintiff's applications as invalid did not violate section 1158.

A.

[5][6] Our consideration of Plaintiff's statutory claim must begin with an examination of the scope of the statute itself. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 119 S.Ct. 1439, 1445, 143 L.Ed.2d 590 (1999) (instructing that analysis set out in *Chevron* is applicable to immigration statutes); *Jaramillo v. INS*, 1 F.3d 1149, 1153 (11th Cir.1993) (en banc) (same). In *Chevron*, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 104 S.Ct. at 2781. We turn, therefore, to the plain language of the statute.

[7] Section 1158 provides, in pertinent part:

> *Any alien* who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, *may apply for asylum* in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: "[a]ny alien ... may apply for asylum." *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 1956, 141 L.Ed.2d 215 (1998) (observing that statute is not ambiguous just because it is broad and that statute may apply to circumstances not envisioned by Congress). That "[a]ny alien" includes Plaintiff

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seems apparent. [FN8] *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); *see also Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir.1997) (noting that word "any" has "an expansive meaning"). Section 1158, therefore, plainly would permit Plaintiff to apply for asylum.

FN8. The INS concedes that Plaintiff is eligible to apply for asylum pursuant to section 1158.

[8] When an alien does apply for asylum within the meaning of the statute, the INS--according to the statute itself and ***1348** INS regulations--must consider the merits of the alien's asylum claim. *See* 8 U.S.C. § 1158(d)(1) ("The Attorney General *shall* establish a procedure for the consideration of asylum applications filed under subsection (a) of this section.") (emphasis added); 8 C.F.R. § 208.9(a) (requiring INS to "adjudicate the claim of each asylum applicant whose application is complete"). The important legal question in this case, therefore, is not whether Plaintiff *may* apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six- year-old child *has* applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent.

[9] About this question, more important than what Congress said in section 1158 is what Congress left unsaid. In reading statutes, we consider not only the words Congress used, but the spaces between those words. Section 1158 is silent on the precise question at issue in this case. Although section 1158 gives "[a]ny alien" the right to "apply for asylum," the statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. *See* 8 U.S.C. § 1158.

B.

[10][11][12][13][14][15][16][17] Because the statute is silent on the issue, Congress has left a gap in the statutory scheme. [FN9] From that gap springs executive discretion. [FN10] As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to ***1349** fill such gaps. [FN11] *See Chevron*, 104 S.Ct. at 2793. Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy. [FN12] *See Aguirre-Aguirre*, 119 S.Ct. at 1445. Our proper review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991).

FN9. That Congress left a gap in the statutory scheme does not mean that Congress has done something wrong. Whether Congress could or should legislate with sufficient detail to address every conceivable set of circumstances that might arise is highly debatable. *See generally Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737, 1744, 135 L.Ed.2d 36 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). Congress may properly commit something to the discretion of the other branches of government.

FN10. This case is about the *discretion* of the executive branch to make policy, not about ministerial enforcement of the "law" by executive officials. It has been suggested that the precise policy adopted by the INS in this case was required by "law." That characterization of this case, however, is inaccurate. As we have explained, when the INS made its pertinent policy, the preexisting law said nothing about the validity of Plaintiff's asylum applications. Instead, Congress just provided that "[a]ny alien" may apply for asylum and left the details of the application process to the discretion of the INS. *See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1140 (9th Cir.1988) (en banc) (Hug, J., dissenting) (explaining that sometimes "Congress enacts quite general provisions, with the specifics to be filled in by the agency"). The INS, in

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its discretion, decided to require six-year-old children--who arrive unaccompanied in the United States from Cuba--to act in immigration matters only through (absent special circumstances) their parents in Cuba. The INS could have shaped its policy in a different fashion, perhaps allowing relatives (for example, those within the fourth degree of relationship) in the United States to act for such children. But it did not, and we cannot. That choice was the sole prerogative of the executive branch. According to the principles set out in *Chevron*, we can only disturb that choice if it is unreasonable. *See* *Chevron*, 104 S.Ct. at 2793; *see also* *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 678, 102 L.Ed.2d 714 (1989) (Scalia, J., dissenting) (explaining discretionary authority of executive branch in administering statutory scheme).

FN11. When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). But the ordinary rule does not always apply: where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch (a political branch accountable to the people and fit for making policy judgments), then the gaps should not be filled in by federal judges. Where Congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency. And the Supreme Court has directed that, for such statutes, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute .... Rather, if the statute is silent ... the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 104 S.Ct. at 2782.

FN12. The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. *See* *Aguirre-Aguirre*, 119 S.Ct. at 1445. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law. *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). And the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); *see also* *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir.1983) (same).

[18][19][20][21][22] That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute. *See* *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 1073, 39 L.Ed.2d 270 (1974). Agencies must respect their own procedural rules and regulations. *See* *id.* at 1074; *see also* *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir.1981). And the policy selected by the agency must be a reasonable one in the light of the statutory scheme. *Chevron*, 104 S.Ct. at 2782. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-promulgated policy . [FN13] *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 1582, 91 L.Ed. 1995 (1947) ("The wisdom of the principle adopted is none of our concern.").

FN13. The Supreme Court has instructed us with these words:
[F]ederal judges--who have no constituency-

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> -have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."
> *Chevron,* 104 S.Ct. at 2793 (citation omitted).

[23] In this case, because the law--particularly section 1158--is silent about the validity of Plaintiff's purported asylum applications, it fell to the INS to make a discretionary policy choice. The INS, exercising its gap-filling discretion, determined these things: (1) six-year-old children lack the capacity to sign and to ***1350** submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist- totalitarian state (such as Cuba), [FN14] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme. *See Chevron,* 104 S.Ct. at 2782.

> FN14. *See* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (noting that "Cuba is a totalitarian state," where Communist Party "exercises control over all aspects of Cuban life").

[24][25] But we first address Plaintiff's contention that the "policy" relied on by the INS in this case is really no policy at all but is, in reality, just a litigating position. An after-the-fact rationalization of agency action--an explanation developed for the sole purpose of defending in court the agency's acts--is usually entitled to no deference from the courts. *Bradberry v. Director, Office of Workers' Comp. Programs,* 117 F.3d 1361, 1366 (11th Cir.1997). But we are unable to say that the position of the INS here is just an after-the-fact rationalization.

[26][27][28] The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced. [FN15] *Cf. IAL Aircraft Holding, Inc. v. FAA,* 206 F.3d 1042, 1046 & n. 5 (11th Cir.2000). While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law), [FN16] the parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that "flatly contradicts" the policy. *Cf. General Elec. Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (noting that agencies have latitude to "adapt their rules and policies to the demands of changing circumstances"). That the INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. *See Chenery,* 67 S.Ct. at 1580; *see also Cook v. Wiley,* 208 F.3d 1314, 1319-20 (11th Cir.2000) (explaining that executive policies not "subjected to the heightened scrutiny of [formal] rulemaking" are nonetheless entitled to "some deference"); *Bigby v. INS,* 21 F.3d 1059, 1063-64 (11th Cir.1994) (finding *Chevron* deference appropriate even though agency policy had not been adopted as regulation); *U.S. Mosaic Tile Co. v. NLRB,* 935 F.2d 1249, 1255 n. 6 (11th Cir.1991) ("Although the agency action in *Chevron* involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications ...."). And that the INS policy may not be a longstanding one likewise affects only the degree of deference required. [FN17] ***1351** *See Chenery,* 67 S.Ct. at 1580. The INS policy, therefore, is entitled to, at least, some deference under *Chevron;* and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.

> FN15. The INS policy on unaccompanied six-year-old children purporting to file for asylum against their parents' wishes was set out in these writings: (1) a memorandum, dated 3 January 2000, from the INS General Counsel to the INS Commissioner; (2) two letters, dated 5 January, from an INS district director to Plaintiff's lawyers and Lazaro, letters explaining the decision of the INS Commissioner; and (3) a letter, dated 12 January, from the Attorney General to

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Plaintiff's lawyers and Lazaro.

FN16. The INS Guidelines "do not have the force and effect of law." *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1511 (11th Cir.1992).

FN17. The INS claims that the approach taken in Plaintiff's case is the INS's longstanding position on young, unaccompanied aliens. The INS, however, points to no evidence in the record showing that the INS, in the past, has taken this approach. But, even assuming that Plaintiff's case triggered the making of this policy to fit cases like Plaintiff's peculiar circumstances, deference to the INS policy would still be due if the policy is a reasonable one. *See* Chenery, 67 S.Ct. at 1580 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

[29][30][31] We accept that the INS policy at issue here comes within the range of reasonable choices. First, we cannot say that the foundation of the policy--the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim-- is unreasonable. [FN18] *See Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir.1985) (presuming that twelve-year-old child was "near the lower end of an age range in which a minor may be mature enough to assert" an asylum claim against the wishes of his parents). Because six-year-old children must have some means of applying for asylum, *see* 8 U.S.C. § 1158(a)(1), and because the INS has decided that the children cannot apply personally, the next element of the INS policy--that a six-year-old child must be represented by some adult in applying for asylum--necessarily is reasonable.

FN18. In other words, we do not think that the INS, as a matter of law, must individually assess each child's mental capacity; we cannot say that looking at capacity instead of age for young children is required. Instead, we recognize that absolute line drawing--although necessarily sacrificing accuracy and flexibility for certainty and efficiency--is an acceptable approach. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 2567-68, 49 L.Ed.2d 520 (1976). And, as long as the approach taken by the INS is a reasonable one, we need not decide what the best approach would be.

We, however, do not mean to suggest that the course taken by the INS is the only permissible approach. Although the INS is not required to let six- year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Even young children can be capable of having an accurate impression of the facts about which they might speak. To obtain asylum, we doubt that it is essential for a child to be able to debate the merits of Marxism-Leninism against the merits of Western-style democracy. Some reasonable people could conclude that it should be sufficient for a child to be able to speak about his fears and to recount the facts that support his fears about returning to another country. Not infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect. *See, e.g., Pocatello v. United States*, 394 F.2d 115, 116-17 (9th Cir.1968) (affirming district court's admission of five-year-old's testimony); *Miller v. State*, 391 So.2d 1102, 1106 (Ala.Crim.App.1980) (affirming decision of trial court to permit four-year- old to testify); *Baker v. State*, 674 So.2d 199, 200 (Fla.Dist.Ct.App.1996) (affirming trial court decision admitting testimony and statements of six-year-old victim).

[32][33][34] The INS determination that ordinarily a parent (even one outside of this country) [FN19]--and, more important, *only* a parent--can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting ***1352** a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of the public in the prompt but fair disposition of asylum claims. The INS policy--by presuming that the parent is the sole, appropriate representative for a child--gives

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paramount consideration to the primary role of parents in the upbringing of their children. But we cannot conclude that the policy's stress on the parent-child relationship is unreasonable. [FN20] *See Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

FN19. We conclude that the approach taken by the INS about out-of- the-country representatives was a reasonable one. Other approaches might have been available. The INS might have selected a policy giving more weight to the fact that the parent of a child in the United States remained outside of this country's jurisdiction. For example, maybe the INS could have required that the adult representative--purporting to act in immigration matters (either by applying for asylum on behalf of the child or in effect vetoing an application for asylum) for a child in this country--be present in this country himself at the pertinent time. *See, e.g., Cozine v. Bonnick*, 245 S.W.2d 935, 937 (Ky.1952) (requiring that next friend, purporting to represent child in court, be resident of state). But what else might have been done is not decisive for us.

FN20. We do not suggest that recognizing the parent-child relationship to the exclusion of other familial relationships is the only reasonable approach. The parent-child relationship is obviously an important one. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); *see also In re Custody of Smith*, 137 Wash.2d 1, 969 P.2d 21, 27-28 (Wash.1998), *cert. granted sub nom. Troxel v. Granville*, 527 U.S. 1069, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999). Still, although the common practice in the courts of this country seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be the next friend of his child as a matter of absolute right. *See Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir.1955) ("[No] parent [ ] may claim to be a guardian ad litem of his minor child as a matter of right."). Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children--even where the parent is not generally "unfit"--is not without limits in this country. *See, e.g., In the Matter of Sampson*, 37 A.D.2d 668, 323 N.Y.S.2d 253, 255 (N.Y.App.Div.1971) (affirming order requiring disfigured child to undergo risky cosmetic surgery against genuine wishes of child's only parent: the state contended surgery would have "a beneficial effect" upon child); *Crommelin-Monnier v. Monnier*, 638 So.2d 912, 916 (Ala.Civ.App.1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country). In addition, the law in the United States frequently treats more distant familial relationships as important. *See, e.g.*, Kan. Stat. Ann. § 38-1541 (permitting any person related within the fourth degree to child to move to intervene in "child in need of care" proceedings); Ala.Code § 12-16- 150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15-12-135(a) (disqualifying persons related within the sixth degree to interested parties from jury service).

Critically important, the INS policy does not neglect completely the independent and separate interest that a child may have, apart from his parents, in applying for asylum. *See Polovchak*, 774 F.2d at 736-37. Instead, according to the INS policy, special circumstances may exist that render a parent an inappropriate representative for the child. [FN21] Where such circumstances do exist, the INS policy appears to permit other persons, besides a parent, to speak for the child in immigration matters. So, to some extent, the policy does protect a child's own right to apply for asylum under section 1158 despite the contrary wishes of his parents.

FN21. Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an

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> exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

[35][36][37] We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction. Because Congress has decided that "[a]ny alien" (including six-year-old children) may apply for asylum, 8 U.S.C. § 1158(a)(1), Congress has charged the INS--when it promulgates policy and fills gaps in the statutory scheme--with facilitation, not hindrance, of that legislative goal. *See Shoemaker v. Bowen*, 853 F.2d 858, 861 (11th Cir.1988) (noting that *Chevron* does not provide agency with license to "frustrate[ ] the underlying congressional policy"). We recognize***1353** that, in some instances, the INS policy of deferring to parents--especially those residing outside of this country--might hinder some six-year-olds with non-frivolous asylum claims and prevent them from invoking their statutory right to seek asylum. But, considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 100 S.Ct. 2844, 2875, 65 L.Ed.2d 1010 (1980) (Burger, C.J., concurring) (noting that agency policy may be valid although policy does not perfectly accomplish legislative goals). And we cannot invalidate the policy--one with international-relations implications--selected by the INS merely because we personally might have chosen another. *See Chevron*, 104 S.Ct. at 2793; *see also Jaramillo*, 1 F.3d at 1152-53. Because we cannot say that this element of the INS policy-- that, ordinarily, a parent, and only a parent, can act for a six-year-old child in immigration matters--is unreasonable, we defer to the INS policy.

[38] The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba. [FN22] *See generally* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) ("[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens."). Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent--even when he is not coerced--demands that the child leave this country to return to a country with little respect for human rights and basic freedoms.

> FN22. According to the United States Department of State, the human rights record of the Cuban government is "poor." Cuban citizens who oppose or criticize the government routinely are "harass[ed], threaten[ed], arbitrarily arrest[ed], detain[ed], imprison[ed], and defame[d]." Cuba regularly denies citizens "the freedoms of speech, press, assembly, and association," and restricts the free exercise of religion. The Cuban constitution provides that "legally recognized civil liberties can be denied to anyone who actively opposes the 'decision of the Cuban people to build socialism.' " *See* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000); *see also* UNHCHR Res.2000/25, U.N. Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about "the continued violation of human rights and fundamental freedoms in Cuba").

[39] Nonetheless, we cannot properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion: where special circumstances--such as definite coercion directed at an individual parent--exist, a non-parental representative may be necessary to speak for the child. In addition and more important, in no context is the executive branch entitled to more deference than in the context of foreign affairs. *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936). This aspect of the INS policy seems to implicate the conduct of foreign affairs more than any other. Something even close to a per se rule-- that, for

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immigration purposes, no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United ***1354** States--likely would have significant consequences for the President's conduct of our Nation's international affairs: such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent's country. As we understand the legal precedents, they, in effect, direct that a court of law defer especially to this international-relations aspect of the INS policy.

We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158, although section 1158 does not require the approach that the INS has chosen to take.

C.

[40] We now examine the INS's application of its facially reasonable policy to Plaintiff in this case. Although based on a policy permissible under *Chevron,* if the ultimate decision of the INS--to treat Plaintiff's asylum applications as invalid--was "arbitrary, capricious, [or] an abuse of discretion," the decision is unlawful. [FN23] *See* 5 U.S.C. § 706(2)(A); *see also INS v. Yueh-Shaio-Yang,* 519 U.S. 26, 117 S.Ct. 350, 353, 136 L.Ed.2d 288 (1996); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971). But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.

> FN23. The INS asks us to apply the "facially legitimate and bona fide reason" standard of review set out in *Kleindienst v. Mandel,* 408 U.S. 753, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972), instead of the more stringent "arbitrary, capricious, or an abuse of discretion" standard. We think that the *Kleindienst* standard is not the correct standard to apply in this case. But we do note that, even if the *Kleindienst* standard were applied, the result in this case would remain the same.

[41] The application signed and submitted by Plaintiff himself, insofar as the INS has decided that six-year-old children cannot file for asylum themselves, necessarily was a nullity under the INS policy. As we have explained, the INS's per se rule--prohibiting six-year-old children from personally filing asylum applications against their parents' wishes--is entitled to deference under the law. The INS, therefore, did not act arbitrarily or abuse its discretion in rejecting Plaintiff's own purported asylum application as void.

[42] Plaintiff contends that, even if the INS policy is facially reasonable under *Chevron,* the INS decision to reject the applications submitted by Lazaro was arbitrary. Plaintiff asserts that two special circumstances--the alleged coercion of Juan Miguel by the Cuban government and the objective basis of Plaintiff's asylum claim--bear negatively upon Juan Miguel's fitness to represent Plaintiff in immigration matters. The INS, according to Plaintiff, was therefore required to recognize some other adult representative--namely, Lazaro--to act on Plaintiff's behalf. We, however, conclude that the INS adequately considered these circumstances in reaching its ultimate decision.

The INS first determined that Juan Miguel, in fact, was not operating under coercion from the Cuban government or that, even if he was, his honest and sincere desires were aligned with those of the Cuban government. That determination was not clearly wrong and was no abuse of discretion. An INS official, on two occasions, interviewed Juan Miguel in person in Cuba. Aware of the possibility that Juan Miguel might be under some kind of coercion, the INS official took steps to ensure that Juan Miguel could express freely his genuine wishes about Plaintiff's asylum claim. The INS official, after meeting with Juan Miguel face-to-face, concluded--based upon her observations of his demeanor--that Juan Miguel's statement was not the result of duress or coercion. We, therefore, cannot say that the INS's rejection of Plaintiff's contention about coercion was arbitrary.

***1355** The INS also preliminarily assessed the objective basis of Plaintiff's asylum claim and concluded that his claim for asylum probably lacked merit. [FN24] Again, we cannot conclude that the INS's determination was arbitrary or an abuse of discretion. In making this assessment, the INS considered the information contained in the asylum applications and information provided to the INS by Plaintiff's lawyers. In addition, the INS interviewed Lazaro and inquired about the basis for Plaintiff's asylum claim. [FN25]

> FN24. We do not decide, as the INS

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advocates, that this summary and preliminary assessment of the merits of Plaintiff's asylum claim was a "consideration" of Plaintiff's purported asylum application within the meaning of the statute. But we do accept that this rough look at the potential merits was a legitimate part of deciding whether Plaintiff's father had a substantial conflict of interest with Plaintiff about asylum that would disqualify the father from representing Plaintiff.

FN25. That the INS, in making a preliminary assessment of the strength of Plaintiff's asylum claim, never interviewed Plaintiff has worried us. But the INS did speak with persons representing Plaintiff--Lazaro, Marisleysis, and Plaintiff's lawyers--on more than one occasion about the nature of his asylum claim.

The essence of Plaintiff's asylum claim was that, if he is returned to Cuba: (1) he will not enjoy the freedom that he has in the United States; (2) he might be forced to undergo "re-education" and indoctrination in communist theory; and (3) he might be used by the Cuban government for propaganda purposes. No one should doubt that, if Plaintiff returns to Cuba, he will be without the degree of liberty that people enjoy in the United States. Also, we admit that re-education, communist indoctrination, and political manipulation of Plaintiff for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility.

[43] Nonetheless, we cannot say that the INS's assessment of Plaintiff's asylum claim--that it probably lacked merit--was arbitrary. To make a meritorious asylum claim, an asylum applicant must show that he has a "well-founded fear of persecution" in his native land. *See* 8 U.S.C. § 1101(a)(42). Congress largely has left the task of defining with precision the phrase "well-founded fear of persecution" to the INS. *See Perlera- Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir.1990) (stating that, where statutory term is ambiguous, agency properly defined term through adjudications); *see also Singh v. INS*, 134 F.3d 962, 967 (9th Cir.1998) (noting that statutes do not define "persecution" or specify acts constituting "persecution").

[44][45][46] Plaintiff points to no earlier INS adjudications or judicial decisions where a person, in circumstances similar to Plaintiff's, was found to have established a "well-founded fear of persecution." Political conditions "which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." *See Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir.1995). We cannot say that the INS had to treat education and indoctrination as synonymous with "persecution." *See Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir.1995) (explaining that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive"); *see also Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir.1998) (stating that "persecution" "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"); *Bradvica v. INS*, 128 F.3d 1009, 1012 (7th Cir.1997) ("[M]ere harassment does not amount to persecution."); Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook*, 254-61 (6th ed.1998) (citing cases discussing meaning of "persecution"). Not all exceptional treatment is persecution. The INS's estimate of the purported applications--as applications ***1356** that were not strong on their merits--is not clearly inaccurate. [FN26]

FN26. We do not know for certain that, if Plaintiff's asylum applications were accepted and fully adjudicated, Plaintiff necessarily would fail to establish his eligibility for asylum. Depending on how the record was developed, we expect that a reasonable adjudicator might find that Plaintiff's fears were "well-founded." We also think that some reasonable adjudicator might regard things like involuntary and forcible "re-education" as persecution. But these issues are not questions that we, in the first instance, are to answer. The ultimate merits of an asylum petition are not before this Court at all. Instead, they are matters that would be committed to the discretion of the INS. The INS (and the courts) never have suggested that an asylum applicant in like circumstances was eligible for asylum. We cannot say that the INS's assessment of the likelihood of success of the applications in this case was arbitrary.

We have not the slightest illusion about the INS's

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choices: the choices-- about policy and about application of the policy--that the INS made in this case are choices about which reasonable people can disagree. Still, the choices were not unreasonable, not capricious and not arbitrary, but were reasoned and reasonable. The INS's considerable discretion was not abused.

CONCLUSION

[47][48] As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

When the INS was confronted with Plaintiff's purported asylum applications, the immigration law of the United States provided the INS with no clear answer. The INS accordingly developed a policy to deal with the extraordinary circumstances of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the express wishes of the child's parents (or sole parent). The INS then applied this new policy to Plaintiff's purported asylum applications and rejected them as nullities.

Because the preexisting law compelled no particular policy, the INS was entitled to make a policy decision. The policy decision that the INS made was within the outside border of reasonable choices. And the INS did not abuse its discretion or act arbitrarily in applying the policy and rejecting Plaintiff's purported asylum applications. The Court neither approves nor disapproves the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict 8 U.S.C. § 1158.

The judgment of the district court is AFFIRMED [FN27].

FN27. NOTICE OF SHORTENED TIME: We order that, if petitions for rehearing or suggestions for rehearing en banc are to be filed, they must be filed within 14 days of this date. Expect no extensions.

212 F.3d 1338, 2000 Daily Journal D.A.R. 5737, 13 Fla. L. Weekly Fed. C 713

Briefs and Other Related Documents (Back to top)

- 2000 WL 33978813 (Appellate Brief) Brief of the Lawyers Committee for Human Rights, the Women's Commission for Refugee Women and Children, and the Florida Immigrant Advocacy Center as Amici Curiae, in Support of Neither Party (May. 04, 2000)
- 2000 WL 33978814 (Appellate Brief) Amicus Curae Brief on behalf of Appellant (May. 04, 2000)
- 2000 WL 33978812 (Appellate Brief) Reply Brief of Plaintiff-Appellant Elian Gonzalez (May. 01, 2000)
- 2000 WL 33980154 (Appellate Brief) Brief of Intervenor Juan Miguel Gonzalez (May. 01, 2000)
- 2000 WL 33978811 (Appellate Brief) Initial Brief of Plaintiff-Appellant Elian Gonzalez (Apr. 10, 2000)

END OF DOCUMENT

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IV. Separation of Church & State

Brett Kavanaugh – *Good News Club v. Milford Central School*

Allegation: In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Facts:

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations.** It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

For opinion see 121 S.Ct. 2093, 121 S.Ct. 296

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL, Respondent.
No. 99-2036.
October Term, 2000.
November 30, 2000.
On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE SALLY CAMPBELL IN SUPPORT OF PETITIONERS

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*i QUESTIONS PRESENTED

1. Whether the Establishment Clause requires the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

2. Whether the Free Speech, Free Exercise, and Equal Protection Clauses permit the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

*iii TABLE OF CONTENTS

QUESTIONS PRESENTED ... i

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... v

INTEREST OF AMICUS CURIAE ... 1

SCHOOL POLICY INVOLVED ... 2

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INTRODUCTION AND SUMMARY OF ARGUMENT ... 2

ARGUMENT ... 5

I. THE CONSTITUTION DOES NOT REQUIRE THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY ... 5

II. THE CONSTITUTION DOES NOT PERMIT THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY ... 9

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS ... 21

CONCLUSION ... 23

***iv** TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) ... 6

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) ... 22

Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) ... passim

Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) ... passim

Campbell v. St. Tammany School Bd., 206 F.3d 482 (5th Cir. 2000) ... passim

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) ... passim

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ... 20

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) ... 10, 14, 19

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Employment Division v. Smith, 494 U.S. 872 (1990) ... 20-21

Engel v. Vitale, 370 U.S. 421 (1962) ... 5

Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991) ... 14

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3rd Cir. 1990) ... 14, 15

Hague v. CIO, 307 U.S. 496 (1939) ... 12

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) ... 12

*v Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) ... 9

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) ... passim

Lee v. Weisman, 505 U.S. 577 (1992) ... 5, 22

McDaniel v. Paty, 435 U.S. 618, 639 (1978) ... 20

Mitchell v. Helms, 120 S. Ct. 2530 (2000) ... 6

Mueller v. Allen, 463 U.S. 388 (1983) ... 6

National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc) ... 14

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) ... passim

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) ... passim

Santa Fe Ind. School District v. Doe, 120 S. Ct. 2266 (2000) ... 5

Widmar v. Vincent, 454 U.S. 263 (1981) ... passim

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Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) ... 6

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) ... 6

ARTICLE

Douglas Laycock, Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers, 81 Nw. L. Rev. 1 (1987) ... 8

*vi RULES

S. Ct. R. 37.3 ... 1

S. Ct. R. 37.6 ... 1

*1 INTEREST OF AMICUS CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amicus curiae and counsel for amicus curiae made a monetary contribution to the preparation or submission of this brief. See id.

Amicus Curiae Sally Campbell has challenged a local policy in St. Tammany Parish, Louisiana, that is similar to the Milford policy at issue in this case. The school board of St. Tammany Parish allows after-hours use of its buildings for civic, recreational, and entertainment uses, and for other uses that pertain to the "welfare of the public." Campbell v. St. Tammany School Bd., 206 F.3d 482, 484 (5th Cir. 2000). The St. Tammany policy expressly excludes partisan political activity, for-profit fundraising, and "religious services or religious instruction." Id. Ms. Campbell asked to use school facilities in St. Tammany School District for religious purposes. Relying on its policy, the School Board denied her request.

Ms. Campbell brought suit, alleging a violation of her First and Fourteenth Amendment rights. A panel of the United States Court of Appeals for the Fifth Circuit ruled that the Constitution does not require St. Tammany to allow religious speech in its facilities. Id. On October 26, 2000, over the dissent of Judges Jones, Smith, Barksdale, Garza, and DeMoss, the Court denied rehearing en banc. 2000 WL 1597749 (5th Cir.). Ms. Campbell intends soon to file a petition for writ of certiorari in this Court.

In their dissent from denial of rehearing en banc, Judges Jones, Smith, Barksdale, Garza, and DeMoss correctly contended that St. Tammany has created a public forum and that the content-based exclusion of religious speech from that forum is unconstitutional. For a forum to be considered a public forum, "[a]ll that is required is that the forum be 'generally open' to the public." Id. at *6 (Jones,

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J.). The St. Tammany facilities are "open 'indifferently' for use by private *2 groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple." Id. at *8.

These five Judges also correctly explained that St. Tammany's exclusion of religious speech is, in any event, unconstitutional even under the test applicable to limited public fora. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). Exclusions of speech from such fora must be both reasonable and viewpoint-neutral. The St. Tammany policy is unreasonable because it bears no relationship to the purposes of the forum: "To describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9 (Jones, J.). In addition, the St. Tammany policy discriminates on the basis of viewpoint, as is inherent in the exclusion of religious speech: "The crux of the issue is this: when measured against the 'welfare of the public standard,' how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" Id.

In summary, these five Judges stated: "It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the 'welfare of the public.' Once it did so, however, it could not arbitrarily discriminate against religious speakers." Id. at *10.

As this description reveals, the Milford case currently before the Court is not unique, but rather exemplifies a broader national problem of unjustified discrimination against religious speech in public facilities (as in St. Tammany). For that reason, and because the Court's resolution of this case is likely to affect the resolution of Ms. Campbell's case, Ms. Campbell respectfully submits this amicus curiae brief.

*3 SCHOOL POLICY INVOLVED

The relevant portions of the Milford Community Use of School Facilities policy are as follows:

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes;
>
> 1. For the purpose of instruction in any branch of education, learning or the arts.
>
> ***
>
> 3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public. ***
>
> Use for Nonreligious Purposes. School premises shall not be used by any individual or organization for religious purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Community Use policy for the Milford Central School District, members of the public may use public school facilities for (i) "instruction in any branch of education, learning or the arts," (ii) "holding social, civic and recreational meetings and entertainment events," or (iii) "other uses pertaining to the welfare of the community." Milford's expansive public access policy contains one -- and only one -- express exception: "School premises shall not be used by any individual or organization for religious purposes." Pursuant to this policy, the Milford Board

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of Education denied the request of the Good News Club (a community-based youth organization that provides moral instruction from a Christian perspective) to use its facilities. See 202 F.3d 502 (2d Cir. 2000).

*4 The discriminatory policy enacted by Milford Central School District targets religious speech for a distinctive burden. Milford's discrimination against private religious speech in general, and against the Good News Club in particular, is unconstitutional. As the Court has concluded in several virtually identical cases, the Constitution demands that private religious speech, religious people, and religious organizations receive at least the same treatment as their secular counterparts in gaining access to public facilities and public property. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, with respect to the precise issue of access to public school facilities that is raised in this case, the Court has repeatedly (and often unanimously) held that "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." Rosenberger, 515 U.S. at 846 (O'Connor, J., concurring). In so ruling, the Court has emphasized time and again that the Free Speech and Free Exercise Clauses protect "private speech endorsing religion." Id. at 841 (majority opinion).

Because the Court has already ruled decisively on the two central issues raised here, this case requires the Court to break no new ground, but merely to reaffirm its prior holdings. First, the Establishment Clause does not require the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility. Second, the Free Speech, Free Exercise, and Equal Protection Clauses do not permit the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility.

*5 ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

One fundamental question in this case is whether the Establishment Clause requires the government to exclude private religious groups such as the Good News Club from open and neutrally available public facilities. The answer is plainly no. The government may open public facilities on a neutral basis -- for use by religious and secular groups alike -- without violating the Establishment Clause.

To be sure, the Court has held that the Establishment Clause prohibits government-led or government-encouraged prayer to student audiences at certain public school events. See, e.g., Santa Fe Indep. School District v. Doe, 120 S. Ct. 2266 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962). But the Court has flatly rejected the broader and more extreme proposition that the Establishment Clause requires the government to eradicate all religious expression, public and private, from public schools and other public facilities. The Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.); see also id. at 775 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) (Establishment Clause not contravened "where truly private speech is allowed on equal terms in a vigorous public forum" so long as there is no "government manipulation of the forum"). The Court thus has

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emphasized time and again the critical distinction "between government speech endorsing religion, which the Establishment *6 Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quotation omitted).

Therefore, it is by now clear that the government does not violate the Establishment Clause when it allows religious individuals or groups to use public facilities or take public assistance that is available on a neutral basis to secular and religious alike. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); see also Mitchell v. Helms, 120 S. Ct. 2530 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). When the government provides facilities or aid on a neutral basis to religious and secular alike, there is no danger that the government has favored (and thereby endorsed) the religious over the secular -- and thus no Establishment Clause violation. Lamb's Chapel, 508 U.S. at 395 ("Under these circumstances ..., there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed .... "). A public facility open for use by private groups is "in a sense, surplus land" such that the government "conveys no message of endorsement" when it permits "privately organized and privately led groups of students (or others)" to use the facility. Laurence Tribe, American Constitutional Law § 14-5, at 1175 (2d ed. 1988).

If the rule were otherwise -- that is, if the Establishment Clause barred the neutral extension of general facilities or benefits to religious groups -- "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *7Widmar, 454 U.S. at 274-75 (quotation omitted). The Constitution requires no such discrimination against religious people and groups.

In assessing neutrality for purposes of the Establishment Clause, moreover, a government forum or benefit readily qualifies as neutral when (as here) the government makes the forum or benefit available to "a wide variety of private organizations." Lamb's Chapel, 508 U.S. at 395. See also Rosenberger, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."); Mergens, 496 U.S. at 252 (neutrality requirement met given that "broad spectrum" of secular groups could use the facilities); Widmar, 454 U.S. at 277 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect"). In other words, the fact that numerous secular groups enjoy the same rights as religious groups more than suffices to demonstrate that the government has not impermissibly favored religion.

The fact that younger (and at least potentially more impressionable) children may attend school or play at a particular public building or park does not alter the Establishment Clause analysis, or the significance of neutrality as the government's essential safe harbor in complying with the Establishment Clause. On the contrary, with younger and more impressionable children, it is doubly important for the government to be scrupulously neutral so as not to convey a message that religion is disfavored. Otherwise, "[w]ithholding access" to religious groups, because they are religious, "would leave an impermissible perception that religious activities are disfavored." Rosenberger, 515 U.S. at 846 (O'Connor, J.,

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concurring). Justice O'Connor's assessment applies to young as well as old. After all, if a young student cannot "understand toleration of [private] religion in the schools" -- which is the necessary premise of the impressionability argument -- he or she *8 would be just as "incapable of understanding exclusion of [private] religion from the schools." Douglas Laycock, Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 19 (1987). [FN2]

FN2. If the Court were to accept the mistaken- attribution/impressionability argument, the appropriate remedy, as Justice Marshall stated in Mergens, would not be an outright ban on private religious speech, but merely a disclaimer making clear that the school does not endorse the groups or clubs that use its facilities. See Mergens, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold access program at issue in Mergens because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary); see also Pinette, 515 U.S. at 794 n.2 (Souter, J., concurring) (if there is a danger of confusion, "no reason to presume that an adequate disclaimer could not have been drafted"); id. at 769 (plurality) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.").
As to any possibility of student peer pressure, as was stated in Mergens, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." Mergens, 496 U.S. at 251. Again the appropriate remedy for the possibility of such pressure would not be an overbroad ban on religious speech, but a neutral mechanism for ensuring, for example, that only students with parental permission were allowed into meetings of private groups occurring in public school facilities. Of course, parental permission is already necessary to attend meetings of the Good News Club, which eliminates any such issue in this case.

In this case, the Establishment Clause does not require the exclusion of religious speech in general -- or the Good News Club in particular -- from Milford's open and neutrally available public facility. It is undisputed that the Good News Club is a private group, not a government organization, and it is undisputed that the Milford school is available to a broad class of secular educational events, "social, civic and recreational meetings and entertainment events," and other uses pertaining to the welfare of the community. The School District therefore would not be favoring (and thereby endorsing) religion over *9 non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter. When, as here, the government ensures neutrality by making its facilities available to religious and secular groups alike, "the message is one of neutrality rather than endorsement" and the Establishment Clause is not violated. Mergens, 496 U.S. at 248.

II. THE CONSTITUTION DOES NOT PERMIT THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

Because the Establishment Clause raises no barrier to religious speech in an open and neutrally available public facility, the remaining question is whether the Constitution permits the Milford School District to exclude religious groups such as the Good News Club from school facilities. Stated more directly, can the government unapologetically and unabashedly discriminate against private religious

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speech in a public facility? The answer to that question as well is no.

The basic principles that guide the free speech analysis are settled. "[P]rivate religious speech ... is as fully protected under the Free Speech Clause as secular private expression." Pinette, 515 U.S. at 760. A "free- speech clause without religion" would be, in the words of the Court, "Hamlet without the prince." Id. (opinion of Court for 7 Justices). The Constitution's protection for religious speech applies not just to speech from a religious perspective, but also to religious "proselytizing," Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981), and religious "worship," Pinette, 515 U.S. at 760; Widmar, 454 U.S. at 269 n.6.

It is "axiomatic" that the government "may not regulate speech based on its substantive content or the message it conveys." Rosenberger, 515 U.S. at 828. When the ***10** government targets not just subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." Id. (internal citation omitted).

It is true that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." Pinette, 515 U.S. at 761. But when the government maintains a forum open to at least some speakers and subject matters, the government's "right to limit protected expressive activity is sharply circumscribed." Id.

In a public forum (whether a traditional public forum such as a park or a public forum designated by the government such as an open bandstand), the government may impose reasonable content-neutral time, place, and manner restrictions. But content-based exclusions from a traditional or designated public forum are subject to strict scrutiny and presumptively unconstitutional. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). When the government operates not a traditional or designated public forum, but what is referred to as a "limited public forum" or a "non-public forum," the government's ability to impose content-based exclusions may be more expansive. But the government still "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." Rosenberger, 515 U.S. at 829 (internal quotations omitted); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); Perry, 460 U.S. at 46. [FN3]

FN3. There is substantial confusion regarding the appropriate terms to describe these three categories. Some cases use the term "non-public forum" to describe what we refer to as a "limited public forum." See, e.g., Cornelius, 473 U.S. at 800. That, of course, creates no real confusion, but reveals that there are two terms that may describe the same kind of forum. Some cases (including many in the Second Circuit) use the term "limited public forum" to describe what we refer to as a "designated public forum." See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 211 (2d Cir. 1997) ("designated public forum, sometimes called the 'limited public forum' "); see also Good News Club, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). That can generate substantial confusion because the standards governing those two kinds of forums otherwise would be different. In any event, the terminology we use in this case -- traditional public forum, designated public forum, and limited public forum -- is consistent with Rosenberger, but we nonetheless caution that the use of terminology is not entirely consistent among courts, advocates, and commentators.

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***11** In this case, Milford's exclusion of Good News Club from its facilities is unconstitutional for any of four independent reasons.

• First, Milford has created a designated public forum, and Milford's exclusion of religious speech (the Good News Club) from that forum is content- based and viewpoint-based, is not justified by a compelling state interest, and thus is unconstitutional under the Free Speech Clause.

• Second, even if Milford has not created a designated public forum, it maintains a limited or non-public forum, and the exclusion of religious speech in general (and instruction about morals from a religious perspective in particular) is viewpoint-based and thus unconstitutional under the Free Speech Clause.

• Third, in order to exclude speech from a limited or non-public forum, the government's exclusion must also be reasonable in light of the purpose of the forum. The blanket exclusion of religious speech, because it is religious, from a forum is facially unreasonable where, as here, it bears no relationship to the purpose for which the forum was created. Milford's policy is thus unconstitutional under the Free Speech Clause for that reason as well.

***12** • Fourth, putting aside the intricacies of free speech doctrine (whether a forum is a designated public forum or merely a limited public forum, whether an exclusion is viewpoint-based or merely content-based), the Milford policy contains a more basic constitutional flaw. The government's exclusion of religious speech, because it is religious, from a public facility violates the Free Exercise and Equal Protection Clauses, both of which bar governmental discrimination against religious people, religious organizations, and religious speech.

1. The policy adopted by the Milford Central School District has created a designated public forum with respect to Milford's school facilities. As a result, the content-based exclusion of religious speech (including the Good News Club) from those facilities is unconstitutional.

A government entity's traditional public fora are those places such as streets and parks that have "immemorially been held in trust for the use of the public." Hague v. CIO, 307 U.S. 496, 515 (1939). In addition, the government can create a public forum for free speech (create the legal equivalent of, for example, a park) by opening public facilities to general use. Perry, 460 U.S. at 45. Public school facilities, in particular, become public fora when school authorities "by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (internal quotations omitted).

The Court's decision in Widmar is instructive on the forum definition issue. There, the University of Missouri at Kansas City made its facilities "generally available for the activities of registered student groups." 454 U.S. at 264-65. The school policy also stated: "No University buildings or grounds ... may be used for purposes of religious worship or religious teaching." Id. at 265 n.3. Because the university had created a public forum, the Court subjected the content-based exclusion of religious speech from the forum to strict scrutiny: "[T]he ***13** UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. ... In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions" -- namely, strict

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scrutiny. Id. at 269-70 (emphasis added).

In Lamb's Chapel, the Court similarly considered whether the government policy at issue there -- providing that school facilities were available to the public for educational, social, civic, and recreational purposes, and for other uses pertaining to the welfare of the community -- created a public forum, or rather a limited public forum. The Court stated that the argument that the school district had created a public forum carried "considerable force," but the Court ultimately decided not to "rule on this issue" because the exclusion of religious groups was plainly viewpoint-based and unconstitutional regardless of the nature of the forum. 508 U.S. at 392-93.

The Court's "strong suggestion" in Lamb's Chapel that open school facilities may well be a public forum is a useful starting point, however, for considering the nature of the forum in this case. See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring). The Milford policy, in our view, plainly creates "a forum generally open to the public." Perry, 460 U.S. at 45. Indeed, it is hard to conjure up a more expansive access policy than one in which a public facility is open for any "social, civic, or recreational use," for uses pertaining to the welfare of the community, and for "instruction in any branch of education." [FN4] For that reason, numerous courts ***14** of appeals analyzing similarly expansive policies where school facilities were open for social, civic, and recreational use by outside groups have held that the schools created public fora. See, e.g., Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5, 941 F.2d 45, 48 (1st Cir. 1991); Gregoire v. Centennial School Dist., 907 F.2d 1366, 1378 (3rd Cir. 1990); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc).

> FN4. To be sure, Milford requires that groups using its facilities also make its events "open to the general public." That is a "manner" restriction imposed on groups seeking to use the school facilities. That is not a content-based restriction and thus does not in any way call into question the conclusion that Milford operates a public forum. Indeed, if anything, the non-exclusivity requirement buttresses the notion that this is a designated public forum.

For example, in the Grace Bible case, the First Circuit panel (including then-Chief Judge Breyer) assessed a policy that, as the Court characterized it, provided access for groups that were "good for the community unless, in the judgment of the school board, it is injurious to the school." 941 F.2d at 48. The school district excluded a group that wished to engage in religious speech. The First Circuit stressed that a school district opening its facilities for public use under such a policy "has no greater right to pick and choose among users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public use." Id. The Court concluded: "The bare fact is, [the school district] has volunteered expressive opportunity to the community at large, excluding some because of the content of their speech. This is elementary violation." Id.

This Court has looked not just to the policy, but also to the "practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Cornelius, 473 U.S. at 802. In this case, the factual record buttresses what the plain terms of the policy reveal. In particular, Milford has granted access to numerous groups such as the Boy Scouts, Girl Scouts, and 4-H Club. ***15** This practice is persuasive evidence regarding the

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open nature of the forum. [FN5]

FN5. The government cannot rely on a vague definition of the forum to escape the conclusion that it has created a public forum. "If the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." Gregoire, 907 F.2d at 1375. Were the rule contrary, "[a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal." Mergens, 496 U.S. at 244.

In sum, the policy and the record show that Milford Central School has created a public forum. Thus, Milford's indisputably content-based exclusion of religious speech in general (and the Good News Club in particular) from that forum is unconstitutional. See Widmar, 454 U.S. at 269; see also Campbell, 2000 WL 1597749 at *8 (Jones, J.) ("The St. Tammany facilities are "open 'indifferently' for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple."). [FN6]

FN6. The court of appeals suggested that the parties had agreed that Milford created only a limited public forum. 202 F.3d at 509. But as explained above, Second Circuit precedent conflates the categories of designated public fora and limited public fora by suggesting that the categories are governed by the same rules. See Bronx Household of Faith, 127 F.3d at 211 ("designated public forum, sometimes called the 'limited public forum' "); see also Good News Club, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). Any concession that a "limited public forum" was involved in this case is, therefore, not a concession at all given Second Circuit precedent that equates a designated public forum and a limited public forum. For that reason, the Court should independently assess the nature of the forum in this case, unconstrained by the parties' prior Second-Circuit-induced characterizations.

2. If Milford's forum is not a designated public forum, it is a limited public forum from which viewpoint-based exclusions are unconstitutional. The decisions in Lamb's Chapel and ***16** Rosenberger demonstrate, moreover, that Milford's exclusion of religious speech in general (and of the Good News Club in particular) from its school facilities is viewpoint-based and thus unconstitutional.

In Lamb's Chapel, the Court considered a school policy like the one at issue in this case that provided: "[S]chool premises shall not be used by any group for religious purposes." 508 U.S. at 387. Pursuant to that policy, the school denied a church's request to use school premises "to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today." Id. The record did not indicate "that the application to exhibit the particular film series ... was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." Id. at 393-94. The Court held that this exclusion of religious perspectives was viewpoint- based and "plainly invalid." Id. at 394. The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious viewpoint."

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Id. at 393.

The Court reached the same result in Rosenberger. The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious student group. The Court held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Relying on Lamb's Chapel, the Court stressed that "discriminating against religious speech [is] discriminating on the basis of viewpoint." Id. at 832 (emphasis added). In particular, "[r]eligion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 831. As that language demonstrates, the Rosenberger Court concluded that the exclusion of religious speech, ideas, *17 thought, and uses from a forum is inherently and by definition viewpoint-based.

In this case, Lamb's Chapel and Rosenberger make clear that Milford's policy and exclusion of the Good News Club is patently unconstitutional. The Milford School District allows instruction about morals provided from a secular perspective, but disallows instruction about morals from a religious perspective. As Judge Cabranes observed in a factually similar case, "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination." Bronx Household of Faith, 127 F.3d at 220 (concurring and dissenting). Similarly, in Campbell, Judge Jones correctly analyzed a vague "welfare" standard similar to that in Milford: "when measured against the 'welfare of the public' standard, how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" St. Tammany, 2000 WL 1597749 at *9. [FN7]

FN7. Bound by Second Circuit precedent, Judge Cabranes' opinion in that case did not take issue with the circuit's distinction between religious speech and religious worship. Such a distinction is, however, flawed for the reasons discussed below.

Of course, under Rosenberger, the express exclusion of religious uses is, in any event, inherently viewpoint-based, and thus unconstitutional regardless of the nature of the forum. As the Court said, "[r]eligion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 831. [FN8]

FN8. The four dissenters in Rosenberger likewise recognized that discrimination against religious speech was unacceptable. "The common factual thread running through Widmar, Mergens, and Lamb's Chapel, is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in Widmar and Mergens) or to suppress a particular religious viewpoint (as in Lamb's Chapel). ... Each case ... drew ultimately on the unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum." 515 U.S. at 888 (Souter, J., dissenting) (internal citations omitted).

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***18** Milford's exclusion of certain religious speech cannot be saved or cabined by positing a distinction between (i) speech from a religious perspective and (ii) religious prayer or worship. The court of appeals attempted to split the atom and to draw such a line, but that is impossible: Religious worship is religious speech and religious thought. As Judge Jacobs persuasively explained, moreover, "[d]iscussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially -- quintessentially -- religious." 202 F.3d at 515 (dissent).

So, too, the Court in Widmar flatly dismissed the idea that religious worship could be segregated from religious speech for purposes of free speech doctrine. The Court said that it is impossible to draw the line where singing, reading, and teaching transforms into "worship." 454 U.S. at 269 n.6 The Widmar analysis is surely correct, as there is no basis in precedent or logic for placing religious speech in one First Amendment category and religious worship in another First Amendment category.

In sum, even assuming that the Milford policy does not create a designated public forum, but only a limited or nonpublic forum, the exclusion of the Good News Club is viewpoint-based and thus unconstitutional.

3. A third independent reason why the exclusion of Good News Club violates the Free Speech Clause is the utter unreasonableness of the exclusion in light of the forum's ***19** purposes. In a limited public forum, the government's exclusion of particular speech not only must be viewpoint-neutral, but also must be "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806; see also Rosenberger, 515 U.S. at 829 (same); Perry, 460 U.S. at 49 (same; government may limit activities in forum, but cannot exclude "activities compatible with the intended purpose of the property"). In this case, Milford's express exclusion of religious speech does not serve any legitimate purpose of the forum.

In Lamb's Chapel, having found that the exclusion was viewpoint-based and thus unconstitutional, the Court did not reach the additional question whether the exclusion was "unreasonable in light of the purposes of the forum." But the Court did pointedly note that the Second Circuit had "uttered not a word in support of its reasonableness holding" and that if the rule were unreasonable, "it could be held facially invalid." 508 U.S. at 393 n.6. As suggested by the Court in Lamb's Chapel, therefore, the reasonableness analysis is a separate and vitally important aspect of the inquiry in limited public forum cases. And it provides an independent basis for striking down Milford's action in this case.

The "reasonableness" inquiry necessarily focuses, first, on the purpose of the Community Use policy and, second, on how that purpose is allegedly thwarted by allowing the forum to be used for religious purposes. The Milford policy allows the forum to be used for instruction in any branch of education, for uses pertaining to the welfare of the community, and for holding social, civic, and recreational meetings and entertainment events. The clear purpose of the Milford policy on its face is to provide the community with a place to meet and to speak as individuals and groups -- a public service provided by the government in the same way that parks are a public service to the people. It is inconceivable, however, that allowing religious speech in that public building would somehow undermine or thwart those purposes. That is especially so given that the policy allows uses pertaining to the "welfare of the community." ***20** As Judge Jones said in analyzing a similar policy in Campbell, "[t]o describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL

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1597749 at *9.

Indeed, the only possible bases for excluding religious speech would be (i) a blatant desire to disfavor religious speech or (ii) a claim that the Establishment Clause required exclusion. The former argument is unreasonable as a matter of law (and unconstitutional, as discussed below), and the latter is unavailing under this Court's precedents. In short, then, the Community Use policy's exclusion of use for "religious purposes" is unreasonable in light of the purposes served by the forum. See St. Tammany, 2000 WL 1597749, at *8 (Jones, J.) (policy excluding religious speech is "unreasonable" and "doomed"); see also Br. of Amicus Curiae American Center for Law and Justice at 17-29.

4. Aside from the intricacies of free speech doctrine, a more fundamental point demonstrates that Milford's exclusion of the Good News Club is unconstitutional. Under the Free Exercise and Equal Protection Clauses (as well as the Establishment Clause), the government may not discriminate against religion, just as the government may not discriminate on the basis of race. The government thus may not impose a burden or deny a benefit because of the religious nature of a group, person, writing, speech, or idea. To use the words of Justice Brennan, the government "may not use religion as a basis of classification for the imposition of duties [and] penalties ..." McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Of course, the non- discrimination principle articulated by Justice Brennan is by now firmly entrenched in this Court's jurisprudence. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 532 (1993) (government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit [] conduct because it is undertaken for religious reasons"); Employment Division v. Smith, 494 U.S. 872, 877 (1990) ("The government "may not *21 impose special disabilities on the basis of religious views or religious status.").

Except in the context of a permissible accommodation of religion, the government must act on a religion-neutral basis, based on objective and discernible criteria that do not refer to or target religion. For example, if the government bars certain categories of speech or activities from a public facility (say, events with more than 50 people in attendance) and defines the limitation without reference to religion, the Constitution is not violated even though a religious meeting with more than 50 people in attendance would be excluded from the facility. In such a case, the government has not discriminated against religion (putting aside, of course, any issue of required accommodation under the Free Exercise Clause).

On the other hand, where the government excludes religious speech -- because it is religious -- from a public facility, the government has plainly discriminated against religion and just as plainly violated the Constitution. And that is precisely what Milford has done in this case by targeting religion for a distinctive burden.

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS.

In closing, it bears mention that the Milford policy poses two additional and important threats to religious liberty and freedom -- threats that this Court has emphasized before and that should inform the analysis in this case.

First, Milford's policy creates grave dangers of excessive entanglement -- namely, of the government seeking to monitor and inquire into the content of speech to determine whether it is sufficiently "religious" to require exclusion. This Court

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on many occasions has emphasized the constitutional dangers implicated when the government intrudes in this way into the *22 nature of speech. See Mergens, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); cf. Lee v. Weisman, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

The Court in Rosenberger elaborated on the problem, stating that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. The Court continued: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion...."Id. at 845-46 (emphasis added).

Second, the School District's policy necessarily induces people seeking to use public facilities to water down their speech and to hide the religiosity of their message in order to satisfy a government administrator that a proposed meeting is not really for "religious purposes." That demeaning and disturbing exercise is neither mandated nor permitted by the Constitution. The Constitution is not "some sort of homogenizing solvent" that forces religious groups "to choose between assimilating to mainstream American culture or losing their political rights." Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring). The Constitution in no way licenses the government to operate a checkpoint where religious people who hide their beliefs and intentions are allowed through, but those who express their true beliefs and intentions are turned away.

*23 In short, these two factors underscore the sound prudential and historical reasons why the Constitution neither requires nor permits discrimination against religious people and religious speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,2000.
Good News Club v. Milford Central School
2000 WL 1784193

Briefs and Other Related Documents (Back to top)

- 2001 WL 196997, 69 USLW 3416 (Oral Argument) Oral Argument (Feb. 28, 2001)
- 2001 WL 173531 (Appellate Brief) Reply Brief for Petitioners (Feb. 15, 2001)
- 2001 WL 43335 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT (Jan. 12, 2001)
- 2001 WL 43353 (Appellate Brief) BRIEF OF AMERICANS UNITED FOR SEPARATION OF

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CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NEW YORK CIVIL LIBERTIES UNION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF THE RESPONDENT (Jan. 12, 2001)

• 2001 WL 43374 (Appellate Brief) BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE IN SUPPORT OF RESPONDENTS (Jan. 12, 2001)

• 2001 WL 43386 (Appellate Brief) BRIEF FOR RESPONDENT (Jan. 12, 2001)

• 2001 WL 43367 (Appellate Brief) BRIEF OF AMICI CURIAE ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; AND NATIONAL COUNCIL OF JEWISH WOMEN, IN SUPPORT OF RESPONDENT (Jan. 11, 2001)

• 2001 WL 43380 (Appellate Brief) BRIEF OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jan. 11, 2001)

• 2000 WL 1803627 (Appellate Brief) BRIEF AMICUS CURIAE FOR 20 THEOLOGIANS AND SCHOLARS OF RELIGION IN SUPPORT OF PETITIONERS (Dec. 05, 2000)

• 2000 WL 1784135 (Appellate Brief) BRIEF OF AMICI CURIAE THE AMERICAN CENTER FOR LAW & JUSTICE, FOCUS ON THE FAMILY, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784136 (Appellate Brief) BRIEF AMICUS CURIAE OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784137 (Appellate Brief) BRIEF AMICI CURIAE OF CHILD EVANGELISM FELLOWSHIP, INC., MAE CULBERTSON, LADETTE ARMSTRONG, MARSHA HALL, MARY TOMMILA, FAMILY RESEARCH COUNCIL, FELLOWSHIP OF CHRISTIAN ATHLETES, AND CAMPUS CRUSADE FOR CHRIST IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784139 (Appellate Brief) BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784144 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784146 (Appellate Brief) BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784148 (Appellate Brief) BRIEF OF DOUGLAS LAYCOCK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784159 (Appellate Brief) BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE AMERICAN MUSLIM COUNCIL, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL BOARD OF CHURCH & SOCIETY OF THE UNITED METHODIST CHURCH, AND THE A.M.E. ZION CHURCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784164 (Appellate Brief) BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (''COLPA'') AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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• 2000 WL 1784166 (Appellate Brief) BRIEF OF THE AMICI CURIAE THE NORTHSTAR LEGAL CENTER AND BRONX HOUSEHOLD OF FAITH IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784206 (Appellate Brief) BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784209 (Appellate Brief) BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784212 (Appellate Brief) BRIEF AMICUS CURIAE OF WALLBUILDERS, INC. in support of the Petitioner (Nov. 30, 2000)

• 2000 WL 1793046 (Appellate Brief) Brief on the Merits for Petitioners (Nov. 30, 2000)

• 2000 WL 33979594 (Appellate Filing) Reply Brief (Aug. 03, 2000)

• 2000 WL 33979705 (Appellate Filing) Brief in Opposition (Jul. 20, 2000)

• 2000 WL 33979674 (Appellate Filing) Brief for Amici Curiae, the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia in Support of Petition for Writ of Certiorari (Jul. 19, 2000)

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Briefs and Other Related Documents

Supreme Court of the United States

GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL.

No. 99-2036.

Argued Feb. 28, 2001.
Decided June 11, 2001.

Christian club for children, a sponsor, and a member brought § 1983 action against public school, alleging that school's refusal to allow club to use school facilities violated, inter alia, their free speech rights. The United States District Court for the Northern District of New York, McAvoy, Chief Judge, 21 F.Supp.2d 147, granted school summary judgment, and club appealed. The United States Court of Appeals for the Second Circuit, 202 F.3d 502, affirmed, and certiorari was granted. The Supreme Court, Justice Thomas, J., held that: (1) school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, and (2) school's viewpoint discrimination was not required to avoid violating the Establishment Clause.

Reversed and remanded.

Justice Scalia filed a concurring opinion.

Justice Breyer filed an opinion concurring in part.

Justice Stevens filed a dissenting opinion.

Justice Souter filed a dissenting opinion, in which Justice Ginsburg joined.

West Headnotes

[1] Constitutional Law ⚖90.1(4)
92k90.1(4)

If a forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law ⚖90.1(4)
92k90.1(4)

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech, and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint, and must be reasonable in light of the purpose served by the forum. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚖90.1(1.4)
92k90.1(1.4)

[3] Schools ⚖72
345k72

Public school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, where school had opened its limited public forum to activities that served a variety of purposes, including events "pertaining to the welfare of the community," and had interpreted its policy to permit discussions of subjects such as "the development of character and morals from a religious perspective," but excluded club on ground that its activities, which included learning Bible verses, relation of Bible stories to members' lives, and prayer, were "the equivalent of religious instruction itself;" fact that club's activities were "decidedly religious in nature" did not mean that they could not also be characterized properly as the teaching of morals and character development from a particular viewpoint; abrogating *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law ⚖90.1(1.4)
92k90.1(1.4)

[4] Schools ⚖72
345k72

Because the exclusion of Christian club from use of public school premises on the basis of its religious perspective constituted unconstitutional viewpoint discrimination, it was no defense for school that purely religious purposes could be excluded under state law enumerating several purposes for which

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local boards may open their schools to public use. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Education Law § 414.

[5] Constitutional Law ⚷90.1(4)
92k90.1(4)

Speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ⚷84.5(3)
92k84.5(3)

[6] Schools ⚷72
345k72

Public school's viewpoint discrimination, in exclusion of Christian children's club from meeting at school based on its religious nature, was not required to avoid violating the Establishment Clause, where the club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, and the school made its forum available to other organizations, despite contention that elementary school children would perceive that the school was endorsing the club and would feel coercive pressure to participate, because the club's activities took place on school grounds. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law ⚷84.1
92k84.1

A significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion, and the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law ⚷84.5(3)
92k84.5(3)

[8] Schools ⚷72
345k72

To the extent Supreme Court considered whether the community would feel coercive pressure to engage in the activities of Christian children's club, conducted after hours on public school premises, the relevant community would be the parents, not the elementary school children, where it was the parents who chose whether their children would attend the club meetings and the children could not attend without their parents' permission, and an argument that the parents would be confused about whether the school was endorsing religion could not be reasonably advanced. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚷84.5(3)
92k84.5(3)

Whatever significance Supreme Court may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, it has never extended its Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚷84.5(3)
92k84.5(3)

[10] Schools ⚷72
345k72

Even if Supreme Court were to consider the possible misperceptions by schoolchildren in deciding whether public school's permitting Christian children's club's after hours activities on school premises would violate the Establishment Clause, the facts of the case did not support school's conclusion, where there was no evidence that young children were permitted to loiter outside classrooms after the school day had ended, parents had to sign permission forms for attendance at club meetings, the meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom, the instructors were not schoolteachers, and the children in the group were not all the same age as in the normal classroom setting. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚷84.5(3)
92k84.5(3)

[11] Schools ⚷72
345k72

Even if Supreme Court were to inquire into the minds of schoolchildren with respect to the Establishment

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Clause implications of permitting Christian children's club to hold meetings after hours on school premises, the danger that children would misperceive the endorsement of religion was no greater than the danger that they would perceive a hostility toward the religious viewpoint if the club were excluded from the public forum. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚿84.5(3)
92k84.5(3)

[12] Schools ⚿72
345k72

Any risk that small children would perceive endorsement of religion did not counsel in favor of excluding a Christian children's club's religious activity after hours on school premises, as there were countervailing constitutional concerns related to rights of other individuals in the community, consisting of the free speech rights of the club and its members. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law ⚿84.5(11)
92k84.5(11)

When a limited public forum is available for use by groups presenting any viewpoint, Supreme Court would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time. U.S.C.A. Const.Amend. 1.

****2095** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***98** Under New York law, respondent Milford Central School (Milford) enacted a policy authorizing district residents to use its building after school for, among other things, (1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare. Stephen and Darleen Fournier, district residents eligible to use the school's facilities upon approval of their proposed use, are sponsors of the **Good News Club**, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, they submitted a request to hold the Club's weekly afterschool meetings in the school. Milford denied the request on the ground that the proposed use--to sing songs, hear Bible lessons, memorize scripture, and pray--was the equivalent of religious worship prohibited by the community use policy. Petitioners (collectively, the Club), filed suit under 42 U.S.C. § 1983, alleging, *inter alia,* that the denial of the Club's application violated its free speech rights under the First and Fourteenth Amendments. The District Court ultimately granted Milford summary judgment, finding the Club's subject matter to be religious in nature, not merely a discussion of secular matters from a religious perspective that Milford otherwise permits. Because the school had not allowed other groups providing religious instruction to use its limited public forum, the court held that it could deny the Club access without engaging in unconstitutional viewpoint discrimination. In affirming, the Second Circuit rejected the Club's contention that Milford's restriction was unreasonable, and held that, because the Club's subject matter was quintessentially religious and its activities fell outside the bounds of pure moral and character development, Milford's policy was constitutional subject discrimination, not unconstitutional viewpoint discrimination.

Held:

****2096** 1. Milford violated the Club's free speech rights when it excluded the Club from meeting after hours at the school. Pp. 2099-2102.

(a) Because the parties so agree, this Court assumes that Milford operates a limited public forum. A State establishing such a forum is not required to and does not allow persons to engage in every type of ***99** speech. It may be justified in reserving its forum for certain groups or the discussion of certain topics. *E.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700. The power to so restrict speech, however, is not without limits. The restriction must not discriminate against speech based on viewpoint, *ibid.,* and must be reasonable in light of the forum's purpose, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567. Pp. 2099-2100.

(b) By denying the Club access to the school's limited public forum on the ground that the Club was religious in nature, Milford discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause. That exclusion is indistinguishable from the exclusions held violative of the Clause in *Lamb's Chapel v. Center Moriches*

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Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352, where a school district precluded a private group from presenting films at the school based solely on the religious perspective of the films, and in *Rosenberger,* where a university refused to fund a student publication because it addressed issues from a religious perspective. The only apparent difference between the activities of Lamb's Chapel and the Club is the inconsequential distinction that the Club teaches moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. *Rosenberger* also is dispositive: Given the obvious religious content of the publication there at issue, it cannot be said that the Club's activities are any more "religious" or deserve any less Free Speech Clause protection. This Court disagrees with the Second Circuit's view that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for Free Speech Clause purposes is that there is no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. Because Milford's restriction is viewpoint discriminatory, the Court need not decide whether it is unreasonable in light of the forum's purposes. Pp. 2100-2102.

2. Permitting the Club to meet on the school's premises would not have violated the Establishment Clause. Establishment Clause defenses similar to Milford's were rejected in *Lamb's Chapel, supra,* at 395, 113 S.Ct. 2141-- where the Court found that, because the films would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members, there was no realistic danger that the community would think that the district was endorsing religion--and in *Widmar v. Vincent,* 454 U.S. 263, 272-273, and n. 13, 102 S.Ct. 269, 70 L.Ed.2d 440--where a university's forum was ***100** already available to other groups. Because the Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar,* Milford's reliance on the Establishment Clause is unavailing. As in *Lamb's Chapel,* the Club's meetings were to be held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Court rejects Milford's attempt to distinguish those cases by emphasizing that its policy involves elementary school children ****2097** who will perceive that the school is endorsing the Club and will feel coerced to participate because the Club's activities take place on school grounds, even though they occur during nonschool hours. That argument is unpersuasive for a number of reasons. (1) Allowing the Club to speak on school grounds would ensure, not threaten, neutrality toward religion. Accordingly, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Club. See, *e.g., Rosenberger, supra,* at 839, 115 S.Ct. 2510. (2) To the extent the Court considers whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman,* 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467, the relevant community is the parents who choose whether their children will attend Club meetings, not the children themselves. (3) Whatever significance it may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g., id.,* at 592, 112 S.Ct. 2649, the Court has never foreclosed private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. *Lee, supra,* at 592, 112 S.Ct. 2649, and *Edwards v. Aguillard,* 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510, distinguished. (4) Even if the Court were to consider the possible misperceptions by schoolchildren in deciding whether there is an Establishment Clause violation, the facts of this case simply do not support Milford's conclusion. Finally, it cannot be said that the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. Because it is not convinced that there is any significance to the possibility that elementary school children may witness the Club's activities on school premises, the Court can find no reason to depart from *Lamb's Chapel* and *Widmar.* Pp. 2103-2107.

3. Because Milford has not raised a valid Establishment Clause claim, this Court does not address whether such a claim could excuse Milford's viewpoint discrimination. Pp. 2103, 2107.

202 F.3d 502, reversed and remanded.

***101** THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined,

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and in which BREYER, JJ., joined in part. SCALIA, J., filed a concurring opinion, *post,* p. 2107. BREYER, J., filed an opinion concurring in part, *post,* p. 2111. STEVENS, J., filed a dissenting opinion, *post,* p. 2112. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 2115.

Thomas Marcelle, Slingerlands, NY, for petitioners.

Frank W. Miller, East Syracuse, NY, for Respondents.

***102** Justice THOMAS delivered the opinion of the Court.

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the **Good News Club** when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.

I

The State of New York authorizes local school boards to adopt regulations governing ****2098** the use of their school facilities. In particular, N.Y. Educ. Law § 414 (McKinney 2000) enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School (Milford) enacted a community use policy adopting seven of § 414's purposes for which its building could be used after school. App. to Pet. for Cert. D1-D3. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." *Id.,* at D1. Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Ibid.*

***103** Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local **Good News Club**, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly afterschool meetings in the school cafeteria. App. in No. 98-9494(CA2), p. A-81. The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use--to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture," *ibid.*--was "the equivalent of religious worship." App. H1-H2. According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities. App. to Pet. for Cert. D2.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

> "The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia,* learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization." App. in No. 98-9494(CA2), at A30.

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed to be ***104** engaged in by the **Good News Club** were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id.,* at A25. In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study." *Id.,* at A56.

In March 1997, petitioners, the **Good News Club**, Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action under Rev.Stat. § 1979, 42 U.S.C. § 1983, against Milford in the United States District Court for the Northern District of New York. The Club alleged that Milford's denial of its application violated its free speech rights under the First and Fourteenth Amendments, its right

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to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* [FN1]

FN1. The District Court dismissed the Club's claim under the Religious Freedom Restoration Act because we held the Act to be unconstitutional in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). See 21 F.Supp.2d 147, 150, n. 4 (N.D.N.Y.1998).

**2099 The Club moved for a preliminary injunction to prevent the school from enforcing its religious exclusion policy against the Club and thereby to permit the Club's use of the school facilities. On April 14, 1997, the District Court granted the injunction. The Club then held its weekly afterschool meetings from April 1997 until June 1998 in a high school resource and middle school special education room. App. N12.

In August 1998, the District Court vacated the preliminary injunction and granted Milford's motion for summary judgment. 21 F.Supp.2d 147 (N.D.N.Y.1998). The court found that the Club's "subject matter is decidedly religious in nature, and not merely a discussion of secular matters *105 from a religious perspective that is otherwise permitted under [Milford's] use policies." *Id.,* at 154. Because the school had not permitted other groups that provided religious instruction to use its limited public forum, the court held that the school could deny access to the Club without engaging in unconstitutional viewpoint discrimination. The court also rejected the Club's equal protection claim.

The Club appealed, and a divided panel of the United States Court of Appeals for the Second Circuit affirmed. 202 F.3d 502 (2000). First, the court rejected the Club's contention that Milford's restriction against allowing religious instruction in its facilities is unreasonable. Second, it held that, because the subject matter of the Club's activities is "quintessentially religious," *id.,* at 510, and the activities "fall outside the bounds of pure 'moral and character development,' " *id.,* at 511, Milford's policy of excluding the Club's meetings was constitutional subject discrimination, not unconstitutional viewpoint discrimination. Judge Jacobs filed a dissenting opinion in which he concluded that the school's restriction did constitute viewpoint discrimination under *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare *Gentala v. Tucson,* 244 F.3d 1065 (C.A.9 2001) (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services); *Campbell v. St. Tammany's School Bd.,* 206 F.3d 482 (C.A.5 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), cert. pending, No. 00-1194; [FN*] *Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207 (C.A.2 1997) (concluding that a ban on religious services and *106 instruction in the limited public forum was constitutional), with *Church on the Rock v. Albuquerque,* 84 F.3d 1273 (C.A.10 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination); and *Good News/Good Sports Club v. School Dist. of Ladue,* 28 F.3d 1501 (C.A.8 1994) (holding unconstitutional a school use policy that prohibited **Good News Club** from meeting during times when the Boy Scouts could meet). We granted certiorari to resolve this conflict. 531 U.S. 923, 121 S.Ct. 296, 148 L.Ed.2d 238 (2000).

FN* [Reporter's Note: See *post,* 533 U.S. 913, 121 S.Ct. 2518.]

II

[1] The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum. See *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). **2100 If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. *Id.,* at 45-46, 103 S.Ct. 948. We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. See *Lamb's Chapel, supra,* at 391-392, 113 S.Ct. 2141. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, see Brief for Petitioners 15-17; Brief for Respondent 26, we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited

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public forum.

[2] When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Lamb's Chapel, supra,* at 392-393, 113 S.Ct. 2141. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, ***107** *Rosenberger, supra,* at 829, 115 S.Ct. 2510, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

III

[3][4] Applying this test, we first address whether the exclusion constituted viewpoint discrimination. We are guided in our analysis by two of our prior opinions, *Lamb's Chapel* and *Rosenberger.* In *Lamb's Chapel,* we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger,* we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the **Good News Club** based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum. [FN2]

FN2. Although Milford argued below that, under § 414, it could not permit its property to be used for the purpose of religious activity, see Brief for Appellee in No. 98-9494(CA2), p. 12, here it merely asserts in one sentence that it has, "in accordance with state law, closed [its] limited open forum to purely religious instruction and services," Brief for Respondent 27. Because Milford does not elaborate, it is difficult to discern whether it is arguing that it is required by state law to exclude the Club's activities.

Before the Court of Appeals, Milford cited *Trietley v. Board of Ed. of Buffalo,* 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), in which a New York court held that a local school district could not permit a student Bible club to meet on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414 of the Education Law." *Id.*, at 5-6, 409 N.Y.S.2d, at 915. Although the court conceded that the Bible clubs might provide incidental secular benefits, it nonetheless concluded that the school would have violated the Establishment Clause had it permitted the club's activities on campus. Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law.

***108** Milford has opened its limited public forum to activities that serve a variety of purposes, including events "pertaining to the welfare of the community." App. to Pet. for Cert. D1. Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development **2101** of character and morals from a religious perspective." Brief for Appellee in No. 98-9494(CA2), p. 6. For example, this policy would allow someone to use Aesop's Fables to teach children moral values. App. N11. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools, *id.*, at N6, and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth," *id.*, at N10-N11. In short, any group that "promote[s] the moral and character development of children" is eligible to use the school building. Brief for Appellee in No. 98-9494(CA2), at 9.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature--"the equivalent of religious instruction itself," 202 F.3d, at 507--it excluded the Club from use of its facilities.

***109** Applying Lamb's Chapel, [FN3] we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum. In *Lamb's Chapel,* the local New

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York school district similarly had adopted § 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes." 508 U.S., at 387, 113 S.Ct. 2141. Citing this prohibition, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, because the films "no doubt dealt with a subject otherwise permissible" under the rule, the teaching of family values, the district's exclusion of the church was unconstitutional viewpoint discrimination. *Id.,* at 394, 113 S.Ct. 2141.

> FN3. We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel,* despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn. See, *e.g.,* 202 F.3d 502, 513 (C.A.2 2000) (Jacobs, J., dissenting) ("I cannot square the majority's analysis in this case with *Lamb's Chapel* "); 21 F.Supp.2d, at 150; App. O9-O11 (District Court stating "that *Lamb's Chapel* and *Rosenberger* pinpoint the critical issue in this case"); Brief for Appellee in No. 98-9494(CA2), at 36-39; Brief for Appellants in No. 98-9494(CA2), pp. 15, 36.

Like the church in *Lamb's Chapel,* the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint. Certainly, one could have characterized the film presentations in *Lamb's Chapel* as a religious use, as the Court of Appeals did, *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 959 F.2d 381, 388-389 (C.A.2 1992). And one easily could conclude that the films' purpose to instruct that " 'society's slide toward humanism ... can only be counterbalanced by a loving home where Christian values are instilled from an early age,' " *id.,* at 384, was "quintessentially religious," 202 F.3d, at 510. The only apparent difference ***110** between the activity of Lamb's Chapel and the activities of the **Good News Club** is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the **Good News Club's** activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. In *Rosenberger,* a student organization ****2102** at the University of Virginia was denied funding for printing expenses because its publication, Wide Awake, offered a Christian viewpoint. Just as the Club emphasizes the role of Christianity in students' morals and character, Wide Awake " 'challenge[d] Christians to live, in word and deed, according to the faith they proclaim and ... encourage[d] students to consider what a personal relationship with Jesus Christ means.' " 515 U.S., at 826, 115 S.Ct. 2510. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. *Id.,* at 831, 115 S.Ct. 2510. Although in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor. Instead, we concluded simply that the university's denial of funding to print Wide Awake was viewpoint discrimination, just as the school district's refusal to allow Lamb's Chapel to show its films was viewpoint discrimination. *Ibid.* Given the obvious religious content of Wide Awake, we cannot say that the Club's activities are any more "religious" or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger.*

Despite our holdings in *Lamb's Chapel* and *Rosenberger,* the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature ***111** warranted treating the Club's activities as different in kind from the other activities permitted by the school. See 202 F.3d, at 510 (the Club "is doing something other than simply teaching moral values"). The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. *Id.,* at 509. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." *Id.,* at 510. With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,' " the exclusion did not constitute viewpoint discrimination. *Id.,* at 511.

[5] We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. See 202 F.3d, at 512 (Jacobs, J., dissenting) ("[W]hen the subject matter is morals

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and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* ***112** *that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination. [FN4]*

FN4. Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,' " *id.*, at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.
Justice SOUTER's recitation of the Club's activities is accurate. See *post,* at 2116-2117 (dissenting opinion). But in our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger.* Religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to Justice SOUTER, the Club's activities constitute "an evangelical service of worship." *Post,* at 2117. Regardless of the label Justice SOUTER wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger.*

****2103** IV

[6] Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. In other words, according to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree.

We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination. ***113** *Widmar v. Vincent,* 454 U.S. 263, 271, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. See *Lamb's Chapel,* 508 U.S., at 394-395, 113 S.Ct. 2141 (noting the suggestion in *Widmar* but ultimately not finding an Establishment Clause problem). We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar.* In particular, in *Lamb's Chapel,* we explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." 508 U.S., at 395, 113 S.Ct. 2141. Accordingly, we found that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Ibid.* Likewise, in *Widmar,* where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. 454 U.S., at 272-273, and n. 13, 102 S.Ct. 269.

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel,* the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar.* Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and

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Widmar by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities ***114** take place on school grounds, even though they occur during nonschool hours. [FN5] This argument is unpersuasive.

> FN5. It is worth noting that, although Milford repeatedly has argued that the Club's meeting time directly after the schoolday is relevant to its Establishment Clause concerns, the record does not reflect any offer by the school district to permit the Club to use the facilities at a different time of day. The superintendent's stated reason for denying the applications was simply that the Club's activities were "religious instruction." 202 F.3d, at 507. In any event, consistent with *Lamb's Chapel* and *Widmar*, the school could not deny equal access to the Club for any time that is generally available for public use.

****2104** [7] First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Rosenberger*, 515 U.S., at 839, 115 S.Ct. 2510 (emphasis added). See also *Mitchell v. Helms*, 530 U.S. 793, 809, 120 S.Ct. 2530, 147 L.Ed.2d 660, (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion" (emphasis added)); *id.*, at 838, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges"). Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger, supra*, at 839, 115 S.Ct. 2510. The **Good News Club** seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the **Good News Club**.

[8] ***115** Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman*, 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the **Good News Club** meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the **Good News Club's** religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

[9] Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g.*, *id.*, at 592, 112 S.Ct. 2649; *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (stating that "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice"), we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

None of the cases discussed by Milford persuades us that our Establishment Clause jurisprudence has gone this far. For example, Milford cites *Lee v. Weisman* for the proposition that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," 505 U.S., at 592, 112 S.Ct. 2649. In *Lee*, however, we concluded that attendance at the graduation exercise was obligatory. *Id.*, at 586, 112 S.Ct. 2649. See also *Santa Fe Independent School* *****2105*** *Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (holding the school's policy of permitting prayer at ***116** football games unconstitutional where the activity took place during a school-sponsored event and not in a public forum). We did not place independent significance on the fact that the graduation exercise might take place on school premises, *Lee, supra*, at 583, 112 S.Ct. 2649. Here, where the school facilities are being used for a

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nonschool function and there is no government sponsorship of the Club's activities, *Lee* is inapposite.

Equally unsupportive is *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), in which we held that a Louisiana law that proscribed the teaching of evolution as part of the public school curriculum, unless accompanied by a lesson on creationism, violated the Establishment Clause. In *Edwards,* we mentioned that students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models. See *id.,* at 584, 107 S.Ct. 2573. But we did not discuss this concern in our application of the law to the facts. Moreover, we did note that mandatory attendance requirements meant that state advancement of religion in a school would be particularly harshly felt by impressionable students. [FN6] But we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue. Even if *Edwards* had articulated the principle Milford believes it did, the facts in *Edwards* are simply too remote from those here ***117** to give the principle any weight. *Edwards* involved the content of the curriculum taught by state teachers *during the schoolday* to children required to attend. Obviously, when individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns expressed in *Edwards* are not present. [FN7]

FN6. Milford also cites *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), for its position that the Club's religious element would be advanced by the State through compulsory attendance laws. In *McCollum,* the school district excused students from their normal classroom study during the regular schoolday to attend classes taught by sectarian religious teachers, who were subject to approval by the school superintendent. Under these circumstances, this Court found it relevant that "[t]he operation of the State's compulsory education system ... assist [ed] and [wa]s integrated with the program of religious instruction carried on by separate religious sects." *Id.,* at 209, 68 S.Ct. 461. In the present case, there is simply no integration and cooperation between the school district and the Club. The Club's activities take place *after* the time when the children are compelled by state law to be at the school.

FN7. Milford also refers to *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), to support its view that "assumptions about the ability of students to make ... subtle distinctions [between schoolteachers during the schoolday and Reverend Fournier after school] are less valid for elementary age children who tend to be less informed, more impressionable, and more subject to peer pressure than average adults." Brief for Respondent 19. Four Justices in *Mergens* believed that high school students likely are capable of distinguishing between government and private endorsement of religion. See 496 U.S., at 250-251, 110 S.Ct. 2356 (opinion of O'CONNOR, J.). The opinion, however, made no statement about how capable of discerning endorsement elementary school children would have been in the context of *Mergens,* where the activity at issue was *after school.* In any event, even to the extent elementary school children are more prone to peer pressure than are older children, it simply is not clear what, in this case, they could be pressured to do.

In further support of the argument that the impressionability of elementary school children even after school is significant, Milford points to several cases in which we have found Establishment Clause violations in public schools. For example, Milford relies heavily on *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), in which we found unconstitutional Pennsylvania's practice of permitting public schools to read Bible verses at the opening of each schoolday. *Schempp,* however, is inapposite because this case does not involve activity by the school during the schoolday.

****2106** [10] Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford's permitting the Club's activities would violate the Establishment Clause, the facts of this case simply do not support Milford's conclusion. There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended. Surely even young children are aware of events for which their parents must sign permission ***118** forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12. [FN8] In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

FN8. Milford also relies on the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, as evidence that Congress has recognized the vulnerability of elementary school children to misperceiving endorsement of religion. The Act, however, makes

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no express recognition of the impressionability of elementary school children. It applies only to public secondary schools and makes no mention of elementary schools. § 4071(a). We can derive no meaning from the choice by Congress not to address elementary schools.

[11] Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours. For that matter, members of the public writ large are permitted in the school after hours pursuant to the community use policy. Any bystander could conceivably be aware of the school's use policy and its exclusion of the **Good News Club**, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement. Cf. *Rosenberger,* 515 U.S., at 835-836, 115 S.Ct. 2510 (expressing the concern that viewpoint discrimination can chill individual thought and expression).

[12] ***119** We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. Cf. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 779-780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from ... discomfort .... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]" (emphasis added)). There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. Cf. *Rosenberger, supra,* at 835, 115 S.Ct. 2510 ("Vital First Amendment speech principles are at stake here"). ****2107** And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

[13] We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the **Good News Club's** activities on school premises, and therefore we can find no reason to depart from our holdings in *Lamb's Chapel* and *Widmar.* Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause. [FN9]

FN9. Both parties have briefed the Establishment Clause issue extensively, and neither suggests that a remand would be of assistance on this issue. Although Justice SOUTER would prefer that a record be developed on several facts, see *post,* at 2118, and Justice BREYER believes that development of those facts could yet be dispositive in this case, see *post,* at 2111 (opinion concurring in part), none of these facts is relevant to the Establishment Clause inquiry. For example, Justice SOUTER suggests that we cannot determine whether there would be an Establishment Clause violation unless we know when, and to what extent, other groups use the facilities. When a limited public forum is available for use by groups presenting any viewpoint, however, we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.

***120** V

When Milford denied the **Good News Club** access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion but write separately to explain further my views on two issues.

I

First, I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure, see *ante,* at 2104, and perceptions of endorsement, see *ante,* at 2104, 2106, "to the extent" that the law makes such factors relevant, ***121** is consistent with the belief (which I hold) that in this case that extent is zero. As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected, see, *e.g., Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). What is at play here is not coercion, but the compulsion of ideas--and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, see, *e.g., Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Murdock v. Pennsylvania,* 319 U.S. 105, 108-109, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Cantwell v. Connecticut,* 310 U.S. 296, 307-310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

As to endorsement, I have previously written that "[r]eligious expression cannot ****2108** violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count." *Id.,* at 765, 115 S.Ct. 2440. See also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 401, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in judgment) ("I would hold, simply and clearly, that giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect").

***122** II

Second, since we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included it (the forum was opened to any "us[e] pertaining to the welfare of the community," App. to Pet. for Cert. D1), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum--"because it's religious" will not do, see, *e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532-533, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 877-878, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)--respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject-matter limits must at least be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). [FN1] But I agree, in any event, that respondent did discriminate on the basis of viewpoint.

FN1. In this regard, I should note the inaccuracy of Justice SOUTER'S claim that the reasonableness of the forum limitation is not properly before us, see *post,* at 2115-2116, and n. 1 (dissenting opinion). Petitioners argued, both in their papers filed in the District Court, Memorandum of Law in Support of Cross-Motion for Summary Judgment in No. 97-CV-0302 (NDNY), pp. 20-22, and in their brief filed on appeal, Brief for Appellants in No. 98-9494(CA2), pp. 33-35, that respondent's exclusion of them from the forum was unreasonable in light of the purposes served by the forum. Although the District Court did say in passing that the reasonableness of respondent's general restriction on use of its facilities for religious purposes was not challenged, see 21 F.Supp.2d 147, 154 (N.D.N.Y.1998), the Court of Appeals apparently decided that the particular reasonableness challenge brought by petitioners had been preserved, because it addressed the argument on the merits, see 202 F.3d 502, 509 (C.A.2 2000) ("Taking first the reasonableness criterion, the Club argues that the

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> restriction is unreasonable ..... This argument is foreclosed by precedent").

As I understand it, the point of disagreement between the Court and the dissenters (and the Court of Appeals) ***123** with regard to petitioner's Free Speech Clause claim is not whether the **Good News Club** must be permitted to present religious viewpoints on morals and character in respondent's forum, which has been opened to secular discussions of that subject, see *ante,* at 2100-2101. [FN2] The answer to that is established by our decision in *Lamb's Chapel, supra.* The point of disagreement is not even whether *some* of the Club's religious speech fell within the protection ****2109** of *Lamb's Chapel.* It certainly did. See *ante,* at 2101; 202 F.3d 502, 509 (C.A.2 2000) (the Club's "teachings may involve secular values such as obedience or resisting jealousy").

> FN2. Neither does the disagreement center on the mode of the Club's speech--the fact that it sings songs and plays games. Although a forum could perhaps be opened to lectures but not plays, debates but not concerts, respondent has placed no such restrictions on the use of its facilities. See App. N8, N14, N19 (allowing seminars, concerts, and plays).

The disagreement, rather, regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. The Club, for example, urges children "who already believe in the Lord Jesus as their Savior" to "[s]top and ask God for the strength and the 'want' ... to obey Him," 21 F.Supp.2d 147, 156 (N.D.N.Y.1998) (internal quotation marks omitted), and it invites children who "don't know Jesus as Savior" to "trust the Lord Jesus to be [their] Savior from sin," *ibid.* The dissenters and the Second Circuit say that the presence of such additional speech, because it is purely religious, transforms the Club's meetings into something different in kind from other, nonreligious activities that teach moral and character development. See *post,* at 2113-2114 (STEVENS, J., dissenting); *post,* at 2116-2117 (SOUTER, J., dissenting); 202 F.3d, at 509-511. Therefore, the argument goes, excluding the Club is not viewpoint discrimination. I disagree.

Respondent has opened its facilities to any "us[e] pertaining to the welfare of the community, provided that such us[e] shall be nonexclusive and shall be opened to the general ***124** public." App. to Pet. for Cert. D1. Shaping the moral and character development of children certainly "pertain[s] to the welfare of the community." Thus, respondent has agreed that groups engaged in the endeavor of developing character may use its forum. The Boy Scouts, for example, may seek "to influence a boy's character, development and spiritual growth," App. N10-N11; cf. *Boy Scouts of America v. Dale,* 530 U.S. 640, 649, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) ("[T]he general mission of the Boy Scouts is clear: '[t]o instill values in young people' " (quoting the Scouts' mission statement)), and a group may use Aesop's Fables to teach moral values, App. N11. When the Club attempted to teach Biblical-based moral values, however, it was excluded because its activities "d[id] not involve merely a religious perspective on the secular subject of morality" and because "it [was] clear from the conduct of the meetings that the **Good News Club** goes far beyond merely stating its viewpoint." 202 F.3d, at 510.

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives, see *Boy Scouts of America v. Dale, supra,* at 649, 120 S.Ct. 2446, by giving *reasons* why that is a good idea--because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered--because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based--that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination. ***125** Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise--and in respondent's facilities every premise but a religious one may be defended.

****2110** In *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), we struck down a similar

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viewpoint restriction. There, a private student newspaper sought funding from a student-activity fund on the same basis as its secular counterparts. And though the paper printed such directly religious material as exhortations to belief, see *id.,* at 826, 115 S.Ct. 2510 (quoting the paper's self-described mission " 'to encourage students to consider what a personal relationship with Jesus Christ means' "); *id.,* at 865, 115 S.Ct. 2510 (SOUTER, J., dissenting) (" 'The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation' " (quoting the paper)); see also *id.,* at 865-867, 115 S.Ct. 2510 (quoting other examples), we held that refusing to provide the funds discriminated on the basis of viewpoint, because the religious speech had been used to "provid[e] ... a specific premise ... from which a variety of subjects may be discussed and considered," *id.,* at 831, 115 S.Ct. 2510 (opinion of the Court). The right to present a viewpoint based on a religion premise carried with it the right to defend the premise.

The dissenters emphasize that the religious speech used by the Club as the foundation for its views on morals and character is not just any type of religious speech--although they cannot agree exactly what type of religious speech it is. In Justice STEVENS's view, it is speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," *post,* at 2112; see also *post,* at 2114, n. 3. This does not, to begin with, distinguish *Rosenberger,* which ***126** also involved proselytizing speech, as the above quotations show. See also *Rosenberger, supra,* at 844, 115 S.Ct. 2510 (referring approvingly to the dissent's description of the paper as a "wor[k] characterized by ... evangelism"). But in addition, it does not distinguish the Club's activities from those of the other groups using respondent's forum--which have not, as Justice STEVENS suggests, see *post,* at 2113, been restricted to roundtable "discussions" of moral issues. Those groups may seek to inculcate children with their beliefs, and they may furthermore "recruit others to join their respective groups," *post,* at 2113. The Club must therefore have liberty to do the same, even if, as Justice STEVENS fears without support in the record, see *ibid.,* its actions may prove (shudder!) divisive. See *Lamb's Chapel,* 508 U.S., at 395, 113 S.Ct. 2141 (remarking that worries about "public unrest" caused by "proselytizing" are "difficult to defend as a reason to deny the presentation of a religious point of view"); cf. *Lynch v. Donnelly,* 465 U.S. 668, 684-685, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (holding that "political divisiveness" could not invalidate inclusion of creche in municipal Christmas display); *Cantwell v. Connecticut,* 310 U.S., at 310-311, 60 S.Ct. 900.

Justice SOUTER, while agreeing that the Club's religious speech "may be characterized as proselytizing," *post,* at 2117, n. 3, thinks that it is even more clearly excludable from respondent's forum because it is essentially "an evangelical service of worship," *post,* at 2117. But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no "*relevance* " to the constitutional issue. *Widmar v. Vincent,* 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); see also *Murdock v. Pennsylvania,* 319 U.S., at 109, 63 S.Ct. 870 (refusing to distinguish evangelism from worship). [FN3] Those holdings ***127** are ****2111** surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. *Widmar v. Vincent, supra,* at 269, n. 6, 102 S.Ct. 269; cf. *Lee v. Weisman,* 505 U.S. 577, 616-617, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology"). And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. See, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va., supra,* at 844-845, 115 S.Ct. 2510; *Widmar v. Vincent, supra,* at 269, n. 6, 102 S.Ct. 269. I will not endorse an approach that suffers such a wondrous diversity of flaws.

FN3. We *have* drawn a different distinction--between religious speech generally and speech about religion--but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic. See *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (State schools in their official capacity may not teach religion but may teach about religion). Whatever the rule there, licensing and monitoring private religious speech is an entirely different matter, see, *e.g., Kunz v. New York,* 340 U.S. 290, 293-294, 71 S.Ct. 312, 95 L.Ed. 280 (1951), even in a limited public forum where the State has some authority to draw subject-matter distinctions.

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* * *

With these words of explanation, I join the opinion of the Court.

Justice BREYER, concurring in part.

I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. See, *e.g., Mitchell v. Helms,* 530 U.S. 793, 839, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (O'CONNOR, J., concurring in judgment); ***128** *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 774, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). As this Court previously has indicated, a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important. See *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 389-390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); see also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 592-594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). Today's opinion does not purport to change that legal principle.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the **Good News Club's** activities, could reasonably perceive the school's permission for the Club to use its facilities as an endorsement of religion. See *Ball, supra,* at 390, 105 S.Ct. 3216 ("[A]n important concern of the effects test is whether ... the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"). The time of day, the age of the children, the nature of the meetings, and other specific circumstances are relevant in helping to determine whether, in fact, the Club "so dominate [s]" the "forum" that, in the children's minds, "a formal policy of equal access is transformed into a demonstration of approval." *Capitol Square Review and Advisory Bd., supra,* at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment).

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. The specific legal action that brought this case **2112 to the Court of Appeals was the District Court's decision to grant Milford Central School's motion for summary judgment. The Court of Appeals affirmed the grant of summary judgment. We now hold that the school was not entitled to *129 summary judgment, either in respect to the Free Speech or the Establishment Clause issue. Our holding must mean that, *viewing the disputed facts* (including facts about the children's perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed "genuine issue[s]" of "material fact," Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school's role, cf. *post,* at 2118 (SOUTER, J., dissenting). Indeed, the Court itself points to facts not in evidence, *ante,* at 2106 ("There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended"), *ante,* at 2106 ("There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours"), identifies facts in evidence which may, depending on other facts not in evidence, be of legal significance, *ibid.* (discussing the type of room in which the meetings were held and noting that the Club's participants "are not all the same age as in the normal classroom setting"), and makes assumptions about other facts, *ibid.* ("Surely even young children are aware of events for which their parents must sign permission forms"), *ibid.* ("Any bystander could conceivably be aware of the school's use policy and its exclusion of the **Good News Club**, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"). The Court's invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today's opinion. Cf. Fed. Rules Civ. Proc. 56(c) (summary judgment appropriate only where there is "no genuine issue as to any material fact" and movant "is entitled to a judgment as a *130 matter of law"), 56(f) (permitting supplementation of record for summary judgment purposes where appropriate).

Justice STEVENS, dissenting.

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The Milford Central School has invited the public to use its facilities for educational and recreational purposes, but not for "religious purposes." Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. The film in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), illustrates this category. See *id.,* at 388, 113 S.Ct. 2141 (observing that the film series at issue in that case "would discuss Dr. [James] Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage"). Second, there is religious speech that amounts to worship, or its equivalent. Our decision in *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), concerned such speech. See *id.,* at 264-265, 102 S.Ct. 269 (describing the speech in question as involving "religious worship"). Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.

A public entity may not generally exclude even religious worship from an open public forum. *Id.,* at 276, 102 S.Ct. 269. Similarly, a public entity that creates a limited public forum for the discussion of certain specified topics may not exclude a speaker simply because she approaches **2113 those topics from a religious point of view. Thus, in *Lamb's Chapel* we held that a public school that permitted its facilities to be used for the discussion of family issues and child rearing could not deny access to speakers presenting a religious point of view on those issues. See 508 U.S., at 393-394, 113 S.Ct. 2141.

But, while a public entity may not censor speech about an authorized topic based on the point of view expressed *131 by the speaker, it has broad discretion to "preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock,* 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); see also *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 275, n. 6, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (STEVENS, J., dissenting) "A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make 'decisions concerning the content of those activities' " (quoting *Widmar,* 454 U.S., at 278, 102 S.Ct. 269 (STEVENS, J., concurring in judgment)). Accordingly, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The novel question that this case presents concerns the constitutionality of a public school's attempt to limit the scope of a public forum it has created. More specifically, the question is whether a school can, consistently with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.

Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize afterschool discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups--for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan--to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and *132 tend to separate young children into cliques that undermine the school's educational mission. Cf. *Lehman v. Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding a city's refusal to allow "political advertising" on public transportation).

School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship. See, *e.g., Campbell v. St. Tammany Parish School Board,* 231 F.3d 937, 942 (C.A.5 2000) ("Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by the First Amendment, without

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inviting political or religious activities presented in a form that would disserve its efforts to maintain neutrality"). Moreover, any doubt on a question such as this should be resolved in a way that minimizes "intrusion by the Federal Government into the operation of our public schools," *Mergens,* 496 U.S., at 290, 110 S.Ct. 2356 (STEVENS, J., dissenting); see also *Epperson v. Arkansas,* **2114 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint .... By and large, public education in our Nation is committed to the control of state and local authorities").

The particular limitation of the forum at issue in this case is one that prohibits the use of the school's facilities for "religious purposes." It is clear that, by "religious purposes," the school district did not intend to exclude all speech from a religious point of view. See App. N13-N15 (testimony of the superintendent for Milford schools indicating that the policy would permit people to teach "that man was created by God as described in the Book of Genesis" and that crime *133 was caused by society's "lack of faith in God"). Instead, it sought only to exclude religious speech whose principal goal is to "promote the gospel." *Id.,* at N18. In other words, the school sought to allow the first type of religious speech while excluding the second and third types. As long as this is done in an evenhanded manner, I see no constitutional violation in such an effort. [FN1] The line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school, particularly an elementary school, must be permitted to draw them. [FN2] Cf. *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 231, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring) ("In no activity of the State is it more vital to keep out divisive forces than in its schools ...").

FN1. The school district, for example, could not, consistently with its present policy, allow school facilities to be used by a group that affirmatively attempted to inculcate nonbelief in God or in the view that morality is wholly unrelated to belief in God. Nothing in the record, however, indicates that any such group was allowed to use school facilities.

FN2. "A perceptive observer sees a material difference between the light of day and the dark of night, and knows that difference to be a reality even though the two are separated not by a bright line but by a zone of twilight." *Buirkle v. Hanover Ins. Cos.,* 832 F.Supp. 469, 483 (D.Mass.1993).

This case is undoubtedly close. Nonetheless, regardless of whether the **Good News Club's** activities amount to "worship," it does seem clear, based on the facts in the record, that the school district correctly classified those activities as falling within the third category of religious speech and therefore beyond the scope of the school's limited public forum. [FN3] In short, I am persuaded that the school district *134 could (and did) permissibly exclude from its limited public forum proselytizing religious speech that does not rise to the level of actual worship. I would therefore affirm the judgment of the Court of Appeals.

FN3. The majority elides the distinction between religious speech on a particular topic and religious speech that seeks primarily to inculcate belief. Thus, it relies on *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), as if that case involved precisely the same type of speech that is at issue here. But, while both Wide Awake, the organization in *Rosenberger,* and the **Good News Club** engage in a mixture of different types of religious speech, the *Rosenberger* Court clearly believed that the first type of religious speech predominated in Wide Awake. It described that group's publications as follows:
"The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors." *Id.,* at 826, 115 S.Ct. 2510.
In contrast to Wide Awake's emphasis on providing Christian commentary on such a diverse array of topics, **Good News Club** meetings are dominated by religious exhortation, see *post,* at 2116 (SOUTER, J., dissenting). My position is therefore consistent with the Court's decision in *Rosenberger.*

Even if I agreed with Part II of the majority opinion, however, I would not **2115 reach out, as it does in Part IV, to decide a constitutional question that was not addressed by either the District Court or the Court of Appeals.

Accordingly, I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

The majority rules on two issues. First, it decides that the Court of Appeals failed to apply the rule in

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Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), which held that the government may not discriminate on the basis of viewpoint in operating a limited public forum. The majority applies that rule and concludes that Milford violated *Lamb's Chapel* in denying Good News the use of the school. The majority then goes on to determine that it would not violate the Establishment Clause of the First Amendment for the Milford School District to allow the **Good News Club** to hold its intended gatherings of public school children in Milford's elementary school. ***135** The majority is mistaken on both points. The Court of Appeals unmistakably distinguished this case from *Lamb's Chapel,* though not by name, and accordingly affirmed the application of a policy, unchallenged in the District Court, that Milford's public schools may not be used for religious purposes. As for the applicability of the Establishment Clause to the **Good News Club's** intended use of Milford's school, the majority commits error even in reaching the issue, which was addressed neither by the Court of Appeals nor by the District Court. I respectfully dissent.

I

Lamb's Chapel, a case that arose (as this one does) from application of N.Y. Educ. Law § 414 (McKinney 2000) and local policy implementing it, built on the accepted rule that a government body may designate a public forum subject to a reasonable limitation on the scope of permitted subject matter and activity, so long as the government does not use the forum-defining restrictions to deny expression to a particular viewpoint on subjects open to discussion. Specifically, *Lamb's Chapel* held that the government could not "permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." 508 U.S., at 393-394, 113 S.Ct. 2141.

This case, like *Lamb's Chapel,* properly raises no issue about the reasonableness of Milford's criteria for restricting the scope of its designated public forum. Milford has opened school property for, among other things, "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." App. to Pet. for Cert. D1-D3. But Milford has done this subject to the restriction that "[s]chool premises shall not be used ... for ***136** religious purposes." *Id.,* at D2. As the District Court stated, Good News did "not object to the reasonableness of [Milford]'s policy that prohibits the use of [its] facilities for religious purposes." *Id.,* at C14.

The sole question before the District Court was, therefore, whether, in refusing to allow Good News's intended use, Milford was misapplying its unchallenged restriction in a way that amounted to imposing a viewpoint-based restriction on what could be said or done by a group entitled to use the forum for an educational, civic, or other permitted purpose. The question was whether Good News was being disqualified when it merely sought to use the school property the same way that the Milford Boy and Girl Scouts and the 4-H Club did. The District Court held on the basis of undisputed facts that Good News's activity was essentially unlike the presentation of views on secular issues from a ****2116** religious standpoint held to be protected in *Lamb's Chapel,* see App. to Pet. for Cert. C29-C31, and was instead activity precluded by Milford's unchallenged policy against religious use, even under the narrowest definition of that term.

The Court of Appeals understood the issue the same way. See 202 F.3d 502, 508 (C.A.2 2000) (Good News argues that "to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination"); *id.,* at 509 ("The crux of the **Good News Club's** argument is that the Milford school's application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral"). [FN1] The Court of Appeals ***137** also realized that the *Lamb's Chapel* criterion was the appropriate measure: "The activities of the **Good News Club** do not involve merely a religious perspective on the secular subject of morality." 202 F.3d, at 510. Cf. *Lamb's Chapel, supra,* at 393, 113 S.Ct. 2141 (district could not exclude "religious standpoint" in discussion on child rearing and family values, an undisputed "use for social or civic purposes otherwise permitted" under the use policy). [FN2] The appeals court agreed with the District Court that the undisputed facts in this case differ from those in *Lamb's Chapel,* as night from day. A sampling of those facts shows why both courts were correct.

FN1. The Court of Appeals held that any challenge to the policy's reasonableness was foreclosed by its own precedent, 202 F.3d, at 502, 509, a holding the majority leaves untouched, see *ante,* at 2100 ("[W]e need not decide whether it is unreasonable in light of

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the purposes served by the forum"); cf. *ante,* at 2100, n. 2 ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law"). In any event, the reasonableness of the forum limitation was beyond the scope of the appeal from summary judgment since the District Court had said explicitly that the religious use limitation was not challenged.

FN2. It is true, as the majority notes, *ante,* at 2101, n. 3, that the Court of Appeals did not cite *Lamb's Chapel* by name. But it followed it in substance, and it did cite an earlier opinion written by the author of the panel opinion here, *Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207 (C.A.2 1997), which discussed *Lamb's Chapel* at length.

Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him.... If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group--His family." App. to Pet. for Cert. C17-C18 (ellipsis in original). The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word," and is "important--and true--because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility." *Id.,* at C20.

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson. ***138** During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to " 'stop and ask God for the strength and the "want" ... to obey Him.' " *Ibid.* They are instructed that

> "[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will--we will pray with you separately, individually .... And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him." *Ibid.*

****2117** During the invitation, the teacher "invites" the "unsaved" children " 'to trust the Lord Jesus to be your Savior from sin,' " and " 'receiv[e][him] as your Savior from sin.' " *Id.,* at C21. The children are then instructed that

> "[i]f you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life." *Ibid.*

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. [FN3] The majority ***139** avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." *Ante,* at 2101. If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

FN3. The majority rejects Milford's contention that Good News's activities fall outside the purview of the limited forum because they constitute "religious worship" on the ground that the Court of Appeals made no such determination regarding the character of the club's program, see *ante,* at 2102-2103, n. 4. This distinction is merely semantic, in light of the Court of Appeals's conclusion that "[i]t is difficult to see how the Club's activities differ materially from the 'religious worship' described" in other case law, 202 F.3d 502, 510 (C.A.2 2000), and the record below.

Justice STEVENS distinguishes between proselytizing and worship, *ante,* at 2112 (dissenting opinion), and distinguishes each from discussion reflecting a religious point of view. I agree with Justice STEVENS that Good News's activities may be characterized as proselytizing and therefore as outside the purpose of Milford's limited forum, *ante,* at 2114. Like the Court of Appeals, I also believe Good News's meetings have elements of worship that put the club's activities further afield of Milford's limited forum policy, the legitimacy of which was unchallenged in the summary judgment proceeding.

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II

I also respectfully dissent from the majority's refusal to remand on all other issues, insisting instead on acting as a court of first instance in reviewing Milford's claim that it would violate the Establishment Clause to grant Good News's application. Milford raised this claim to demonstrate a compelling interest for saying no to Good News, even on the erroneous assumption that *Lamb's Chapel's* public forum analysis would otherwise require Milford to say yes. Whereas the District Court and Court of Appeals resolved this case entirely on the ground that Milford's actions did not offend the First Amendment's Speech Clause, the majority now sees fit to rule on the application of the Establishment Clause, in derogation of this Court's proper role as a court of review. *E.g., National Collegiate Athletic ***140** Assn. v. Smith,* 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999) ("[W]e do not decide in the first instance issues not decided below").

The Court's usual insistence on resisting temptations to convert itself into a trial court and on remaining a court of review is not any mere procedural nicety, and my objection to turning us into a district court here does not hinge on a preference for immutable procedural rules. Respect for our role as a reviewing court rests, rather, on recognizing that this Court can often learn a good deal from considering how a ****2118** district court and a court of appeals have worked their way through a difficult issue. It rests on recognizing that an issue as first conceived may come to be seen differently as a case moves through trial and appeal; we are most likely to contribute something of value if we act with the benefit of whatever refinement may come in the course of litigation. And our customary refusal to become a trial court reflects the simple fact that this Court cannot develop a record as well as a trial court can. If I were a trial judge, for example, I would balk at deciding on summary judgment whether an Establishment Clause violation would occur here without having statements of undisputed facts or uncontradicted affidavits showing, for example, whether Good News conducts its instruction at the same time as school-sponsored extracurricular and athletic activities conducted by school staff and volunteers, see Brief for Respondent 6; whether any other community groups use school facilities immediately after classes end and how many students participate in those groups; and the extent to which Good News, with 28 students in its membership, may "dominate the forum" in a way that heightens the perception of official endorsement, *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 851, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (O'CONNOR, J., concurring); see also *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). We will never know these facts.

Of course, I am in no better position than the majority to perform an Establishment Clause analysis in the first ***141** instance. Like the majority, I lack the benefit that development in the District Court and Court of Appeals might provide, and like the majority I cannot say for sure how complete the record may be. I can, however, speak to the doubtful underpinnings of the majority's conclusion.

This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment. See *id.,* at 271, 102 S.Ct. 269 ("[T]he interest of the [government] in complying with its constitutional obligations may be characterized as compelling"); *Lamb's Chapel,* 508 U.S., at 394, 113 S.Ct. 2141. Milford's actions would offend the Establishment Clause if they carried the message of endorsing religion under the circumstances, as viewed by a reasonable observer. See *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring). The majority concludes that such an endorsement effect is out of the question in Milford's case, because the context here is "materially indistinguishable" from the facts in *Lamb's Chapel* and *Widmar. Ante,* at 2103. In fact, the majority is in no position to say that, for the principal grounds on which we based our Establishment Clause holdings in those cases are clearly absent here.

In *Widmar,* we held that the Establishment Clause did not bar a religious student group from using a public university's meeting space for worship as well as discussion. As for the reasonable observers who might perceive government endorsement of religion, we pointed out that the forum was used by university students, who "are, of course, young adults," and, as such, "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U.S., at 274, n. 14, 102 S.Ct. 269. To the same effect, we remarked that the "large number of groups meeting on campus" negated "any reasonable inference of

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University support from the mere fact of a campus meeting place." *Ibid.* Not only was the forum "available to a broad class of nonreligious as ***142** well as religious speakers," but there were, in fact, over 100 recognized student groups at the University, and an "absence of empirical evidence that religious groups [would] dominate [the University's] open forum." *Id.,* at 274- ****2119** 275, 102 S.Ct. 269; see also *id.,* at 274, 102 S.Ct. 269 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"). And if all that had not been enough to show that the university-student use would probably create no impression of religious endorsement, we pointed out that the university in that case had issued a student handbook with the explicit disclaimer that "the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members.' " *Id.,* at 274, n. 14, 102 S.Ct. 269.

Lamb's Chapel involved an evening film series on child rearing open to the general public (and, given the subject matter, directed at an adult audience). See 508 U.S., at 387, 395, 113 S.Ct. 2141. There, school property "had repeatedly been used by a wide variety of private organizations," and we could say with some assurance that "[u]nder these circumstances ... there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed ...." *Id.,* at 395, 113 S.Ct. 2141.

What we know about this case looks very little like *Widmar* or *Lamb's Chapel.* The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six. [FN4] The Establishment Clause cases have ***143** consistently recognized the particular impressionability of schoolchildren, see *Edwards v. Aguillard,* 482 U.S. 578, 583-584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) , and the special protection required for those in the elementary grades in the school forum, see *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 620, n. 69, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). We have held the difference between college students and grade school pupils to be a "distinction [that] warrants a difference in constitutional results," *Edwards v. Aguillard, supra,* at 584, n. 5, 107 S.Ct. 2573 (internal quotation marks and citation omitted).

FN4. It is certainly correct that parents are required to give permission for their children to attend Good News's classes, see *ante,* at 2104 (as parents are often required to do for a host of official school extracurricular activities), and correct that those parents would likely not be confused as to the sponsorship of Good News's classes. But the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, Lodging, Exh. X2, who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the "challenge" and "invitation."

The fact that there may be no evidence in the record that individual students were confused during the time the **Good News Club** met on school premises pursuant to the District Court's preliminary injunction is immaterial, cf. Brief for Petitioners 38. As Justice O'CONNOR explained in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), the endorsement test does not focus "on the actual perception of individual observers, who naturally have differing degrees of knowledge," but on "the perspective of a hypothetical observer." *Id.,* at 779-780, 115 S.Ct. 2440 (opinion concurring in part and concurring in judgment).

Nor is Milford's limited forum anything like the sites for wide-ranging intellectual exchange that were home to the challenged activities in *Widmar* and *Lamb's Chapel.* See also *Rosenberger,* 515 U.S., at 850, 836-837, 115 S.Ct. 2510. In *Widmar,* the nature of the university campus and the sheer number of activities offered precluded the reasonable college observer from seeing government endorsement in any one of them, and so did the time and variety of community use in the *Lamb's Chapel* case. See also *Rosenberger,* 515 U.S., at 850, 115 S.Ct. 2510 ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical"); *id.,* at 836-837, 850, 115 S.Ct. 2510 (emphasizing the array of university-funded magazines containing "widely divergent ****2120** viewpoints" and the fact that believers in Christian evangelism competed on equal footing in the University forum with aficionados of "Plato, Spinoza, and Descartes," as well as "Karl Marx, Bertrand Russell, and Jean-Paul Sartre"); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 ***144** U.S. 226, 252, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion").

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The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children. The club is open solely to elementary students (not the entire community, as in *Lamb's Chapel*), only four outside groups have been identified as meeting in the school, and Good News is, seemingly, the only one whose instruction follows immediately on the conclusion of the official schoolday. See Brief for National School Boards Association et al. as *Amici Curiae* 6. Although school is out at 2:56 p.m., Good News apparently requested use of the school beginning at 2:30 on Tuesdays "during the school year," so that instruction could begin promptly at 3:00, see Lodging, Exh. W-1, at which time children who are compelled by law to attend school surely remain in the building. Good News's religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until "the room is clear," and "people are out of the room," App. P29, before starting proceedings in the classroom located next to the regular third- and fourth-grade rooms, *id.*, at N12. In fact, the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a community church, 8 or 10 children attended; after the school became the site, the number went up three-fold. *Id.*, at P12; Lodging, Exh. AA2.

Even on the summary judgment record, then, a record lacking whatever supplementation the trial process might have led to, and devoid of such insight as the trial and appellate judges might have contributed in addressing the Establishment Clause, we can say this: there is a good case that Good News's exercises blur the line between public ***145** classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority's conclusion, and while the consolation may be that nothing really gets resolved when the judicial process is so truncated, that is not much to recommend today's result.

121 S.Ct. 2093, 533 U.S. 98, 150 L.Ed.2d 151, 154 Ed. Law Rep. 45, 1 Cal. Daily Op. Serv. 4737, 2001 Daily Journal D.A.R. 5858, 14 Fla. L. Weekly Fed. S 337, 2001 DJCAR 2934

Briefs and Other Related Documents (Back to top)

. 2001 WL 196997, 69 USLW 3416 (Oral Argument) Oral Argument (Feb. 28, 2001)

. 2001 WL 173531 (Appellate Brief) Reply Brief for Petitioners (Feb. 15, 2001)

. 2001 WL 43335 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT (Jan. 12, 2001)

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. 2000 WL 1784146 (Appellate Brief) BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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END OF DOCUMENT

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

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

Facts:

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

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

For opinion see 120 S.Ct. 2266, 120 S.Ct. 494

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
SANTA FE INDEPENDENT SCHOOL DISTRICT, Petitioner,
v.
Jane DOE, et al., Respondents.
No. 99-62.
December 30, 1999.
On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

*iii TABLE OF CONTENTS

QUESTION PRESENTED ... i

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... v

INTEREST OF AMICI CURIAE ... 1

SCHOOL POLICY INVOLVED ... 1

SUMMARY OF ARGUMENT ... 2

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ARGUMENT ... 5

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT -- INDEED, CONSTITUTIONALLY CANNOT -- BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT ... 5

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy ... 5

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge ... 15

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis ... 18

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games ... 19

II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS." ... 20

*iv III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES ... 22

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE ... 25

V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE ... 27

CONCLUSION ... 30

*v TABLE OF AUTHORITIES

CASES

Adler v. Duval County School Bd., 174 F.3d 1236 (11th Cir. 1999) ... 22

Agostini v. Felton, 521 U.S. 203 (1997) ... 14, 26

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) ... 27, 29

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) ... passim

Bowen v. Kendrick, 487 U.S. 589 (1988) ... 25, 27

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) ... passim

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ... 14

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ... passim

Engel v. Vitale, 370 U.S. 421 (1962) ... passim

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) ... passim

Lee v. Weisman, 505 U.S. 577 (1992) ... passim

Lynch v. Donnelly, 465 U.S. 668 (1984) ... 6, 19, 22, 27

Marsh v. Chambers, 463 U.S. 783 (1983) ... 6, 27

Mueller v. Allen, 463 U.S. 388 (1983) ... 13, 14, 26

*vi Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) ... passim

Tilton v. Richardson, 403 U.S. 672 (1973) ... 9

United States v. Salerno, 481 U.S. 739 (1987) ... 25

Wallace v. Jaffree, 472 U.S. 38 (1985) ... 23, 24

Widmar v. Vincent, 454 U.S. 263 (1981) ... passim

Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) ... passim

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Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) ... 13, 14

RULES

S. Ct. R. 37.3 ... 1

S. Ct. R. 37.6 ... 1

MISCELLANEOUS

Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/religion.html (May 1998) ... 25

Nadine Strossen, How Much God in the Schools? A Discussion of Religion's Role in the Classroom, 4 Wm. & Mary Bill Rts. J. 607 (1995) ... 15

Eugene Volokh, Equal Treatment is Not Establishment, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999) ... 29

*1 INTEREST OF AMICI CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. See id.

Congressman Steve Largent represents the First District of Oklahoma in the United States House of Representatives. Congressman J.C. Watts represents the Fourth District of Oklahoma in the United States House of Representatives. Both Mr. Largent and Mr. Watts played professional football; Mr. Largent is a member of the Hall of Fame.

Congress has substantial authority to enact legislation and vote on constitutional amendments regarding student religious speech, particularly in the Nation's public schools. See generally Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990). As citizens and Members of Congress, Mr. Largent and Mr. Watts have a deep interest in ensuring appropriate protection for student religious speech in our public schools and in preventing discrimination against religious organizations, religious persons, and religious speech. Mr. Largent and Mr. Watts thus have a strong interest in this case and submit that Santa Fe High School's religion-neutral policy for a brief student statement before varsity football games is entirely appropriate and consistent with the Constitution.

SCHOOL POLICY INVOLVED

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The Santa Fe Independent School District in Galveston County, Texas, maintains the following policy for Santa Fe High School:

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and *2 student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Pet. App. F1 (emphases added).

SUMMARY OF ARGUMENT

Santa Fe High School allows a student to make a brief statement to the crowd before home varsity football games "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Santa Fe High School's policy does not require or even encourage the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind. Nor, on the other hand, does the school policy prevent the student from doing so. The policy is thus entirely neutral toward religion and religious speech.

Respondents nonetheless claim that the school policy on its face violates the Establishment Clause because an individual student (not a school or government official) might invoke God's name, utter religious words, or say a prayer in his or her pre-game statement. Respondents' Establishment Clause theory directly conflicts with this Court's settled jurisprudence. The Court has held that the Establishment Clause permits a neutral school speech policy in which individuals may engage in religious or other speech as they see fit in a school forum. See *3Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981). In these cases, the Court has stressed the critical distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quoting Mergens, 496 U.S. at 250).

Similarly, in Lee v. Weisman, 505 U.S. 577 (1992), a case striking down government-led and government-composed prayer at school graduations, the Court repeatedly distinguished government religious speech from private religious speech. Indeed, in concurrence, Justice Souter, joined by Justices Stevens and O'Connor, foreshadowed and effectively answered in advance the question presented in this case: "If the State had chosen its ... speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." Id. at 630 n.8 (Souter, J., concurring) (emphasis added) (citing Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986)).

The Court's cases show, moreover, that respondents' theory of the Constitution is exactly backwards. If Santa Fe High School took steps to prevent the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school would violate the Constitution --

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the Free Speech and Free Exercise Clauses of the First Amendment. The Constitution protects the Santa Fe student speaker who chooses to mention God just as much as it protects the Santa Fe student speaker who chooses not to mention God. The school cannot force the student to "say a prayer," nor can the school prohibit the student from "saying a prayer." By adhering scrupulously to this principle *4 of neutrality, the Santa Fe High School policy for pre-game student statements satisfies the Constitution.

As seven Justices indicated in Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), the school need not issue any sort of "disclaimer" because this case involves an individual's verbal speech (in contrast to a case such as Pinette involving a fixed visual display in a public area). That said, we understand that a disclaimer is currently read over the public address system at Santa Fe High School football games. Given that fact and, in any event, given that this case involves a facial challenge, the Court can uphold the Santa Fe policy without considering whether and/or under what circumstances a school disclaimer ever might be necessary.

The forum's scarcity (namely, the fact that only one student per game speaks) does not alter the constitutional analysis. The Court explained in Rosenberger that "nothing" in the Court's decisions suggests that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835.

Finally, respondents' theory would cause severe practical harm. Schools would have to monitor and censor religious words by all non-governmental speakers (a high school football player in a pre-game pep rally, a student newspaper writer, the guest speaker at a school speakers' series, the valedictorian at graduation). This Court, however, has never forced or even allowed the public schools of this country to censor students and speakers who happen to be religious or wish to speak religious words at a school event. On the contrary, as the Court has said, the absolutist legal theory of those who seek to cleanse public school events of all private religious expression evinces a pervasive "hostility to religion" that is neither required nor permitted under the Religion Clauses. Rosenberger, 515 U.S. at 846.

*5 ARGUMENT

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT -- INDEED, CONSTITUTIONALLY CANNOT -- BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT.

Respondents do not dispute that a public high school may set aside a moment before a football game for a student to deliver a public message solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. The sole question is whether, as respondents submit, the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer.

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy.

Three mutually reinforcing strands of this Court's jurisprudence demonstrate that a public high school such as Santa Fe constitutionally need not (indeed, constitutionally cannot) prohibit the student from religious speech in his or her pre-game statement to the crowd.

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First, the Court's cases striking down government school prayer have carefully distinguished governmental religious speech from protected private religious speech. Second, in a series of related cases, the Court has held that student religious speech in a school forum is not attributable to the State and therefore does not violate the Establishment Clause. Indeed, it is constitutionally impermissible for the government to discriminate against religion and prevent a student from engaging in religious speech at a school event. Third, the Court has similarly held that decisions by private individuals to use neutrally available government aid for religious purposes are not attributable to the State for purposes of the Establishment ***6** Clause, a principle akin to the theory of neutrality employed in the student speech cases.

1. The Court has held that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayer in classes or at graduation ceremonies. [FN2]

> FN2. The Establishment Clause generally does not prohibit governmental religious speech at non-school events so long as no one is compelled to speak or indicate agreement with the religious message. See Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); see also County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting). The examples of such governmental religious speech are pervasive and long-standing. The President issues Thanksgiving Day proclamations; this Court starts its sessions with a plea that "God save the United States and this Honorable Court"; both Houses of Congress begin the day with official prayer; the phrase "In God We Trust" adorns our currency; the list goes on.

The facts in the leading case, Engel v. Vitale, 370 U.S. 421 (1962), are well-known. A school board in New York had directed that teachers and students begin each school day with an official prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Id. at 422. The Court struck down the policy, stating that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." Id. at 425.

In concurrence, Justice Douglas emphasized a critical theme that would recur in the Court's decisions in subsequent years: "Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." Id. at 442-43 (Douglas, J., concurring) (quotation omitted; emphasis added). ***7** "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." Id. at 443.

In Lee v. Weisman, 505 U.S. 577 (1992), the Court held that Engel applied to public school graduation ceremonies. The Court pointed to the following "dominant facts": The school had "decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." Id. at 586-87; see also id. at 588 (State made "decision to include a prayer"). Moreover, the school principal selected the clergy member and "directed and controlled the content of the prayers." Id. at 588. The degree of school involvement "made it clear that the graduation prayers bore the imprint of the State." Id. at 590. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated the critical facts: The "government composes official

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prayers, selects the member of the clergy to deliver the prayer, [and] has the prayer delivered at a public school event." Id. at 603 (Blackmun, J., concurring) (quotation omitted).

But the Lee Court cabined its holding in a way important to this case by stressing the critical distinction between (i) individual religious speech in schools, which is protected by the Constitution, and (ii) government-required religious speech in schools, which the Court held to be prohibited by the Constitution. The Court stated, for example, that "the First Amendment does not allow the government to stifle prayers." Id. at 589 (emphasis added). The Court explained that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Id.

The problem the Court identified in Lee, therefore, was not that students were exposed to religious speech, but that they were exposed to governmental religious speech. "In religious debate or expression the government is not a prime participant .... A state-created orthodoxy puts at grave risk ***8** that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." Id. at 591-92 (emphasis added). The First Amendment thus is not concerned with actions that do not "so directly or substantially involve the state in religious exercises or in the favoring of religion." Id. at 598 (quotation omitted; emphasis added).

Given that private individuals can engage in religious speech in school settings, the Court recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." Id. at 598-99. But that is hardly some constitutional vice; to the contrary, it is a constitutional virtue. Indeed, the Court expressly warned that "[a] relentless and all- pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Id. at 598.

In a concurring opinion, Justice Souter, joined by Justices Stevens and O'Connor, elaborated by distinguishing the situation in Lee from a hypothetical policy that presumably would satisfy the Constitution (a policy that happens to be precisely akin to that employed by Santa Fe High School for football games): "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." Id. at 630 n.8 (Souter, J., concurring) (emphasis added) (citing Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986)).

The opinions and analyses of the Engel and Lee Courts foreshadowed -- and effectively approved in advance -- the Santa Fe High School policy at issue here. The Establishment Clause permits a student speaker to deliver a religious message in a neutrally available school forum, so long as the school ***9** itself does not select, compose, deliver, or require a religious message.

2. We need not rely solely on statements in Lee and Engel, however, to support our argument. In a series of cases over the last two decades, the Court has held that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. Indeed, the Court has held that the Constitution prohibits the government from excluding private religious speech, because it is religious, from a school event.

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These cases arose after certain schools and plaintiffs read Engel and other decisions as license (or judicial compulsion) to eradicate all traces of religion, government and private, from the public schools. The Court has rejected these homogenizing efforts to cleanse public schools of private religious expression, emphasizing time and again the critical distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quoting Mergens, 496 U.S. at 250).

The cases affirming this dispositive principle are by now familiar: Widmar, Mergens, Lamb's Chapel, Rosenberger, and Pinette. Because of their importance to this case, we briefly review each.

In Widmar v. Vincent, the Court held that the Constitution "forbids a State to enforce certain exclusions [of religious speakers] from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. 263, 267-68 (1981). A public university had justified its exclusion of religious speakers by citing the Establishment Clause as interpreted in Tilton v. Richardson, 403 U.S. 672 (1973), but the Court in Widmar reaffirmed "the right of religious speakers to use public forums on equal terms with *10 others." 454 U.S. at 273 n.12. As the Court stated, "by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there." Id. at 272 n.10.

In Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), the Court extended the principle of Widmar to the high school context -- in a case where Congress through the Equal Access Act had mandated equal treatment of religious speech in public schools. A high school religious group sought permission to meet at the high school, as other groups did. The school denied the request, arguing that "official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students." Id. at 247-48. The Court, without dissent on the constitutional issue, rejected that Establishment Clause argument. The Court relied on the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 250 (plurality). The Court added that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." Id. (emphasis added). And if a state "refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Id. at 248 (plurality).

The Court reached the same conclusion in Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). The Court struck down a school board rule that allowed schools to open their facilities except to religious uses. The Court unanimously concluded that the policy violated the Free Speech Clause and stated that "there would have been no realistic danger that the community would think that the *11 District was endorsing religion or any particular creed" by allowing religious uses in the school. Id. at 395.

The Court again relied on the neutrality principle in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious group on the ground that the group's student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." Id. at 823.

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The Court first held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." Id. at 831. As to the Establishment Clause analysis, the Court began with the "central lesson": A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Id. at 839. In the speech context, the Court stated: "[M]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." Id.

The Court found that a program including payments for expenses of the religious magazine as well as other student publications would be "neutral toward religion." Id. at 840. Such a program would respect the "critical difference between governmentspeech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 841 (quotation omitted); see also id. at 834 (speech of "private persons" and "University's own speech" controlled "by different principles"); id. (referring to "distinction between the University's own favored message and the private speech of students").

***12** The Court applied those same principles of neutrality outside the educational context in Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). The State there had excluded a private religious display (a cross) from a public square generally open to private displays.

The Court stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Id. at 760. A plurality stated that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." Id. at 767 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

In a concurring opinion, Justice Souter, joined by Justices O'Connor and Breyer, largely agreed with those principles, albeit finding that a state disclaimer might be necessary in cases of fixed visual displays. Id. at 784 (Souter, J., concurring). As to the need for a disclaimer, the concurring Justices distinguished a fixed visual display from an individual's verbal speech: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." Id. at 786.

In sum, as this series of cases makes clear, state action prohibiting a student speaker from engaging in religious speech, because it is religious, is a First Amendment violation. But even if it were not a First Amendment free speech/free exercise violation to exclude religious speech, these cases show that it is surely not a First Amendment Establishment Clause violation for a school to permit religious speech on a neutral basis at a school event. As Justice Kennedy has explained, "in some circumstances the First Amendment may require that ***13** government property be available for use by religious groups, and even where not required, such use has long been permitted." County of Allegheny v. ACLU, 492 U.S. 573, 667 (1989) (Kennedy, J., concurring and dissenting) (citations omitted; emphasis added).

3. The principle that the government does not violate the Establishment Clause

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when it enacts a neutral program available to religious and non-religious alike finds additional doctrinal support in a separate strand of this Court's Establishment Clause jurisprudence. The Court has rejected challenges to government programs through which a "religious" individual or religious organization may take advantage of a neutrally available government benefit (the analytic equivalent of the neutrally available school speech forum). Four cases illustrate this principle.

In Mueller v. Allen, 463 U.S. 388 (1983), the Court considered a tax deduction program that allowed deductions for school expenses, including for parents who sent their children to religious schools. Citing Widmar, the Court held that where religion is advanced only "as a result of decisions of individual parents 'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." Id. at 399 (quoting Widmar, 454 U.S. at 274).

The Court applied the same principle in Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986). The government provided financial assistance to blind students, one of whom used the assistance to attend a seminary. The Court, through Justice Marshall, stated: "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." Id. at 488-89.

Mueller and Witters laid the constitutional foundation for the Court's decision in Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). There, the school district provided *14 sign-language interpreters to students, but refused to provide them to students attending religious schools on the ground that the assistance would violate the Establishment Clause. The Court rejected that defense: "[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." Id. at 10.

Finally, in Agostini v. Felton, 521 U.S. 203 (1997), the Court relied on Mueller, Witters, and Zobrest in concluding that Title I's aid program did not violate the Establishment Clause. The Court held that the Constitution permits government aid to students on "a neutral basis" -- aid available regardless whether the student attends a sectarian or non-sectarian school. Id. at 234-35. Such a program "cannot reasonably be viewed as an endorsement of religion." Id. at 235.

4. The decisions in Widmar, Mergens, Lamb's Chapel, Rosenberger, and Pinette -- when read together with Lee v. Weisman and cases such as Mueller, Witters, Zobrest, and Agostini -- establish two critical principles that speak directly to the issue in this case. First, the Establishment Clause permits a citizen or student or religious group to utilize a neutrally available school forum to speak religious words or invoke God's name or say a prayer. Second, if the government were to prevent citizens or students at a school event from religious speech, because it is religious, the government would violate the free speech and free exercise [FN3] rights of the speakers.

FN3. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs").

These principles, which validate the policy at issue in this case, should not be controversial. The President of the ACLU, for example, has correctly analyzed the issue presented here: *15 [T]he First Amendment would protect the right of a

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student speaker to voluntarily make religious statements even at a school-sponsored event. ... [I]f the student were truly expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in Weisman. ... "If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."
Nadine Strossen, How Much God in the Schools? A Discussion of Religion's Role in the Classroom, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (quoting Lee, 505 U.S. at 630 n.8 (Souter, J., concurring)).

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge.

This case involves a student's verbal speech at a school event, as opposed to a fixed visual display in a public square. As a result, the school need not issue a disclaimer to eliminate any claimed audience misperception of government endorsement of a student's private speech.

Seven Justices suggested as much in Pinette, with Justice Souter, joined by Justices O'Connor and Breyer, explaining the rationale in concurrence: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." 515 U.S. at 786 (Souter, J., concurring). A four-Justice plurality added that the Court's "Religion Clause jurisprudence is complex enough without the addition of th[e] highly litigable feature" of sometimes-mandatory government disclaimers. ***16**Id. at 769 n.4 (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.).

That said, the Court in this case need not consider whether and/or under what circumstances a disclaimer ever might be necessary, for two reasons.

First, this is a facial challenge to the Santa Fe High School football game policy. The Court thus could uphold the school's policy against the facial attack and simply leave for another day the question whether and/or under what circumstances a disclaimer ever might be necessary. See Pinette, 515 U.S. at 784, 794 n.2 (Souter, J., concurring) (even a fixed display in the public square would not violate the Establishment Clause "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it"; "there is no reason to presume that an adequate disclaimer could not have been drafted"); Mergens, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold program at issue in Mergens because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary).

Second, and buttressing the first point, we understand that Santa Fe High School in fact issued the following oral disclaimer over the public address system at games after October 15 of this past season:
Marian Ward, a Santa Fe High School Student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of Ms. Ward's choice of a pre-game message. The purpose of the message is to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. [FN4]

FN4. This statement is recited in an October 15, 1999, letter agreement

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between counsel in a separate case involving student pre-game speech at Santa Fe High School football games. See Ward v. Santa Fe Independent School District, No. G-99-556 (S.D. Tex., Houston Division). We have been informed that the letter agreement reciting that statement is part of the record in that case.

***17** As the Court concluded in Pinette and Mergens, this kind of disclaimer, while not constitutionally necessary, would leave the audience (even the "unreasonable" listeners) with absolutely no doubt that the student's speech is not approved or endorsed by the government. See Pinette, 515 U.S. at 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); id. at 769 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such."); id. at 784 (Souter, J., joined by O'Connor and Breyer, JJ., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); Mergens, 496 U.S. at 251 (plurality opinion of O'Connor, J.) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, ... students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."). [FN5]

FN5. In this case, moreover, any chance of widespread audience confusion is all but nonexistent given that the students themselves elect the speaker and are thus necessarily aware of the school policy.

In short, a disclaimer is not constitutionally required here. But given that this is a facial challenge and given the current practice at Santa Fe High School, the Court could leave for ***18** another day the question whether and/or under what circumstances a disclaimer ever might be necessary.

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis.

The forum in this case is scarce, in the sense that only one student uses it at each home varsity football game, and there are only three to six home games a year. But the fact of scarcity does not alter the neutrality analysis.

First, as the Court in Rosenberger explained, the government's provision of a neutral forum does not suddenly become problematic if only a few speakers can utilize the forum. In such circumstances, it is "incumbent on the State ... to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in Lamb's Chapel] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835. The Court thus flatly rejected the suggestion that scarcity provided a rationale for discrimination against religious speech: "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in Lamb's Chapel been scarce, had the demand been greater than the supply, our decision would have been no different." Id.

Justices Marshall and Brennan also helpfully analyzed the possible effects of scarcity in their separate opinion in Mergens. Considering the possibility of a

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forum that did not "include the participation of more than one advocacy- oriented group," 496 U.S. at 268 (Marshall, J., concurring), those two Justices still did not suggest that such a development would be unconstitutional. Rather, that fact would simply make the school responsible, they said, to "affirmatively disclaim any endorsement" of the private speech. Id.

Second, and this is important, the school here does not decide whether the speaker will utter religious words, nor does ***19** the school premise availability of the forum on whether the speaker will utter religious words. The forum is neutral, and the choice whether to invoke God' s name or speak religious words is within the sole discretion of the student.

Compare, by contrast, a situation where the government could allow only a single school group to meet on school grounds. Suppose that a number of clubs applied for the facility. Suppose further that the school chose a religious club -- because it was religious -- rather than allocating the scarce facility on a religion-neutral basis. In that case, an Establishment Clause issue would arise. In this case, however, the school has done nothing to favor or promote a speaker who may choose to speak religious words over a speaker who may choose not to speak religious words.

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games.

The Court has stated that Establishment Clause jurisprudence is "delicate and fact-sensitive," Lee, 505 U.S. at 597, and that "[e]very government practice must be judged in its unique circumstances," Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). In this case, that principle suggests particular attention to the following points.

First and most importantly, as we have already explained, this case involves a facial challenge to a student speech policy where the student is free to speak a religious message -- or not -- as he or she sees fit.

Second, as we have said, the Court could uphold the student speech policy without reaching the question whether and/or under what circumstances a disclaimer ever might be necessary.

***20** Third this case involves a high school. The Court need not consider whether the same principles would apply to elementary school events.

Fourth, the speech policy before the Court applies only to football games. A football game is extracurricular and more in the nature of a student event than are curricular, school-dominated events such as graduations and daily classes. While graduations and classes unmistakably bear "the imprint of the State," Lee, 505 U.S. at 590, extracurricular activities generally provide an opportunity for students to participate without the same degree of school control. To be sure, faculty advisors or coaches are important, but the football team, the debate team, the cheerleading squad, the newspaper, the yearbook, the school play are activities designed to give students an extra degree of freedom to grow and learn and err in a less autocratic, less structured environment. In short, the coercive, state-dominated atmosphere described in Lee simply does not translate to extracurricular events such as football games. Cf. Mergens, 496 U.S. at 267 (Marshall, J., concurring) ("To the extent that a school emphasizes the autonomy of its students, ... there is a corresponding decrease in the likelihood that student speech will be regarded as school speech.").

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II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS."

By allowing the student speaker to say what he or she chooses (so long as the message is within the very broad bounds of the school policy), the Santa Fe school district avoids entangling itself in the difficult task of determining what is religious speech and what is not. Respondents' position, by contrast, would generate enormous practical problems that only highlight the flaws in their argument.

If the student speaker must avoid "prayer," as respondents demand, does that mean all references to God? What about ***21** references to the "Father"? The "Father above"? Must the student avoid a reference to "our Creator"? Can the student ask the crowd to observe a moment of silence for the crowd members "to pray" as they wish? Can the student refer to the afterlife? Can the student, without invoking God, use phrases that originated in the Bible? Is the word "bless" ok?

Who knows. What we do know is that the public schools -- and then the courts -- would have to monitor the private speech of individuals to make these and hundreds of other nuanced judgments and try to draw a line between religious and non-religious speech. But just as this Court is "ill-equipped to sit as a national theology board," County of Allegheny, 492 U.S. at 678 (Kennedy, J., concurring and dissenting), so too Santa Fe High School is ill- equipped to sit as a local Religion Censor, ordered by this Court to painstakingly eliminate all traces of private religious expression from its school. See Mergens, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); cf. Lee, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.").

And the school would need to play the role of Religion Censor not just at football games, but at all school events and gatherings. What to do about: A student running for student council who wants to say at an pre-election debate that the philosopher most influential to her was Jesus Christ and to explain why? A student at an awards banquet who wants to give thanks to God? A football captain who speaks to the team before the game and wishes to say a prayer and to ask God to bless the team? A student newspaper writer who wishes to write why his religion is important to him?

***22** Logically at least, all are prohibited in respondents' Orwellian world. The schools throughout the country would have to review statements and messages at all school events to ferret out religious content. Schools would necessarily engage in "government censorship, to ensure that all student [speech] meet some baseline standard of secular orthodoxy." Rosenberger, 515 U.S. at 844. As the Court stated in Rosenberger, however, the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." Id. at 835.

There should be no mistake, then, about what's at stake here. If the theory advanced by respondents is to become enshrined in this Court's case law, the full extermination of private religious speech from the public schools would be well on its way. See Adler v. Duval County School Bd., 174 F.3d 1236, 1256- 57 (11th Cir. 1999) (Marcus, J., dissenting) ("[T]he majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony ....").

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The Court should adhere to the principle of neutrality, avoid entangling schools in the review of student speech for religious words and influences, and uphold the Santa Fe policy.

III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES.

The express purpose of the Santa Fe policy for football games is "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. Those are "legitimate secular purposes." Lynch, 465 U.S. at 693 (O'Connor, J., concurring) ("solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" are legitimate secular purposes).

***23** The policy also provides an opportunity for the individual student speakers to express themselves publicly, thereby improving their own confidence and skills. And it allows the student speakers to seek unity within and reflection among the student body, thereby helping to heal some of the schisms and frustrations that inevitably develop in high schools. One need not reflect long on some of the horrific events in this country's public high schools in the past year to appreciate the desirability and validity of such goals.

The court of appeals did cast negative aspersions on the fact that the school policy states that the student may give an "message and/or invocation." But that language is neutral toward religious speech -- and thus is entirely permissible. As Justice O'Connor explained in Wallace v. Jaffree, even if a "statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). Thus, Justice O'Connor noted that a neutral moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others," would pass muster. Id. at 76.

Chief Justice Burger and Justice White both concurred with Justice O'Connor's analysis on this point. Chief Justice Burger explained: "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." Id. at 85 (Burger, C.J., dissenting). The Chief Justice agreed with Justice O'Connor that it "makes no sense to say" that a state "endorse[s] prayer" by specifying that "voluntary prayer is one of the authorized activities." Id. And Justice White noted that the student who asked whether he can pray during a moment of silence must be told "yes," and "[i]f that is the case, I would not invalidate a statute that at the outset ***24** provided the legislative answer to the question, 'May I pray?"' Id. at 91 (White, J., dissenting).

As Justice O'Connor suggested in Wallace, it would be a bizarre rule, to put it charitably, that condemned a school policy where a student could give a "message and/or invocation," but allowed a policy where a student could give a "message" -- when in fact the student was free under both policies to speak religious words. If the Constitution turned on such a strange distinction, the school here surely would re-adopt its policy without the word "invocation" and then school officials would spend their time answering "yes" to students asking whether they could utter religious words. That makes no sense, as the three Justices who addressed the issue concluded in Wallace.

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In that regard, we note that the five-Justice majority opinion in Wallace never said that inclusion of the word "prayer" as a mere alternative rendered the Alabama statute unconstitutional. Rather, there was "unrebutted evidence of legislative intent," id. at 58 -- evidence that "ma[de] it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words 'or voluntary prayer' to the statute." Id. at 61.

Santa Fe's policy carefully follows the path charted by Justice O'Connor in Wallace. The policy's neutral phrase "message and/or invocation" makes clear that the student may -- but need not -- choose to invoke God's name or speak religious words.

But "the neutral language is itself skewed," respondents no doubt will argue. To begin with, such a suggestion borders on the incoherent, particularly in the context of a facial challenge. More to the point, a fundamental problem to which student speech policies such as Santa Fe's must respond is that many people have misread Engel and Lee v. Weisman to require the wholesale elimination of religious speech -- even private religious speech -- from the public schools. Indeed, the Court ***25** can take judicial notice of the fact that those cases led to such widespread misinterpretation by public school officials that the President in 1995 ordered the Secretary of Education to distribute guidelines nationwide explaining that student religious speech is not only permitted, but protected, in public schools. See Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/ religion.html (May 1998) ("The purpose of promulgating these presidential guidelines [in 1995] was to end much of the confusion regarding religious expression in our nation's public schools .... Schools may not discriminate against private religious expression by students ....").

The Santa Fe policy also combats that widespread misinterpretation by clarifying in a neutral way that religious speech is simply an alternative that is permitted, but not required, from student speakers at football games -- akin to what the presidential guidelines stated and this Court held in Widmar, Mergens, Lamb's Chapel, and Rosenberger.

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE.

Respondents may suggest that most speakers at football games ultimately will choose to say religious words. But in this facial challenge to the policy, with no record to analyze, there is no basis to assume that the forum in fact will be used primarily by speakers employing religious words. See United States v. Salerno, 481 U.S. 739, 745 (1987). The Court here has only to determine "whether it is possible for the [policy] to be implemented in a constitutional manner." Mergens, 496 U.S. at 260 (Kennedy, J., concurring); see also Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

In any event, if most speakers express religious words, that development could raise (at most) claims of audience confusion over whether the government had somehow encouraged or ***26** endorsed religion. Of course, a disclaimer making clear that the private speech is not approved or endorsed by the state, while not constitutionally necessary with respect to an individual's verbal speech, see Pinette, 515 U.S. at 786 (Souter, J., concurring), would eliminate any conceivable problem, see Mergens, 496 U.S. at 266-70 (Marshall, J., concurring).

There is a more direct and persuasive answer, however, to this kind of argument. The fact that some percentage (even 100%) of the speakers at a public school event

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may choose to engage in religious speech in a neutrally available forum cannot be a constitutional problem any more than if 100% of government workers donate a portion of their salaries to religious organizations. Cf. Witters, 474 U.S. at 486; see also Agostini, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); Mueller, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of citizens claimed benefits under the law.").

Consider the following practical example of the problems with this kind of approach: If High School A has events where 10% of the students utter religious words, High School B holds events where 50% of the students utter religious words, and High School C has events where 95% of the students utter religious words, what result? Do the percentages matter? Do the relative percentages matter? How? Does High School C have to tell some students to stop speaking religious words? Which ones? (And what exactly are sufficiently "religious words" to use in making this calculation, in any event?) [FN6]

FN6. Respondents may also raise the specter that school officials will in fact coerce students into providing religious messages. If so, that will provide occasion for an as-applied challenge to the school's implementation of its policy. See Bowen, 487 U.S. at 618-21; Pinette, 515 U.S. at 766 (plurality opinion of Scalia, J.) (discussing hypothetical applications where a "governmental entity manipulates its administration of a public forum").

***27** V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

In Establishment Clause cases, the search for an overarching test is not always necessary, see Lee, 505 U.S. at 586, and can sometimes be counterproductive or even harmful, see Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("Any test that must deal with widely disparate situations risks being so vague as to be useless. ... Lemon has, with some justification, been criticized on this score.").

The Court, of course, has been closely and deeply divided regarding the appropriate test and way to analyze government practices (i) that favor or promote religion over non-religion and (ii) that are deeply rooted in our history and tradition. See Lee, 505 U.S. at 632 (Scalia, J., dissenting) (decision "lays waste a tradition that is as old as public-school graduation ceremonies themselves"); County of Allegheny, 492 U.S. at 657 (Kennedy, J., concurring and dissenting) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); Lynch, 465 U.S. at 674 (upholding government's nativity display: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); Marsh, 463 U.S. at 792 (legislative prayer constitutional because it has become "part of the fabric of our society"); Engel, 370 U.S. at 446 (Stewart, J., ***28** dissenting) ("What is relevant to the issue here is ... the history of the religious traditions of our people ....").

But those deep juridical divisions about the proper Establishment Clause "test" and analysis have by and large disappeared -- or been muted as irrelevant -- when the Court has analyzed laws neutral toward religion in cases such as Widmar,

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Mergens, Lamb's Chapel, and Witters. As Justice Thomas has explained, while the Court's Establishment Clause jurisprudence arguably is "in hopeless disarray" in several areas, the principle that government neutrality satisfies the Establishment Clause "has enjoyed an uncharacteristic degree of consensus." Rosenberger, 515 U.S. at 861 (Thomas, J., concurring). No matter what Establishment Clause test might be employed, the Court generally has held that a law neutral toward religion satisfies Establishment Clause scrutiny (with a limited exception not relevant to this case [FN7]).

> FN7. The Court has suggested that neutrality may not suffice in that limited class of cases where government monies in a neutral benefits program would go directly to religious institutions. Of course, that exception is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence establishing neutrality as an Establishment Clause safe harbor. See Rosenberger, 515 U.S. at 852-63 (Thomas, J., concurring). But this case, in any event, does not involve a funding program.

It is true, of course, that some citizens hostile to religion in any form may argue that even government neutrality toward private religion is still "too favorable" toward religion. These citizens may not want to see private displays of religion in the open public square (as in Pinette), to hear private individuals express religion in the public square (as here), to read religious speech as an expressly listed alternative in a student speech policy, to know that religion is obtaining taxpayer-funded assistance on a neutral basis (as with police and fire protection for churches), to see places of worship built alongside other buildings in residential communities (as most zoning ordinances allow). Some citizens may want to be free of ***29** private religious speech and organizations just as much as they want to be free from the government's "exercise of religion." But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society -- below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.

The Religion Clauses, of course, do not require any such "hostility to religion, religious ideas, religious people, or religious schools." Kiryas Joel, 512 U.S. at 717 (O'Connor, J., concurring). On the contrary, the Constitution, this Court's precedents, and our traditions demand that government accord religious speech, religious people, and religious organizations at least the same treatment as their secular counterparts. This Court therefore has stated time and again, and often unanimously, that government neutrality toward religion-- meaning no discrimination between religious and non-religious organizations, people, and speech -- is not an Establishment Clause violation. Striking down a law neutral toward religion, the Court has said, would reflect the "hostility to religion" that the Constitution neither requires nor permits. Rosenberger, 515 U.S. at 846; see generally Eugene Volokh, Equal Treatment is Not Establishment, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999).

Respondents ask this Court to ignore the neutrality of the school policy and, as a necessary result, to cleanse public schools throughout the country of private religious speech. The Court should reject respondents' submission and affirm, as it has done many times before, that a neutral government policy of the kind maintained by Santa Fe High School satisfies the Establishment Clause.

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*30 CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,1999.
Santa Fe Independent School Dist. v. Doe
1999 WL 1272963

Briefs and Other Related Documents (Back to top)

• 2000 WL 374300, 68 USLW 3654 (Oral Argument) Oral Argument (Mar. 29, 2000)

• 2000 WL 340270 (Appellate Brief) SUPPLEMENTAL BRIEF FOR PETITIONER (Mar. 28, 2000)

• 2000 WL 340266 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Mar. 27, 2000)

• 2000 WL 263824 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Mar. 08, 2000)

• 2000 WL 140838 (Appellate Brief) BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS , NATIONAL PEARL, PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS (Feb. 02, 2000)

• 2000 WL 140928 (Appellate Brief) BRIEF FOR RESPONDENTS (Feb. 02, 2000)

• 2000 WL 126190 (Appellate Brief) BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS (Jan. 31, 2000)

• 1999 WL 1272941 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

• 1999 WL 1272942 (Appellate Brief) Brief on the Merits of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Dec. 30, 1999)

• 1999 WL 1272948 (Appellate Brief) BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

• 1999 WL 1272950 (Appellate Brief) BRIEF OF AMICI CURIAE SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DI STRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER (Dec. 30, 1999)

• 1999 WL 1272967 (Appellate Brief) BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

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• 1999 WL 1269304 (Appellate Brief) BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1269325 (Appellate Brief) BRIEF FOR PETITIONER (Dec. 29, 1999)

• 1999 WL 1272953 (Appellate Brief) BRIEF OF AMICUS CURIAE THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1272970 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1276928 (Appellate Brief) BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R yPA 16yr2000026040;0001;;ES;PAADCS16;1000636;r), RICHARD K. ARMEY (R TX 26), TOM DELAY (R TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BA RR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX (Dec. 29, 1999)

• 1999 WL 33612744 (Joint Appendix) (Dec. 29, 1999)

• 1999 WL 1269303 (Appellate Brief) BRIEF AMICI CURIAE FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER (Dec. 28, 1999)

• 1999 WL 1259991 (Appellate Brief) BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER (Dec. 23, 1999)

• 1999 WL 1267471 (Appellate Brief) BRIEF OF STUDENT PRESS LAW CENTER, AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY (Dec. 23, 1999)

• 1999 WL 33611439 (Appellate Filing) Response to Petition for Writ of Certiorari (Oct. 08, 1999)

• 1999 WL 33611367 (Appellate Filing) Petitioner's Supplemental Brief in Support of the Petition for Writ of Certiorari (Aug. 24, 1999)

• 1999 WL 33611382 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

• 1999 WL 33611383 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

• 1999 WL 33611385 (Appellate Filing) Brief of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Aug. 06, 1999)

• 1999 WL 33611384 (Appellate Filing) Brief Amici Curiae for Stephanie Vega and Other Students and Parents of Santa Fe Independent School District in Support of Petitioner (Aug. 04, 1999)

• 1999 WL 33611365 (Appellate Filing) Petition for Writ of Certiorari (Jul. 06,

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Briefs and Other Related Documents

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,
v.
Jane DOE, Individually and as Next Friend for Her Minor Children, Jane and John Doe, et al.

No. 99-62.

Argued March 29, 2000.
Decided June 19, 2000.

Students and their parents filed § 1983 action against school district, alleging that district's policies and practices, including policy of permitting student-led, student-initiated **prayer** before football games, violated Establishment Clause and demanding prospective injunctive and declaratory relief in addition to money damages. The United States District Court for the Southern District of Texas, Samual B. Kent, J., ordered district to enact more restrictive policy, allowing only nonsectarian, nonproselytizing **prayer,** and appeals were taken. The United States Court of Appeals for the Fifth Circuit, 168 F.3d 806, determined that even modified policy violated Establishment Clause. District's petition for certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) student-led, student-initiated invocations prior to football games did not amount to private speech; (2) policy of permitting such invocations was impermissibly coercive; and (3) challenge to policy was not premature, as it was invalid on its face.

Affirmed.

Chief Justice Rehnquist filed a dissenting opinion, in which Justices Scalia and Thomas joined.

West Headnotes

[1] Constitutional Law ⚷274(2)
92k274(2)

The Fourteenth Amendment imposes the First Amendment's substantive limitations on the legislative power of the States and their political subdivisions. U.S.C.A. Const.Amends. 1, 14.

[2] Constitutional Law ⚷84.5(3)
92k84.5(3)

[2] Schools ⚷165
345k165

Student-led, student-initiated invocations prior to football games, as authorized by policy of public school district, did not amount to private speech, for purposes of Establishment Clause, as invocations were given over school's public address system by speaker who was elected by majority of student body, invocations took place on government property at government- sponsored, school-related events, expressed purposes of policy encouraged selection of religious message, and audience would perceive message as public expression of majority views delivered with district's approval. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚷82(9)
92k82(9)

Selective access does not transform government property into a public forum for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law ⚷82(1)
92k82(1)

Fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

[5] Constitutional Law ⚷84.1
92k84.1

The Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ⚷84.5(3)
92k84.5(3)

In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of **prayer** in

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public schools. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law ⚿84.1
92k84.1

When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is entitled to some deference, but it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law ⚿84.5(3)
92k84.5(3)

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚿84.5(3)
92k84.5(3)

[9] Schools ⚿165
345k165

Public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games was impermissibly coercive, despite policy's mechanism of authorizing student elections to determine whether invocations would be given and which student would lead them, as such elections were product of district decision and encouraged divisiveness along religious lines, students' decision to attend football games could not be deemed entirely voluntary, and, even if attendance was voluntary, district could not compel student to choose between religious conformity and foregoing attendance at game. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚿84.1
92k84.1

The preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚿84.1
92k84.1

It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚿84.1
92k84.1

The government may no more use social pressure to enforce religious orthodoxy than it may use more direct means. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law ⚿84.5(3)
92k84.5(3)

The Religion Clauses of the First Amendment do not impose a prohibition on all religious activity in public schools. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law ⚿84.5(3)
92k84.5(3)

First Amendment's Religion Clauses do not prohibit any public school student from voluntarily praying at any time before, during, or after the schoolday. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law ⚿46(1)
92k46(1)

Students' and parents' challenge to constitutionality of public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games was not premature, although no message had actually been delivered under policy, as policy was invalid on its face because it established improper majoritarian, student-body election on religion, and had purpose of, and created perception of, encouraging delivery of **prayer** at series of important school events. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law ⚿84.1
92k84.1

Under the *Lemon* standard, a court must invalidate a statute challenged under the Establishment Clause if it lacks a secular legislative purpose. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law ⚿84.5(3)
92k84.5(3)

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[17] Schools ⚿165
345k165

Public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games lacked valid secular purpose, but was instead implemented with purpose of endorsing school **prayer,** in light of text of policy, which reflected district's involvement in election of speaker and content of message, and evolution of policy, which arose in response to issue of school **prayer.** U.S.C.A. Const.Amend. 1.

[18] Constitutional Law ⚿84.1
92k84.1

Whether a government activity violates the Establishment Clause is in large part a legal question to be answered on the basis of judicial interpretation of social facts; every government practice must be judged in its unique circumstances. U.S.C.A. Const.Amend. 1.

****2268 *290** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Prior to 1995, a student elected as **Santa Fe** High School's student council chaplain delivered a **prayer** over the public address system before each home varsity football game. Respondents, Mormon and Catholic students or alumni and their mothers, filed a suit challenging this practice and others under the Establishment Clause of the First Amendment. While the suit was pending, petitioner school district (District) adopted a different policy, ****2269** which authorizes two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students held elections authorizing such **prayers** and selecting a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian, nonproselytizing **prayer.** The Fifth Circuit held that, even as modified by the District Court, the football **prayer** policy was invalid.

Held: The District's policy permitting student-led, student-initiated **prayer** at football games violates the Establishment Clause. Pp. 2275-2283.

(a) The Court's analysis is guided by the principles endorsed in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There, in concluding that a **prayer** delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so, *id.,* at 587, 112 S.Ct. 2649. The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here--on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public **prayer**--is not properly characterized as "private" speech. Although the District relies heavily on this Court's cases addressing public forums, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, it is clear that the District's ***291** pregame ceremony is not the type of forum discussed in such cases. The District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally, see, *e.g., Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592, but, rather, allows only one student, the same student for the entire season, to give the invocation, which is subject to particular regulations that confine the content and topic of the student's message. The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. See *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193. Moreover, the District has failed to divorce itself from the invocations' religious content. The policy involves both perceived and actual endorsement of religion, see *Lee,* 505 U.S., at 590, 112 S.Ct. 2649, declaring that the student elections take place because the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "[u]pon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemniz[ing] the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an

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appeal for divine assistance and, as used in the past at **Santa Fe** High School, has always entailed a focused religious message. A conclusion that the message is not "private speech" is also established by factors beyond the policy's text, including the official setting in which the invocation is delivered, see, *e.g., Wallace v. Jaffree,* 472 U.S. 38, 73, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29, by the policy's sham secular purposes, see *id.,* at 75, 105 S.Ct. 2479, and by its history, which indicates that the District intended to preserve its long-sanctioned practice of **prayer** before football games, see *Lee,* 505 U.S., at 596, 112 S.Ct. 2649. Pp. 2275-2279.

2270 (b) The Court rejects the District's argument that its policy is distinguishable from the graduation **prayer in *Lee* because it does not coerce students to participate in religious observances. The first part of this argument--that there is no impermissible government coercion because the pregame messages are the product of student choices--fails for the reasons discussed above explaining why the mechanism of the dual elections and student speaker do not turn public speech into private speech. The issue resolved in the first election was whether a student would deliver **prayer** at varsity football games, and the controversy in this case demonstrates that the students' views are not unanimous on that issue. One of the Establishment Clause's purposes is to remove debate over this kind of issue from governmental supervision or control. See *Lee,* 505 U.S., at 589, 112 S.Ct. 2649. Although the ultimate choice of student speaker is attributable to the students, the District's decision *292 to hold the constitutionally problematic election is clearly a choice attributable to the State, *id.,* at 587, 112 S.Ct. 2649. The second part of the District's argument--that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary--is unpersuasive. For some students, such as cheerleaders, members of the band, and the team members themselves, attendance at football games is mandated, sometimes for class credit. The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football. *Id.,* at 593, 112 S.Ct. 2649. The Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals. See *id.,* at 596, 112 S.Ct. 2649. Pp. 2279-2281.

(c) The Court also rejects the District's argument that respondents' facial challenge to the policy necessarily must fail because it is premature: No invocation has as yet been delivered under the policy. This argument assumes that the Court is concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that the Court keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, *Lynch v. Donnelly,* 465 U.S. 668, 694, 104 S.Ct. 1355, 79 L.Ed.2d 604, and guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. See, *e.g., Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520; *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745. As discussed above, the policy's text and the circumstances surrounding its enactment reveal that it has such a purpose. Another constitutional violation warranting the Court's attention is the District's implementation of an electoral process that subjects the issue of **prayer** to a majoritarian vote. Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Cf. *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193. For the foregoing reasons, the policy is invalid on its face. Pp. 2281-2283.

168 F.3d 806, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, *293 C.J., filed a dissenting opinion, in which **2271 SCALIA and THOMAS, JJ., joined, *post,* p. 2283.

Jay A. Sekulow, for petitioner.

John Cornyn, Austin, TX, for Texas, et al., as amici curiae by special leave of the Court.

Anthony P. Griffin, Galveston, TX, for respondent.

*294 Justice STEVENS delivered the opinion of the Court.

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Prior to 1995, the **Santa Fe** High School student who occupied the school's elective office of student council chaplain delivered a **prayer** over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, **prayer** initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing **prayer.** The Court of Appeals held that, even as modified by the District Court, the football **prayer** policy was invalid. We granted the school district's petition for certiorari to review that holding.

I

The **Santa Fe** Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the State. The District includes the **Santa Fe** High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment. [FN1]

FN1. A decision, the Fifth Circuit Court of Appeals noted, that many District officials "apparently neither agreed with nor particularly respected." 168 F.3d 806, 809, n. 1 (C.A.5 1999). About a month after the complaint was filed, the District Court entered an order that provided, in part:
"[A]ny further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." App. 34-35.

***295** Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, ****2272** [FN2] and to deliver overtly Christian **prayers** over the public address system at home football games.

FN2. At the 1994 graduation ceremony the senior class president delivered this invocation:
"Please bow your heads.
"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of **Santa Fe.** We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray." *Id.*, at 19.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. [FN3] With respect ***296** to the impending graduation, the order provided that "non-denominational **prayer"** consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the **prayer** was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the **prayer** is non-proselytizing." App. 32.

FN3. For example, it prohibited school officials from endorsing or participating in the baccalaureate ceremony sponsored by the **Santa Fe** Ministerial Alliance, and ordered the District to establish

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policies to deal with
"manifest First Amendment infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental." *Id.*, at 34.

In response to that portion of the order, the District adopted a series of policies over several months dealing with **prayer** at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

" 'The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing ***297** their graduation ceremonies.' " 168 F.3d 806, 811 (C.A.5 1999) (emphasis deleted).

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include **prayer** at the high school graduation." App. 52. In a second vote the class elected two seniors to deliver the invocation and benediction. [FN4]

FN4. The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen." *Id.*, at 53. The student benediction was similar in content and closed: "Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways. Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen." *Id.*, at 54.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian ****2273** and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "**Prayer** at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytising," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation: "[T]he district's high school students voted to determine whether a student would deliver **prayer** at varsity football games.... The students chose to allow a ***298** student to say a **prayer** at football games." *Id.*, at 65. A week later, in a separate election, they selected a student "to deliver the **prayer** at varsity football games." *Id.*, at 66.

The final policy (October policy) is essentially the same as the August policy, though it omits the word " **prayer**" from its title, and refers to "messages" and "statements" as well as "invocations." [FN5] It is the validity of that policy that is before us. [FN6]

FN5. Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

FN6. It provides:
"STUDENT ACTIVITIES:
"PRE-GAME CEREMONIES AT FOOTBALL GAMES
"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether

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such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.*, at 104-105.

***299** The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it held that the school's "action must not 'coerce anyone to support or participate in' a religious exercise." App. to Pet. for Cert. E7. Applying that test, it concluded that the graduation **prayers** appealed "to distinctively Christian beliefs," [FN7] and that delivering a ****2274 prayer** "over the school's public address system prior to each football and baseball game coerces student participation in religious events." [FN8] Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals majority agreed with the Does.

FN7. "The graduation **prayers** at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these **prayers** during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause." App. to Pet. for Cert. E8.

FN8. *Id.,* at E8-E9.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992), that court held that student-led **prayer** that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school ***300** graduations and that school-encouraged **prayer** was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist.,* 70 F.3d 402 (C.A.5 1995), it had described a high school graduation as "a significant, once in-a- lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." *Id.,* at 406-407. [FN9]

FN9. Because the dissent overlooks this case, it incorrectly assumes that a "**prayer**-only policy" at football games was permissible in the Fifth Circuit. See *post,* at 2286 (opinion of REHNQUIST, C.J.).

In its opinion in this case, the Court of Appeals explained:

"The controlling feature here is the same as in *Duncanville:* The **prayers** are to be delivered *at football games*--hardly the sober type of annual event that can be appropriately solemnized with **prayer.** The distinction to which [the District] points is simply one without difference. Regardless of whether the **prayers** are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the **prayers.** Thus, as we indicated in *Duncanville,* our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek **Prayer** Policy cannot survive. We therefore reverse the district court's holding that [the District's] alternative Clear Creek **Prayer** Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions." 168 F.3d, at 823.

The dissenting judge rejected the majority's distinction between graduation ceremonies and football games. In his ***301** opinion the District's

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October policy created a limited public forum that had a secular purpose [FN10] and provided neutral accommodation of noncoerced, private, religious speech. [FN11]

> FN10. "There are in fact several secular reasons for allowing a brief, serious message before football games--some of which [the District] has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.
> "Having again relinquished all editorial control, [the District] has created a limited public forum for the students to give brief statements or **prayers** concerning the value of those goals and the methods for achieving them." 168 F.3d, at 835.
>
> FN11. "The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non- coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious speech." *Id.*, at 836.

****2275** We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated **prayer** at football games violates the Establishment Clause." 528 U.S. 1002, 120 S.Ct. 494, 145 L.Ed.2d 381 (1999). We conclude, as did the Court of Appeals, that it does.

II

[1] The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Wallace v. Jaffree,* 472 U.S. 38, 49-50, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) . In *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), we held that a **prayer** delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student **prayer** at a different ***302** type of school function, our analysis is properly guided by the principles that we endorsed in *Lee.*

As we held in that case:

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Id.,* at 587, 112 S.Ct. 2649 (citations omitted) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)).

[2] In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (opinion of O'CONNOR, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

[3] These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such ***303** forums, [FN12] it is clear that the pregame ceremony is not the type of forum discussed in those cases. [FN13] ****2276** The **Santa Fe** school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' ... by the student body generally." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or

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invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message, see *infra,* at 2277-2278, 2278-2279. By comparison, in *Perry* we rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here. [FN14] As we concluded in *Perry,* "selective access does not transform government property into a public forum." 460 U.S., at 47, 103 S.Ct. 948.

FN12. See, *e.g.,* Brief for Petitioner 44-48, citing *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (limited public forum); *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (limited public forum); *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (traditional public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (limited public forum). Although the District relies on these public forum cases, it does not actually argue that the pregame ceremony constitutes such a forum.

FN13. A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause. See, *e.g., Pinette,* 515 U.S., at 772, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment) ("I see no necessity to carve out ... an exception to the endorsement test for the public forum context").

FN14. The school's internal mail system in *Perry* was open to various private organizations such as "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units." 460 U.S., at 39, n. 2, 103 S.Ct. 948.

***304** Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, **Santa Fe's** student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

[4] Recently, in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

> "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here." *Id.,* at 235, 120 S.Ct. 1346.

Like the student referendum for funding in *Southworth,* this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. [FN15] Because "fundamental rights may not be ***305** submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the District's elections are insufficient safeguards of diverse student speech.

FN15. If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.
The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen." *Post,* at 2285.

In *Lee,* the school district made the related argument that its policy of endorsing only "civic or nonsectarian" **prayer** was acceptable because it minimized the intrusion on the audience as a whole. We ****2277** rejected that claim by explaining that such a majoritarian policy "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." 505 U.S., at 594, 112 S.Ct. 2649. Similarly, while **Santa Fe's** majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself

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from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is " 'one of neutrality rather than endorsement' " [FN16] or by characterizing the individual student as the "circuit-breaker" [FN17] in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee,* the "degree of school involvement" makes it clear that the pregame **prayers** bear "the imprint of the State and thus put school-age children who objected in an untenable position." *Id.,* at 590, 112 S.Ct. 2649.

FN16. Brief for Petitioner 19 (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)).

FN17. Tr. of Oral Arg. 7.

The District has attempted to disentangle itself from the religious messages by developing the two-step student ***306** election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board *has chosen to permit* students to deliver a brief invocation and/or message." App. 104 (emphasis added). The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." *Id.,* at 104-105. The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.*

[5] In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good sportsmanship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. [FN18] Indeed, the only type of message that is expressly endorsed in the text is an "invocation"--a term that primarily describes an appeal for divine ***307** assistance. [FN19] In fact, as used in the past at **Santa Fe** High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely ****2278** how the students understand the policy. The results of the elections described in the parties' stipulation [FN20] make it clear that the students understood that the central question before them was whether **prayer** should be a part of the pregame ceremony. [FN21] We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public **prayer** as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

FN18. THE CHIEF JUSTICE's hypothetical of the student body president asked by the school to introduce a guest speaker with a biography of her accomplishments, see *post,* at 2287-2288 (dissenting opinion), obviously would pose no problems under the Establishment Clause.

FN19. See, *e.g.,* Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a **prayer** of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship").

FN20. See *supra,* at 2272-2273, and n. 4.

FN21. Even if the plain language of the October policy were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S., at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 534-535, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (making the same point in the Free Exercise Clause context).

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is

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selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is ***308** clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

[6] In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of **prayer** in public schools." *Wallace,* 472 U.S., at 73, 76, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective **Santa Fe** High School student will unquestionably perceive the inevitable pregame **prayer** as stamped with her school's seal of approval.

[7] The text and history of this policy, moreover, reinforce our objective student's perception that the **prayer** is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace,* 472 U.S., at 75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment).

***309** According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis [h] an appropriate environment ****2279** for competition." Brief for Petitioner 14. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste [r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes **prayer** sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet nonreligious.

Most striking to us is the evolution of the current policy from the long- sanctioned office of "Student Chaplain" to the candidly titled "**Prayer** at Football Games" regulation. This history indicates that the District intended to preserve the practice of **prayer** before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led **prayer** at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee,* 505 U.S., at 596, 112 S.Ct. 2649.

[8] School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying ***310** message to adherents that they are insiders, favored members of the political community." *Lynch,* 465 U.S., at 688, 104 S.Ct. 1355 (O'CONNOR, J., concurring). The delivery of such a message--over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public **prayer**--is not properly characterized as "private" speech.

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III

[9] The District next argues that its football policy is distinguishable from the graduation **prayer** in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was "whether a student would deliver **prayer** at varsity football games," App. 65, and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

[10] One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." 505 U.S., at 589, 112 S.Ct. 2649. The two student elections authorized ***311** by the policy, coupled with ****2280** the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee,* 505 U.S., at 587, 112 S.Ct. 2649.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Brief for Petitioner 41. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

[11] There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee,* "[l]aw reaches past formalism." 505 U.S., at 595, 112 S.Ct. 2649. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." *Ibid.* We stressed in *Lee* the ***312** obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.,* at 593, 112 S.Ct. 2649. High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.,* at 596, 112 S.Ct. 2649.

[12] Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame **prayer** has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no

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more use social pressure to enforce orthodoxy than it may use more direct means." *Id.*, at 594, 112 S.Ct. 2649. As in *Lee*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.*, at 592, 112 S.Ct. 2649. The constitutional command will not permit the District "to exact religious conformity from a student as the ****2281** price" of joining her classmates at a varsity football game. [FN22]

> FN22. "We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands." *Lee*, 505 U.S., at 595-596, 112 S.Ct. 2649.

[13][14] ***313** The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Wallace*, 472 U.S., at 59, 105 S.Ct. 2479. Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of **prayer.**

[15] Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship ***314** because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch*, 465 U.S., at 694, 104 S.Ct. 1355 (O'CONNOR, J., concurring), and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of **prayer** to a majoritarian vote.

[16] The District argues that the facial challenge must fail because "**Santa Fe's** Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Brief for Petitioner 17 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 613, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen*, THE CHIEF JUSTICE concluded that "[a]s in previous cases involving facial challenges on Establishment Clause grounds, *e.g.*, *Edwards v. Aguillard*, [482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)]; *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, ****2282** 77 L.Ed.2d 721 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ..., which guides '[t]he general nature of our inquiry in this area,' *Mueller v. Allen*, *supra*, at 394, 103 S.Ct. 3062." 487 U.S., at 602, 108 S.Ct. 2562. Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91

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S.Ct. 2105, 29 L.Ed.2d 745 (1971). It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

[17] As discussed, *supra,* at 2277-2278, 2278-2279, the text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker ***315** and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message--that of **Santa Fe's** traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

[18] This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led **prayer** at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such **prayers** from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts.... Every government practice must be judged in its unique circumstances...." *Lynch,* 465 U.S., at 693-694, 104 S.Ct. 1355 (O'CONNOR, J., concurring). Our discussion in the previous sections, *supra,* at 2277-2279, demonstrates that in this case the District's direct involvement with school **prayer** exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every **Santa Fe** High School student understands clearly--that this policy is about **prayer.** The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school **prayer.**

***316** Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student **prayer,** was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace,* for example, we invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of **prayer** activities for one minute at the beginning of each school day." 472 U.S., at 60, 105 S.Ct. 2479; see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Therefore, even if no **Santa Fe** High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage **prayer** is also at issue. Government efforts to endorse religion cannot evade constitutional ****2283** reproach based solely on the remote possibility that those attempts may fail.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of **prayer.** Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. [FN23] Like the referendum in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. ***317** 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. [FN24] No further injury is required for the policy to fail a facial challenge.

FN23. THE CHIEF JUSTICE accuses us of "essentially invalidat[ing] all student elections," see *post,* at 2285. This is obvious hyperbole. We have concluded that the resulting religious message under

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this policy would be attributable to the school, not just the student, see *supra,* at 2275- 2279. For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored **prayer** violates the Establishment Clause.

FN24. THE CHIEF JUSTICE contends that we have "misconstrue[d] the nature ... [of] the policy as being an election on '**prayer**' and 'religion,' " *post,* at 2285. We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver ***prayer*** at varsity football games," that the "students chose to allow a student to say a ***prayer*** at football games," and that a second election was then held "to determine which student would deliver the ***prayer.***" App. 65-66 (emphases added). Furthermore, the policy was titled "***Prayer*** at Football Games." *Id.,* at 99 (emphasis added). Although the District has since eliminated the word "**prayer**" from the policy, it apparently viewed that change as sufficiently minor as to make holding a new election unnecessary.

To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum," *Pinette,* 515 U.S., at 780, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment). Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of **prayer** at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

***318** Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and **prayer,** to be observed by acknowledging with grateful hearts the many and signal favors of Almighty ****2284** God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." See also *Bowen v. Kendrick,* 487 U.S. 589, 612, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). While there is an exception to this principle in the First Amendment overbreadth context because of our concern that people may refrain from speech out of fear of prosecution, *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32, 38-40, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999), there is no similar justification for Establishment Clause cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question is not whether the district's policy *may be* applied in violation of the Establishment Clause, but whether it inevitably will be.

***319** The Court, venturing into the realm of prophecy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante,* at 2282. To do so, it applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). [FN1]

FN1. The Court rightly points out that in facial challenges in the Establishment Clause context, we have looked to *Lemon's* three factors to "guid[e][t]he general nature of our inquiry." *Ante,* at 2282 (internal quotation marks omitted) (citing *Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). In *Bowen,* we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." 487 U.S., at 612, 108 S.Ct. 2562 (internal quotation marks omitted). But here the Court, rather

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how the referendum functions. See *id.*, at 235-236, 120 S.Ct. 1346.

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." *Ante,* at 2283. The Court so holds despite that any speech that may occur as a result of the election process here would be *private,* not *government,* speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say **prayers.** Under the Court's view, the mere grant of power ***322** to the students to vote for such ****2286** offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student **prayer,** was a constitutional violation." *Ante,* at 2282. But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104-105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace,* 472 U.S., at 74-75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Mueller v. Allen,* 463 U.S. 388, 394-395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (stressing this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). The Court grants no deference to--and appears openly hostile toward--the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante,* at 2277; Cf. *Lynch,* 465 U. S, at 693, 104 S.Ct. 1355 (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante,* at 2277. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.' " Under the Court's logic, a public school that sponsors ***323** the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice. [FN4]

FN4. The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante,* at 2277-2278. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the Free Exercise Clause mandates such tolerance. See *ante,* at 2281 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch v. Donnelly,* 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

The Court bases its conclusion that the true purpose of the policy is to endorse student **prayer** on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." *Ante,* at 2278-2279, 2282. But the context-- attempted compliance with a District Court order--actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a **prayer**-only policy. See *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992). But the school district went further than required by the District Court order and eventually settled ****2287** on a policy that gave the student speaker a choice to

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deliver either an ***324** invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose. [FN5]

> FN5. *Wallace v. Jaffree,* 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to **prayer** to an existing statute providing a moment of silence for meditation. *Id.,* at 59, 105 S.Ct. 2479. Here the school district added a secular alternative to a policy that originally provided only for **prayer.** More importantly, in *Wallace,* there was "unrebutted evidence" that pointed to a wholly religious purpose, *id.,* at 58, 105 S.Ct. 2479, and Alabama "conceded in the courts below that the purpose of the statute was to make **prayer** part of daily classroom activity," *id.,* at 77-78, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

The Court also relies on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), to support its conclusion. In *Lee,* we concluded that the content of the speech at issue, a graduation **prayer** given by a rabbi, was "directed and controlled" by a school official. *Id.,* at 588, 112 S.Ct. 2649. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria--like good public speaking skills or social popularity--and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy ***325** would likely pass constitutional muster. See *Lee, supra,* at 630, n. 8, 112 S.Ct. 2649 (SOUTER, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. See *ante,* at 2276-2277. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment *speech* cases and is used as a guide for determining when we apply strict scrutiny. For example, we look to "content neutrality" in reviewing loudness restrictions imposed on speech in public forums, see *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and regulations against picketing, see *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. See *ante,* at 2276-2277.

But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, *e.g., Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). ****2288** Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" **prayer** and the policy's content limitations ***326** prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante,* at 2277.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

Briefs and Other Related Documents (Back to top)

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. 2000 WL 374300, 68 USLW 3654 (Oral Argument) Oral Argument (Mar. 29, 2000)

. 2000 WL 340270 (Appellate Brief) SUPPLEMENTAL BRIEF FOR PETITIONER (Mar. 28, 2000)

. 2000 WL 340266 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Mar. 27, 2000)

. 2000 WL 263824 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Mar. 08, 2000)

. 2000 WL 140838 (Appellate Brief) BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS , NATIONAL PEARL, PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS (Feb. 02, 2000)

. 2000 WL 140928 (Appellate Brief) BRIEF FOR RESPONDENTS (Feb. 02, 2000)

. 2000 WL 126190 (Appellate Brief) BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS (Jan. 31, 2000)

. 1999 WL 1272941 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272942 (Appellate Brief) Brief on the Merits of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Dec. 30, 1999)

. 1999 WL 1272948 (Appellate Brief) BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272950 (Appellate Brief) BRIEF OF AMICI CURIAE SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DI STRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272963 (Appellate Brief) BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272967 (Appellate Brief) BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1269304 (Appellate Brief) BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1269325 (Appellate Brief) BRIEF FOR PETITIONER (Dec. 29, 1999)

. 1999 WL 1272953 (Appellate Brief) BRIEF OF AMICUS CURIAE THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1272970 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1276928 (Appellate Brief) BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R yPA 16yr2000026040;0001;;ES;PAADCS16;1000636;r), RICHARD K. ARMEY (R TX 26), TOM DELAY (R

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TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BA RR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX (Dec. 29, 1999)

. 1999 WL 33612744 (Joint Appendix) (Dec. 29, 1999)

. 1999 WL 1269303 (Appellate Brief) BRIEF AMICI CURIAE FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER (Dec. 28, 1999)

. 1999 WL 1259991 (Appellate Brief) BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER (Dec. 23, 1999)

. 1999 WL 1267471 (Appellate Brief) BRIEF OF STUDENT PRESS LAW CENTER, AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY (Dec. 23, 1999)

. 1999 WL 33611439 (Appellate Filing) Response to Petition for Writ of Certiorari (Oct. 08, 1999)

. 1999 WL 33611367 (Appellate Filing) Petitioner's Supplemental Brief in Support of the Petition for Writ of Certiorari (Aug. 24, 1999)

. 1999 WL 33611382 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

. 1999 WL 33611383 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

. 1999 WL 33611385 (Appellate Filing) Brief of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Aug. 06, 1999)

. 1999 WL 33611384 (Appellate Filing) Brief Amici Curiae for Stephanie Vega and Other Students and Parents of Santa Fe Independent School District in Support of Petitioner (Aug. 04, 1999)

. 1999 WL 33611365 (Appellate Filing) Petition for Writ of Certiorari (Jul. 06, 1999)

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Friedrich, Dabney Langhorne - Nominations Files

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
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Brett Kavanaugh Binder [3]

Brett Kavanaugh – Florida School Vouchers

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

Facts:

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

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

District Court of Appeal of Florida,
First District.

John Ellis "Jeb" BUSH, in his official capacity as Governor of the State of Florida and Chairman of the State Board of Education; Attorney General Robert A. Butterworth, Secretary of Education Tom Gallagher, Secretary of State Katherine Harris, Comptroller Robert Milligan, Commissioner of Insurance and State Treasurer Bill Nelson, Commissioner of Agriculture Bob Crawford, in their official capacities and as members of the State Board of Education; and Florida Department of Education, Appellants,
v.
Ruth D. HOLMES; Gregory and Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; The Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers, Appellees.
Brenda McShane, in her own behalf as natural guardian of her child, Brenisha McShane; Dermita Merkman, in her own behalf and as natural guardian of her child, Jessica Merkman; Tracy Richardson, in her own behalf and as natural guardian of her child, Khaliah Clanton; Sharon Mallety, in her own behalf and as natural guardian of her child, Jermall Bell; Barbara Landrum, in her own behalf and as natural guardian of her children, Laquila and Stacy Marie Wheeler; and Urban League Of Greater Miami, Inc., Appellants,
v.
Ruth D. Holmes; Gregory And Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers,
Appellees.

Nos. 1D00-1121 and 1D00-1150.

Oct. 3, 2000.

Individuals filed separate complaints alleging that opportunity scholarship program (OSP) statute violated state and federal constitutions. The Circuit Court, Leon County, L. Ralph Smith, J., granted motion to consolidate and found that OSP, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is unconstitutional on its face under constitutional section providing for public education. State defendants and parents of students receiving opportunity scholarships appealed. The District Court of Appeal, Kahn, J., held that: (1) entering judgment holding OSP statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, and (2) OSP statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education.

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Reversed and remanded.

West Headnotes

[1] Judgment ⚿183
228k183

[1] Pleading ⚿343
302k343

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings was erroneous. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[2] Appeal and Error ⚿1073(1)
30k1073(1)

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, where prejudice was not demonstrated and parties had adequate notice, time to respond, and opportunity to be heard. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. §§ 59.041, 229.0537.

[3] Schools ⚿3
345k3

Opportunity scholarship program (OSP) statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education; although constitution directs that public education be accomplished through system of free public schools, nothing clearly prohibits legislature from allowing well delineated use of public funds for private school education. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[4] Constitutional Law ⚿26
92k26

The Florida Constitution is a limitation upon, rather than a grant of, power.

[5] Constitutional Law ⚿48(1)
92k48(1)

Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document.

[6] Constitutional Law ⚿48(1)
92k48(1)

[6] Constitutional Law ⚿48(3)
92k48(3)

When a legislative enactment is challenged, the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt.

[7] Constitutional Law ⚿14
92k14

The principle of "expressio unius est exclusio alterius," which holds that to express or include one thing implies the exclusion of the other or of the alternative, should be used sparingly with respect to the constitution.

[8] Constitutional Law ⚿12
92k12

[8] Constitutional Law ⚿13
92k13

Courts must be mindful that the constitution is what the people intended it to be; its dominant note is the general welfare, and it was not intended to bind like a strait-jacket, but contemplated experimentation for the common good.

[9] Appeal and Error ⚿170(2)
30k170(2)

District Court of Appeal would decline to consider constitutional arguments challenging statute, where trial court determined that such arguments contained mixed questions of law and fact and did not address arguments, but only addressed alternative claim of facial constitutionality that could be decided without presentation of evidence.

***670** Frank R. Jimenez, Acting General Counsel, and Reginald J. Brown, Deputy General Counsel, Tallahassee; Charles T. Canady, Washington, D.C.; Carol A. Licko, Thomson, Muraro, Razook & Hart, P.A., Miami; and Jay P. Lefkowitz and Brett M. Kavanaugh of Kirkland & Ellis, Washington, D.C.,

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for Appellants John Ellis" Jeb" Bush, et al.

Thomas E. Warner, Solicitor General of Florida, Louis F. Hubener, Assistant Attorney General, James A. Peters, Special Counsel, and Richard A. Hixson, Deputy Solicitor General, Tallahassee, for Robert A. Butterworth, Attorney General of Florida.

Harry L. Hooper, General Counsel, Comptroller's Office, Tallahassee, for Robert Milligan, Florida Comptroller.

Michael Olenick, General Counsel, Tallahassee, for Florida Department of Education.

Kenneth W. Sukhia of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tallahassee; and Clint Bolick and Matthew Berry, Institute for Justice, Washington, D.C., for Appellants Brenda McShane, et al.

Frank A. Shepherd of Pacific Legal Foundation, Miami, for Amici Curiae Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, Robert N. Wright, and Pacific Legal Foundation; and Paul D. Clement, Jeffrey M. Telep, and Jeffrey S. Bucholtz of King & Spalding, Washington, D.C., for Amici Curiae The Center for Education Reform, American Education Reform Foundation, American Legislative Exchange Council, Children First CEO America, Education Leaders Council, Floridians for School Choice, " I Have a Dream" Foundation of Washington, D.C., and Mayor Bret Schundler, Republican Mayor of Jersey City, New Jersey, and founder of Empower the People on behalf of Appellants Brenda McShane, et al.

Ronald G. Meyer of Meyer and Brooks, P.A., Tallahassee; Robert H. Chanin, John M. West, and Alice O'Brien of Bredhoff & Kaiser, P.L.L.C., Washington, D.C.; Andrew H. Kayton, American Civil Liberties Union Foundation of Florida, Inc., Miami; Michael A. Sussman of National Association for Advancement of Colored People, New York; Julie Underwood, General Counsel of National School Boards Association, Virginia; Elliot M. Mincberg and Judith E. Schaeffer, of People for the American Way Foundation, Washington, D.C.; Marc D. Stern of American Jewish Congress, New York; Steven K. Green and Ayesha N. Khan, Americans United for Separation of Church and State, Washington, D.C.; Steven R. Shapiro of American Civil Liberties Union Foundation, New York; Jeffrey P. Sinensky and Kara H. Stein of the American Jewish Committee, New York; Joan Peppard, Anti-Defamation League, Miami; and Elizabeth J. Coleman and Steven M. Freeman of Anti-Defamation League, New York, for Appellees Ruth D. Holmes, et al.

W. Dexter Douglass and Thomas P. Crapps of Douglass Law Firm, Tallahassee; Marvin E. Frankel and Justine A. Harris of Kramer Levin Naftalis & Frankel LLP, New York; David Strom of the American Federation of Teachers, Washington, D.C.; Pamela L. Cooper, General Counsel, Florida Teaching Profession-NEA, Tallahassee, for Appellees Florida Education Association/United, AFT AFL-CIO, et al.

KAHN, J.

This is a consolidated appeal from a final judgment declaring section 229.0537, Florida Statutes (1999), "insofar as it establishes a program through which the State pays for certain students to attend private schools," facially unconstitutional under article IX, section 1 of the Florida Constitution. [FN1] Section 229.0537 contains the provisions ***671** of Florida's Opportunity Scholarship Program (OSP) and is part of a larger comprehensive legislative program addressing Florida's public schools. *See* Ch. 99-398, Laws of Fla. For the reasons explained below, we reverse and remand this case for further proceedings. In so doing, we emphasize that our holding addresses only the narrow issue of the facial constitutionality of the OSP under article IX, section 1 of the Florida Constitution.

FN1. Article IX, section 1 provides:
Public education.--The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

I. BACKGROUND

Section 229.0537 became law on June 21, 1999. *See* Ch. 99-398, § 78, at 4368, Laws of Fla. The next day, the appellees in this consolidated appeal, a group of parents, Florida citizens, and interest groups, filed a

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complaint alleging that section 229.0537 violated certain constitutional provisions: (1) article I, section 3 of the Florida Constitution [FN2]; (2) article IX, section 1 of the Florida Constitution; (3) article IX, section 6 of the Florida Constitution [FN3]; and (4) the Establishment Clause of the First Amendment to the U.S. Constitution. On July 29, 1999, the Florida Education Association and others (FEA), filed a complaint challenging the constitutionality of section 229.0537 on the same four grounds raised by the appellees. [FN4] The complaints named as defendants Governor John Ellis "Jeb" Bush and cabinet members, in their official capacities and as members of the State Board of Education, in addition to the Florida Department of Education ("State defendants").

FN2. Article 1, section 3 provides:
Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

FN3. Article IX, section 6 provides:
State school fund.--The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

FN4. The record on appeal does not contain the complaint(s) filed by the FEA.

The FEA filed a motion to consolidate the two cases and the trial court granted this motion. A group of parents and guardians of students receiving opportunity scholarships ("the parents"), moved to intervene in both cases, and the trial court also granted these motions. The parents thereafter moved to dismiss the article IX, section 1 claims for lack of standing, justiciability, and failure to state a claim. Following a hearing, the trial court denied these motions.

The trial court held a case management conference on December 2, 1999. The court explained that the purpose of the conference was for the parties to identify "the issues that would require the presentation of evidence to resolve those issues and those issues that dealt with the challenge of the constitutionality of the statute on its face." After hearing arguments from the parties, the court deferred consideration of whether the statute was unconstitutional under the religion clauses in the Florida and U.S. constitutions. The court did decide, however, that it could consider the argument that section 229.0537 violated article IX, section 1 on its face because, in the trial court's view, this challenge did not require an evidentiary basis. Accordingly, on December 8, 1999, the trial court entered an order setting ***672** a final hearing for February 24, 2000, and directing the parties to file briefs on "the issue of the facial constitutionality of the Opportunity Scholarship Program, Fla. Stat., Section 229.0537, under Article IX, Section 1 of the Florida Constitution...."

On December 30, 1999, the plaintiffs filed separate briefs and attachments. On January 28, 2000, the State defendants filed Objections to Final Hearing Procedure or, in the Alternative, Motion to Strike Plaintiffs' Briefs. The State defendants argued for the first time that the trial court's summary resolution of the facial constitutionality of the statute "is on the brink of an abyss." The State defendants also argued that the plaintiffs "present myriad factual arguments masked as legal arguments."

On February 4, 2000, the plaintiffs filed responses challenging the timeliness of the defendants' objections, and on February 7, 2000, the trial court conducted a hearing on the objections. The court stated that "[t]his is the final hearing on the facial constitutionality of this statute" and ruled that it was "exercising its inherent power to limit the issues that are going to be tried, and these issues are going to be strictly matters of law." The trial court denied the State's motion to strike the initial briefs and confirmed the final hearing date of February 24, 2000. On February 17, the court rendered an order in accordance with these rulings and denying defendants' objections to the final hearing procedure.

On February 24, the court heard oral argument from the parties and amici curiae. On March 14, 2000, the trial court entered a final judgment holding that "[s]ection 229.0537, Fla. Stat., insofar as it establishes a program through which the State pays tuition for certain students to attend private schools, is declared to be unconstitutional on its face under Article IX, § 1 of the Florida Constitution."

The State defendants filed a timely notice of appeal, assigned case number 1D00-1121 in this court. The parents filed a separate notice of appeal, assigned

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case number 1D00-1150. This court granted appellees' motion to consolidate the cases.

Appellants raise essentially two points in this consolidated appeal. First, appellants assert that the trial court denied them due process and a fair trial by ignoring the Florida Rules of Civil Procedure and entering final judgment without trial or evidence, upon disputed facts, and without a motion for summary judgment or judgment on the pleadings. Second, appellants assert that the trial court erred in holding the OSP facially unconstitutional under article IX, section 1 of the Florida Constitution.

II. WHETHER THE PROCEDURE EMPLOYED BY THE TRIAL COURT WARRANTS REVERSAL

[1][2] Regarding the first point, the trial court did err in the procedure it employed because nothing in the Florida Rules of Civil Procedure authorizes this procedure. We find this constituted harmless error, however, because the parties had adequate notice, time to respond, and an opportunity to be heard, and appellants have not demonstrated any prejudice much less "a miscarriage of justice." *See* § 59.041, Fla. Stat. (1999) ("No judgment shall be set aside or reversed ... for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."). The cases relied upon by appellants involve situations where a trial court failed to set a matter for trial pursuant to Rule 1.440. *See Orange Lake Country Club, Inc. v. Levin,* 645 So.2d 60, 62 (Fla. 5th DCA 1994) (finding trial court erred in entering judgment where, among other things, trial court failed to set matter for trial pursuant to Rule 1.440); *Ramos v. Menks,* 509 So.2d 1123, 1124 (Fla. 1st DCA 1986) (reversing final judgment and remanding for further proceedings where trial court failed to follow ***673** Rule 1.440); *Bennett v. Continental Chems. Inc.,* 492 So.2d 724, 727 (Fla. 1st DCA 1986) (en banc) (holding that "strict compliance with rule 1.440 is mandatory"). That is not the situation here. Moreover, appellants appear to have acquiesced in the procedure adopted by the trial court, objecting only to the plaintiffs' fact-intensive assertions. *See Bennett v. Ward,* 667 So.2d 378, 380 (Fla. 1st DCA 1995) (explaining that appellant "may have waived objection not only to notice of trial but, more fundamentally, to the apparent omission altogether of any bench trial or evidentiary hearing" where, although no motion for summary judgment was ever filed, trial court held hearing and entered final judgment of foreclosure); *Frank v. Pioneer Metals, Inc.,* 121 So.2d 685, 688 (Fla. 3d DCA 1960) (rejecting appellant's argument that the trial court erred by transferring the case to the equity side of the court: "[W]e are constrained to point out that by the appellant's failure to timely object to that procedure which she now contends to be irregular, she will be deemed to have waived the objection by acquiescence. Procedural matters not objected to in the trial court cannot be raised upon appeal."). We thus conclude that the procedure employed by the trial court, although erroneous, does not warrant reversal.

III. WHETHER THE OSP IS FACIALLY UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION I OF THE FLORIDA CONSTITUTION

[3] As a substantive matter, appellants argue that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. In particular, appellants assert that the trial court should not have relied on the principle of expressio unius est exclusio alterius in finding that the Florida Constitution does not permit the Legislature to enact the OSP. We agree with appellants and, for the reasons set forth below, we reverse on this point and remand this case for further proceedings.

A.

In striking the OSP as facially unconstitutional, the trial court stated:

> By providing state funds for some students to obtain a K-12 education through private schools, as an alternative to the high quality education available through the system of free public schools, the legislature has violated the mandate of the Florida Constitution, adopted by the electorate of this state. Tax dollars may not be used to send the children of this state to private schools as provided by the Opportunity Scholarship Program.

Recognizing that nothing in the constitution directly limits the authority of the Legislature to establish the OSP, the trial court nonetheless concluded, "[T]he negative implication is evident."

[4][5][6] The Florida Constitution is a limitation upon, rather than a grant of, power. *See Board of Public Instruction for County of Sumter v. Wright,* 76 So.2d 863, 864 (Fla.1955) ("This court has consistently adhered to the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power."); *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 881 (1944) (" 'Our state constitution is

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a limitation upon power, and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid.' ") (quoting *Chapman v. Reddick,* 41 Fla. 120, 25 So. 673, 677 (1899)). Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document. Indeed, "[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt." *Taylor,* 19 So.2d at 882. Recognizing these principles, appellants argue that the trial court ***674** erred in relying on another maxim, expressio unius est exclusio alterius, in finding section 229.0537 facially unconstitutional.

[7] This argument has merit. The principle of expressio unius est exclusio alterius is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* 602 (7th ed.1999). This principle should be used sparingly with respect to the constitution. *See Taylor,* 19 So.2d at 881 (explaining that the expressio unius maxim "should be sparingly used in construing the constitution"). As appellants explain, and appellees acknowledge, the trial court did not find that article IX, section 1, by its terms, expressly prohibits state-funded scholarships for children to attend a private school; instead, the trial court found an implied prohibition. Specifically, the trial court found that "[b]ecause Article IX, section 1 directs that public education, K-12, be accomplished through a 'system of free public schools,' that is, in effect, a prohibition on the Legislature to provide a K-12 public education in any other way." Despite the fact that the constitution does not, by its terms, expressly direct that the State may only fulfill its obligation to provide education "through" the public school system, the trial court arrived at the "evident" negative implication.

In applying the expressio unius principle to this case, the trial court quoted a portion of the Florida Supreme Court's opinion in *Weinberger v. Board of Public Instruction of St. Johns County* :

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

93 Fla. 470, 112 So. 253, 256 (1927) (citations omitted). In *Weinberger* and the other cases relied upon by the trial court, however, the expressio unius principle found its way into the analysis only because the constitution forbade any action other than that specified in the constitution, and the action taken by the Legislature defeated the purpose of the constitutional provision. *See id.* at 254-56 (finding bonds proposed to be issued by Board of Public Instruction void ab initio because their maturity dates did not conform to article 12, section 17 of the Florida Constitution, which specified that "[a]ny bonds issued hereunder shall become payable within thirty years from the date of issuance in annual installments which shall commence not more than three years after the date of issue"); *State ex rel. Murphy v. Barnes,* 24 Fla. 29, 3 So. 433, 433-34 (1888) (finding that statute providing for compensation of county solicitors by the State violated Florida Constitution provision that "[t]he compensation of all county school officers shall be paid from the school fund of their respective counties, and all other county officers receiving stated salaries shall be paid from the general funds of their respective counties" and explaining that "[w]hen a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way"). *See also Sullivan v. Askew,* 348 So.2d 312, 315-16 (Fla.1977) (quoting *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 (Fla.1975) (quoting *Weinberger*), and holding that Governor had sole, unrestricted, and unlimited discretion to exercise pardon power and procedures adopted by Governor for exercise of that exclusive power were consistent with constitutional grant of authority); *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 ***675** (Fla.1975) (quoting *Weinberger* and advising that provisions for suspension and automatic reinstatement of civil rights contained in Correctional Reform Act of 1974 infringed on Governor's constitutional duties and responsibilities relating to executive clemency); *In re Investigation of a Circuit Judge,* 93 So.2d 601, 606-08 (Fla.1957) (citing *Weinberger* and finding

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that where constitution creates office, fixes its term, and provides under what conditions officer may be removed before expiration of term, neither Legislature nor any other authority has power to remove or suspend such officer in any manner other than that provided in constitution); *State ex rel. Ellars v. Board of County Comm'rs of Orange County,* 147 Fla. 278, 3 So.2d 360, 362-63 (1941) (quoting *Weinberger* and finding statute, which fixed compensation of county solicitors of criminal courts of record in counties having population between 70,000 and 100,000, was valid general law applicable to office of county solicitor of criminal court of Orange County and was not subject to constitutional prohibition against enactment of special or local laws regulating fees of county officers); *State ex rel. Church v. Yeats,* 74 Fla. 509, 77 So. 262, 264 (1917) ("Article 19 leaves the determination of its enforcement to the registered voters of the counties and election districts, irrespective of race or color, to be determined by a majority of the aggregate; the statute requires two majorities, one of the white and the other the colored registered voters, and in this it clearly defeats the purpose of the Constitution in local option article, which this court has said was to remit to the registered voters of each county the settlement of the issue whether the sale of intoxicating wines or beer should be prohibited within the county.").

In contrast, in this case, nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use [FN5] of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary. We therefore reject the trial court's finding that the constitution not only mandates that the State "make adequate provision for the education of all children" in Florida, but that it also prescribes the sole means for implementation of that mandate. Contrary to the conclusion of the trial court, and the argument advanced by appellees, article IX, section 1 does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system.

> FN5. *See* § 229.0537(2)(a), Fla. Stat. (1999) (explaining that to receive an opportunity scholarship to attend a participating private school, a student must have "spent the prior school year in attendance at a public school that has been designated pursuant to s. 229.57 as performance grade category 'F,' failing to make adequate progress, and that has had two school years in a 4-year period of such low performance, and the student's attendance occurred during a school year in which such designation was in effect" or the student has been assigned to such a school for the next school year).

[8] In passing section 229.0537, the Legislature made specific findings indicating it sought to advance, not defeat, the purpose of article IX, section 1:

> The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. *The Legislature finds that the State Constitution requires the state to provide the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent or guardian, to remain in a school found by the state to be failing for 2 years in a 4-year period.* The Legislature shall make available opportunity ***676** scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school as provided in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the educational public purpose, as delineated in subsection (4).

§ 229.0537(1), Fla. Stat. (1999) (emphasis added). Although, in establishing the OSP, the Legislature recognized that some public schools may not perform at an acceptable level, the Legislature attempted to improve those schools by raising expectations for and creating competition among schools, while at the same time not penalizing the students attending failing schools. *See* Ch. 99-398, at 4273, Laws of Fla. ("WHEREAS, children will have the best opportunity to obtain a high-quality education in the public education system of this state and that system can best be enhanced when positive parental influences are present, when we allocate resources efficiently and concentrate resources to enhance a safe, secure, and disciplined classroom learning environment, when we support teachers, when we reinforce shared high academic expectations, and when we promptly reward success and promptly identify failure, as well as

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promptly appraise the public of both successes and failures ..."). We must be mindful that "[t]he Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good." *State v. State Bd. of Admin.*, 157 Fla. 360, 25 So.2d 880, 884 (1946).

B.

We note that the Legislature has, in the past, established a program providing public funds for certain students to attend private schools. *See Scavella v. School Bd. of Dade County,* 363 So.2d 1095 (Fla.1978). In *Scavella* the Florida Supreme Court indicated that "the state is responsible for providing adequate educational opportunities for all children" and "all Florida residents have the right to attend this public school system for free." *Id.* at 1098. The court explained that "[r]ealizing that the public schools may not have the special facilities or instructional personnel to provide an adequate educational opportunity for the exceptional students, the legislature has allowed the school boards to make contractual arrangements with private schools." *Id.; see* § 230.23(4)(m)2., Fla. Stat. (1977).

Scavella involved a challenge to a statute that allowed school boards to cap the amount of money paid to a private school in these contractual arrangements. *See Scavella,* 363 So.2d at 1098; § 230.23(4)(m)7., Fla. Stat. (1977). The supreme court interpreted this statute to mean that school boards could not impose a cap that would deprive "any student of a right to a free education" and found the statute, as interpreted, constitutional. *See Scavella,* 363 So.2d at 1099. As pointed out by appellees and the trial court, however, *Scavella* did not involve a challenge under article IX, section 1.

Nevertheless, in *Scavella,* the supreme court upheld a legislative program authorizing the payment of private school tuition for students whose needs could not be met in the public schools and specified that, in implementing this program, students could not be deprived of "a right to a free education." By analogy, the OSP statute does not deprive students of "a right to a free education" and requires participating private schools to "[a]ccept as full tuition and fees the amount provided by the state for each student." § 229.0537(4)(i), Fla. Stat. (1999).

*677 C.

Based on the foregoing, we hold that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. Nothing in that constitutional provision prohibits the action taken by the Legislature. The trial court erred by employing the exclusio unius principle to find an implied prohibition.

IV. OTHER CONSTITUTIONAL ISSUES

[9] Appellees have asserted that, even if the trial court erred in its application of article IX, section 1, the order on appeal should be affirmed on alternative constitutional grounds. Specifically, appellees assert that the OSP violates (1) article IX, section 6 of the Florida Constitution; (2) article I, section 3 of the Florida Constitution; and (3) the Establishment Clause of the United States Constitution.

Following the case management conference, the trial court determined that only the facial constitutionality of the OSP under article IX, section 1, could be decided without the presentation of evidence. In the court's view, the remaining issues appeared to constitute mixed questions of fact and law. This court has explained that such issues are inappropriate for initial determination on appeal:

> The rule followed by the Florida courts, as we interpret prior decisions, is that the question of the constitutionality of a statute is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute. While there are circumstances in which trial courts are permitted to adjudicate the merits of constitutional issues in ruling on a motion to dismiss, ... the circumstances of the particular case determine whether this is appropriate. The preferable rule, properly applied here, appears to be that if the complaint's well-pleaded allegations entitle the plaintiff to a declaration of rights, the motion to dismiss should be denied and the plaintiff allowed to adduce evidence in behalf of his pleading.
>
> The wisdom of this rule is particularly evident in this case where we have been asked to rule for the first time on constitutional questions of considerable magnitude, without the benefit of any record except the various complaints and motions directed to the complaints, including appellees' motion to dismiss, the granting of which sparked this appeal. It is a familiar canon of appellate review that appellate courts are loath to rule upon

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issues not directly ruled upon by the trial court. Courts prefer that the constitutionality of a statute be considered first by a trial court. This rule is relaxed if the constitutional issues are fully briefed and relate to matters of law exclusively, ... and the full record is before the court.

Glendale Fed. Sav. & Loan Ass'n v. State, Dep't of Ins., 485 So.2d 1321, 1324-25 (Fla. 1st DCA 1986) (citations and footnote omitted). Accordingly, we decline to consider the alternative constitutional arguments asserted by appellees.

V. CONCLUSION

In sum, although we find the trial court erred regarding the procedure it employed in considering the facial constitutionality of the OSP under article IX, section 1, we find that error harmless in this case. We further find, however, that the trial court erred in holding the OSP facially unconstitutional under this provision. The trial court must now consider the remaining allegations raised by appellees, as to which we express no opinion.

REVERSED and REMANDED for further proceedings.

WEBSTER and VAN NORTWICK, JJ., CONCUR.

767 So.2d 668, 147 Ed. Law Rep. 1125, 25 Fla. L. Weekly D2385

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Brett Kavanaugh – Race

Allegation: In a friend of the court brief, Kavanaugh joined Robert Bork in opposing a voting scheme that was intended to assist native Hawaiians by ensuring that only they could vote for board members overseeing a trust for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495 (2000). Before the case was heard, he was quoted as saying that "this case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of the government." Warren Richey, *New Case May Clarify Court's Stand on Race*, THE CHRISTIAN SCIENCE MONITOR (Oct. 6, 1999).

Facts:

- **The Supreme Court agreed with the position taken by Mr. Kavanaugh's client, that limiting voting for candidates to a statewide office that disbursed state and federal funds based on racial ancestry violated the Constitution. The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any other State on account of race, color, or previous condition of servitude." U.S. CONST. Amend. XV § 1.**
  - ✓ **In a 7 to 2 decision, with the majority including Justices Breyer, Souter, and O'Connor**, the Court reaffirmed the basic premise upon which the brief was based: that "[t]he National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race." *Rice*, 120 S. Ct. at 1054.
  - ✓ The Court explained, "The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Id.* at 523.
  - ✓ The Court added, "Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others." *Id.*
- The brief submitted by Mr. Kavanaugh on behalf of his clients sought to enforce the Fifteenth Amendment against a state law that prohibited citizens from voting in a statewide election based on their race.
  - ✓ When Hawaii was admitted as the 50th State of the Union in 1959, the state adopted the Hawaiian Homes Commission Act, passed by Congress, as part of its Constitution. The Act set aside 200,000 acres of public lands and granted the state over 1.2 million additional acres of land to be held "as a public trust."

- The proceeds and income from the lands were to be used for one or more of five purposes: (1) support of public schools and other public educational institutions, (2) betterment of native Hawaiians, (3) development of farm and home ownership, (4) public improvements, and (5) provisions of land for public use.

✓ In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer special trust revenues "for the betterment of the conditions of native Hawaiians," and any appropriations that were made for the benefit of "native Hawaiians" and/or "Hawaiians."

- The term "native Hawaiian" and "Hawaiian" are defined as descendants of aboriginal peoples or races inhabiting the Hawaiian Islands previous to 1778.

✓ The Hawaii Constitution limited membership on the OHA board of trustees to "Hawaiians," and explicitly provided that the trustees shall be "elected by ... Hawaiians."

✓ Although petitioner was a citizen of Hawaii, and his ancestors were residents of the Hawaiian Islands prior to U.S. annexation in 1959, he did not meet the statutory definitions and was thus precluded from voting.

➢ The racial qualification in the Hawaiian law categorically excluded members of certain racial minorities, such as African-Americans and Japanese-Americans, who were members of groups historically discriminated against in the U.S.

➢ One of Mr. Kavanaugh's clients on the brief was the New York Civil Rights Coalition, a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste or discrimination.

➢ Mr. Kavanaugh's statement regarding the Rice case was consistent with statements made by Justice O'Connor in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), where the Supreme Court upheld the University of Michigan Law School's race-conscious admissions policy. Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

For opinion see 120 S.Ct. 1044, 120 S.Ct. 31, 119 S.Ct. 1248

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of the State of Hawaii, Respondent.
No. 98-818.
October Term, 1998.
May 27, 1999.
On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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*i QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

*ii TABLE OF CONTENTS

QUESTION PRESENTED ... i

TABLE OF CONTENTS ... ii

TABLE OF AUTHORITIES ... iv

INTEREST OF AMICI CURIAE ... 1

SUMMARY OF ARGUMENT ... 2

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ARGUMENT ... 4

INTRODUCTION ... 4

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS ... 7

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS ... 10

A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment ... 11

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest ... 14

C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny ... 19

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship with Hawaiians Do Not Justify Hawaii's Racial Voting Qualification ... 21

*iii E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed ... 24

CONCLUSION ... 30

*iv TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ... passim

Anderson v. Martin, 206 F. Supp. 700 (E.D. La. 1962), rev'd, 375 U.S. 399 (1964) ... 14, 20

Anderson v. Martin, 375 U.S. 399 (1964) ... 4

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Ball v. James, 451 U.S. 355 (1981) ... 10

Batson v. Kentucky, 476 U.S. 79 (1986) ... 14

Bazemore v. Friday, 478 U.S. 385 (1986) ... 20

Bell v. Maryland, 378 U.S. 226 (1964) ... 12

Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) ... 6, 24

Brown v. Board of Education, 347 U.S. 483 (1954) ... 3, 13, 24

Buchanan v. Warley, 245 U.S. 60 (1917) ... 10

Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997) ... 29

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) ... 25

Chisom v. Roemer, 501 U.S. 380 (1991) ... 8

*v City of Mobile v. Bolden, 446 U.S. 55 (1980) ... 8, 13

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ... passim

Defunis v. Odegaard, 416 U.S. 312 (1974) ... 12, 28

Fullilove v. Klutznick, 448 U.S. 448 (1980) ... passim

Gomillion v. Lightfoot, 364 U.S. 339 (1960) ... 4, 8, 9, 13

Guinn v. United States, 238 U.S. 347 (1915) ... 4, 8, 9

Hirabayashi v. United States, 320 U.S. 81 (1943) ... 12

Holder v. Hall, 512 U.S. 874 (1994) ... 7

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Hunt v. Cromartie, No. 98-85, 1999 WL 303677 (May 17, 1999) ... 12, 14

Johnson v. De Grandy, 512 U.S. 997 (1994) ... 13

Korematsu v. United States, 323 U.S. 214 (1944) ... 7, 18

Loving v. Virginia, 388 U.S. 1 (1967) ... passim

McLaughlin v. Florida, 379 U.S. 184 (1964) ... 11, 12

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ... passim

Miller v. Johnson, 515 U.S. 900 (1995) ... 11, 12, 14, 23

***vi** Morrison v. Olson, 487 U.S. 654 (1988) ... 6

Morton v. Mancari, 417 U.S. 535 (1974) ... 26-28

Oyama v. California, 332 U.S. 633 (1948) ... 4

Palmore v. Sidoti, 466 U.S. 429 (1984) ... 11, 15

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) ... 12, 15

Plessy v. Ferguson, 163 U.S. 537 (1896) ... 12, 13, 24

Powers v. Ohio, 499 U.S. 400 (1991) ... 10, 11, 13, 23

Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985) ... 30

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) ... 13, 16, 28

Reynolds v. Sims, 377 U.S. 533 (1964) ... 10

Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) ... 10

Shaw v. Reno, 509 U.S. 630 (1993) ... passim

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Smith v. Allwright, 321 U.S. 649 (1944) ... 8

South Carolina v. Katzenbach, 383 U.S. 301 (1966) ... 7

Strauder v. West Virginia, 100 U.S. 303 (1880) ... 11

*vii United States v. Antelope, 430 U.S. 641 (1977) ... 26

United States v. Holliday, 70 U.S. 407 (1865) ... 29

United States v. Paradise, 480 U.S. 149 (1987) ... 17

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) ... 29, 30

Washington v. Davis, 426 U.S. 229 (1976) ... 14

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) ... 15, 16

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ... 4

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. amend. xiv. ... passim

U.S. Const. amend. xv. ... passim

U.S. Const. art. i, § 8 ... 25

U.S. Const. art. ii, § 2 ... 25

25 C.F.R. § 83 ... 30

25 C.F.R. § 83.2 ... 29

42 U.S.C. § 1973 ... 20

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Admission Act of March 18, 1959, 73 Stat. 4, § 5(f) ... 4, 5

Haw. Const. art. xii ... 5

Haw. Rev. Stat. § 10-3(1) ... 5

Haw. Rev. Stat. § 10-13.5 ... 5

Haw. Rev. Stat. § 13D-3(b) ... 5, 7

***viii** S. Ct. R. 37.3 ... 1

S. Ct. R. 37.6 ... 1

MISCELLANEOUS

Michael Barone & Grant Ujifusa, The Almanac of American Politics (1998) ... 24

Stuart M. Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996) ... 22, 27, 30

Rachael Paschal, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 Wash. L. Rev. 209 (1991) ... 29

Laurence H. Tribe, American Constitutional Law (2d ed. 1988) ... 9

*1 INTEREST OF AMICI CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. See id.

The Center for Equal Opportunity is a non-profit organization dedicated to the idea that America should be one nation and that citizens of all races, colors, and ethnicities *2 should be treated equally. The New York Civil Rights Coalition is a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste, or discrimination. Carl Cohen is a Professor of Philosophy at the University of Michigan, has served for many years in the leadership of the American Civil

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Liberties Union, and is the author of Naked Racial Preference (1995). Abigail Thernstrom is the co-author of America in Black and White: One Nation, Indivisible (1997) and the author of Whose Votes Count? Affirmative Action and Minority Voting Rights (1987). Amici submit that the Fourteenth and Fifteenth Amendments prohibit Hawaii's racial voting qualification.

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment, by its language and history, applies to all state elections.

Notwithstanding the clear language of the Fifteenth Amendment, Hawaii determines a citizen's qualifications to vote in elections for the Office of Hawaiian Affairs solely on the basis of the citizen's race. Hawaii's racial voting qualification is a clear violation of the Fifteenth Amendment, and that violation alone requires reversal of the decision of the court of appeals.

The racial voting qualification also violates the Equal Protection Clause of the Fourteenth Amendment. This Court's cases establish that the Equal Protection Clause prohibits racial classifications except when such classifications are necessary and narrowly tailored to serve a compelling government interest.

***3** Outside of an immediate threat to life or limb, as in a prison race riot, a compelling government interest exists only when the government has imposed the racial classification as a remedy for past, identified discrimination in that jurisdiction and field (such as discrimination in the schools in a particular jurisdiction). Hawaii has not shown or attempted to show that its racial voting qualification in elections for the Office of Hawaiian Affairs is designed to remedy past discrimination in voting against """Hawaiians" in Hawaii.

In any event, even assuming such past discrimination, a racial qualification to vote has never been held necessary and narrowly tailored to remedy past discrimination. Moreover, this racial voting qualification is not narrowly tailored in scope: It is a strict racial qualification that categorically excludes members of certain racial groups (all but "Hawaiians") from the ballot in elections for the Office of Hawaiian Affairs -- including members of racial groups historically discriminated against in the United States and in Hawaii. Nor is the racial qualification narrowly tailored in duration: Hawaii established the racial classification in 1978, and it has no termination date.

Hawaii has explained that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But a state has no right to engage in racial classifications on the right to vote in a state election simply to preserve a particular culture. This Court has forbidden analogous "cultural" justifications for racial classifications in cases ranging from Brown v. Board of Education to Loving v. Virginia.

Finally, Hawaii's attempt to end-run the Equal Protection Clause by analogizing "Hawaiians" to American Indian tribes is entirely unavailing. As this Court repeatedly has held, differential treatment of Indian tribes as tribes is justified by the Constitution's specific reference to Indian tribes as separate sovereigns. The Constitution does not contain a Hawaiian ***4** Commerce Clause, and Hawaiians do not and could not qualify as an American Indian tribe.

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ARGUMENT

INTRODUCTION

Hawaii determines a citizen's qualifications to vote in state elections for the Office of Hawaiian Affairs on the basis of the citizen's race. As is clear from that introductory sentence alone, Hawaii's racial restriction on voting is a patent violation of the United States Constitution. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Loving v. Virginia, 388 U.S. 1 (1967); Anderson v. Martin, 375 U.S. 399 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Guinn v. United States, 238 U.S. 347 (1915). [FN2]

FN2. We will use the terms "race" and "racial" throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny. See Oyama v. California, 332 U.S. 633, 646 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). We will adopt the convention of state law and use the term " " "Hawaiian" to refer to those whose ancestors were Hawaiian. For purposes of our brief, there is no need to further distinguish by blood amount between " "Hawaiians" and "native Hawaiians," although state law does so.

Two provisions of law provide the backdrop for this controversy: the federal Admission Act of 1959 and the Hawaii Constitution, as amended in 1978. The Admission Act, enacted by Congress at the time of Hawaii's admission to the Union, ceded to the State approximately 1,800,000 acres of land that the United States had owned since 1898. The Admission Act restricted the State's use of land to five purposes: (1) support of public schools; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership on as widespread a basis as possible; (4) making of public improvements; and (5) provision of lands for public use. Admission Act of March 18, 1959, 73 Stat. 4, § 5(f).

*5 The Admission Act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide." Id. The Act thereby permitted the State to use those lands in a race-neutral way and/or for the benefit of all citizens of Hawaii. Indeed, that is precisely how the State administered the lands from 1959 to 1978 when the State used money from the lands on a race-neutral basis primarily for state educational purposes. Pet. App. 5a. [FN3]

FN3. A discrete block of 200,000 acres is administered by the State's Department of Hawaiian Home Lands pursuant to a separate statutory regime. A 1920 federal statute (the Hawaii Homes Commission Act, 42 Stat. 108) dealt with those lands by means of an express racial classification, albeit one that was not applied in the decades that followed. In any event, the HHCA program is not at issue here, although it also has serious constitutional problems to the extent that it relies on racial classifications.

In 1978, however, Hawaii dramatically changed course. The State enacted a constitutional amendment, see Haw. Const. art. xii, which along with a statute enacted shortly thereafter accomplished three things. First, the State required that 20% of the proceeds from the Admission Act lands be used solely to benefit certain native Hawaiians. Id.; Haw. Rev. Stat. § § 10-3(1); 10- 13.5. Second, the State created the Office of Hawaiian Affairs (OHA) to administer that 20% portion of the proceeds and to administer solely for the benefit of Hawaiians other monies

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received from general state funds. The OHA's officers must be Hawaiians. Haw. Const. art. xii. Third, the State imposed still another racial qualification, allowing only Hawaiians to vote in the OHA elections. Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian ....").

*6 The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century. See generally Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring in judgment). The scheme benefits one preferred racial class within the State of Hawaii to the exclusion of all others and creates collateral racial classifications that are unnecessary even to serve that (itself unconstitutional) purpose. The scheme is a clearcut and extensive violation of the Constitution: None of its three elements, particularly the voting qualification at issue here, is constitutional.

Under the State's theory, the State of Massachusetts could declare certain state funds in Massachusetts to be distributed for the benefit of Irish- Americans, establish an Office of Irish Affairs composed solely of Irish- Americans to administer the funds, and restrict the vote for that Office to those citizens of Massachusetts with Irish blood. The State of Florida could do the same for Cuban-Americans, the State of Wisconsin for German-Americans, the State of Texas for Mexican-Americans, and so on. As a matter of logic and of constitutional law, affirmance of the court of appeals decision could usher in an extraordinary racial patronage and spoils system.

Hawaii no doubt will label such concerns an exaggeration, suggesting that other states would not adopt such a scheme. But we do not possess so clear a crystal ball as to confidently predict how a state 10 or 25 or 50 years from now might utilize a decision in Hawaii's favor in this case. And ultimately the Court must consider what a ruling in Hawaii's favor would authorize. See Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). As Justice Jackson stated, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court *7 for all time has validated the principle of racial discrimination .... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Korematsu v. United States 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The aspect of the OHA program specifically at issue here is the racial voting qualification, which violates both the Fifteenth Amendment and the Fourteenth Amendment.

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

The Fifteenth Amendment to the Constitution, ratified in the wake of the Civil War on February 3, 1870, speaks clearly and definitively: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment repaired the Constitution's original tolerance of racial restrictions on the right to vote and stands as a legal bulwark against the racial strife and ethnic balkanization that has troubled this country since its founding -- and that to this day plagues this Nation and others around the globe. See generally Holder v. Hall, 512 U.S. 874, 894-95 (1994) (Thomas, J., concurring in judgment); South

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Carolina v. Katzenbach, 383 U.S. 301, 309-13 (1966).

Since 1978, however, the State of Hawaii has prohibited citizens of certain races, because of their race, from voting in elections for the Office of Hawaiian Affairs -- a government office that controls and disburses a significant amount of state funds, formulates policy, and administers certain state lands. See Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person ... is Hawaiian...."). Hawaii excludes not just *8 Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.

The primary question presented to this Court is whether Hawaii, by prohibiting individuals from voting in a state election because of their race, has violated the Fifteenth Amendment, which prohibits States from denying individuals the right to vote because of their race. To pose the question is to resolve the case. As this Court has stated, the Fifteenth Amendment is "unequivocal[]" and prohibits race-based voting qualifications (as well as facially race-neutral voting qualifications that are intended to harm members of a particular race). Shaw v. Reno, 509 U.S. 630, 639 (1993); see City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); Gomillion, 364 U.S. at 339; Smith v. Allwright, 321 U.S. 649, 657 (1944); Guinn, 238 U.S. at 347; cf. Chisom v. Roemer, 501 U.S. 380, 392 (1991) ("every election in which registered electors are permitted to vote" is covered under § 2 of Voting Rights Act of 1965, which enforces the Fifteenth Amendment) (quotation omitted; emphasis added).

Hawaii has offered an array of historical and policy considerations in support of its racial voting scheme, primarily based on preserving the culture of Hawaiians. But all such arguments are, for purposes of the Fifteenth Amendment, nothing but diversions. Hawaii restricts the right to vote in a state election based on a citizen's race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.

What is perhaps most telling about the unconstitutionality of Hawaii's racial voting qualification is that in the nearly 130 years since the Fifteenth Amendment was ratified -- troubled though those years have been with respect to racial relations and racially motivated voting devices -- no State so far as we are aware has thought it permissible to enact into law a facial *9 racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try to evade what all understood to be the meaning of the Fifteenth Amendment. See Shaw, 509 U.S. at 639-40 (describing various forms of "[o]stensibly race- neutral devices" used "to deprive black voters of the franchise"); see Gomillion, 364 U.S. at 341; Guinn, 238 U.S. at 364-65.

In light of the plain conflict between Hawaii's racial qualification for voting and the clear language of the Fifteenth Amendment, the question that comes to the fore in this case focuses on the court of appeals: How did it go so far astray? The court of appeals recognized, after all, that the voter qualification at issue here was "expressly racial" and "clearly racial on its face." Pet. App. 10a, 15a. The court also acknowledged that the Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote." Pet. App. 15a (quoting Laurence H. Tribe, American Constitutional Law 335 n.2 (2d ed. 1988)).

The court explained, however, that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for." Pet. App. 11a. The court concluded that a state could allow racial restrictions on the right to vote

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when the underlying state office was, in essence, devoted to distributing funds for the benefit of a racially restricted class. Pet. App. 15a. The court held that such a scheme "does not deny non-Hawaiians the right to vote in any meaningful sense." Pet. App. 15a (emphasis added). The court did not explain, however, from what source it derived a "meaningful sense" exception to the Fifteenth Amendment's ban on racial voting qualifications, nor did it say how voting in elections to a state office that, among other things, controls and spends substantial sums of state money is not "meaningful."

***10** The court said that it found guidance in cases in which this Court has held that limited special-purpose elections are consistent with the right to vote that the Court has inferred from the Fourteenth Amendment. See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); cf. Reynolds v. Sims, 377 U.S. 533 (1964). But in relying on those cases, the court of appeals overlooked a critical point: Those cases did not deal with racial restrictions on the right to vote. The Fifteenth Amendment places voting qualifications based on race in a constitutionally different class from voting qualifications based on non- suspect characteristics. Thus, the Constitution does not expressly provide that all citizens in a jurisdiction can vote in all elections (a point confirmed by the Salyer case), but it expressly prohibits denial of the right to vote in any state election on account of race. Cf. Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); Buchanan v. Warley, 245 U.S. 60, 74-75, 82 (1917) (state can limit property rights, but cannot do so on the basis of race).

In sum, this Court's resolution of this case should be quite straightforward. Nearly 130 years after the Fifteenth Amendment's ratification, the State of Hawaii seeks the Court's blessing to strip an American citizen of his right to vote in a state election based on his race. The words of the Fifteenth Amendment mean what they say, however, and the Fifteenth Amendment thus flatly bars Hawaii's denial of the right to vote in a state election on account of race.

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

Hawaii's racial restriction on voting also violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

***11** A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment, also ratified in the wake of the Civil War on July 9, 1868, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While not phrased in the plain and crystalline terms of the Fifteenth Amendment, the """central purpose" of the amendment is "to prevent the States from purposefully discriminating between individuals on the basis of race." Shaw, 509 U.S. at 642 (emphasis added). [FN4]

FN4. See Miller v. Johnson, 515 U.S. 900, 904 (1995) ("central mandate is racial neutrality in governmental decisionmaking"); Powers, 499 U.S. at 415 (Fourteenth Amendment's mandate is that "race discrimination be eliminated from all official acts and proceedings of the State"); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); Loving, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth

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Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"); Strauder v. West Virginia, 100 U.S. 303, 307 (1880) ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States ....").

To be sure, the Court has not as yet adopted the most stringent rule for analyzing racial classifications under the Equal Protection Clause--that "only a social emergency rising to the level of imminent danger to life and limb ... can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens." ***12**Croson, 488 U.S. at 521 (Scalia, J., concurring in judgment) (quotation omitted). [FN5] The Court's decisions have nonetheless established that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979). As a result, "all laws that classify citizens on the basis of race ... are constitutionally suspect and must be strictly scrutinized." Hunt v. Cromartie, No. 98-85, 1999 WL 303677, at *4 (May 17, 1999); see Adarand, 515 U.S. at 235-36; Shaw, 509 U.S. at 642-43; Croson, 488 U.S. at 493-94 (plurality).

FN5. See also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); Defunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting); McLaughlin, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); Bell v. Maryland, 378 U.S. 226, 287-88 (1964) (Goldberg, J., joined by Warren, C.J., concurring); Hirabayashi v. United States, 320 U.S. 81, 110-11 (1943) (Murphy, J., concurring); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

The Court has stressed that racial classifications must be strictly scrutinized because classifications of citizens solely on the basis of race """are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." Shaw, 509 U.S. at 657. They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution." Miller, 515 U.S. at 912 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). And they reflect "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from ***13** those of other citizens." Johnson v. DeGrandy, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring) (quotation omitted). [FN6]

FN6. Strict scrutiny applies regardless of the race benefited or burdened because a "benign racial classification is a contradiction in terms," Metro Broadcasting, 497 U.S. at 609 (O'Connor, J., dissenting) (quotation omitted), and there is "no principled basis for deciding which groups would merit

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heightened judicial solicitude and which would not," Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 296 (1978) (Powell, J.). Strict scrutiny also applies, of course, even when the racial classification burdens or benefits the races equally. Powers, 499 U.S. at 410; Brown v. Board of Education, 347 U.S. 483, 494-95 (1954).

Racial classifications are offensive to the Constitution for a more practical reason as well. There is no way to apply them without formal rules for deciding who is and is not a member of a given race and without some governing body to apply and enforce those rules. Cf. Plessy, 163 U.S. at 552. As Justice Stevens has emphasized, however, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." Fullilove, 448 U.S. at 535 n.5 (Stevens, J., dissenting). Justice Stevens thus stated in Fullilove that a "serious effort" to "define racial classes" must "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." Id.; see also Metro Broadcasting, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (comparing racial set-aside to South African Population Registration Act). This case illustrates the point: The State of Hawaii has struggled mightily to define who exactly is a "Hawaiian," an enterprise that has led to a variety of conflicting definitions and generated numerous lawsuits.

Strict scrutiny under the Equal Protection Clause applies with particular force to racial classifications affecting the voting process. See Shaw, 509 U.S. at 644. [FN7] The Court has ***14** stated that "[r]acial classifications with respect to voting carry particular dangers" -- including "balkaniz[ing] us into competing racial factions." Shaw, 509 U.S. at 657 (emphasis added). """When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." Miller, 515 U.S. at 911-12 (quotation omitted); cf. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986). As Judge Wisdom stated over a generation ago, "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." Anderson v. Martin, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting) (emphasis added), rev'd, 375 U.S. 399 (1964). [FN8]

FN7. See Gomillion, 364 U.S. at 349 (Whittaker, J., concurring); see also City of Mobile, 446 U.S. at 86 (Stevens, J., concurring in judgment) (Gomillion is "compelled by the Equal Protection Clause").

FN8. The Justices who dissented in Shaw still would consider a "direct and outright deprivation of the right to vote" on account of race (as here) subject to the strictest scrutiny. Shaw, 509 U.S. at 659 (White, J., dissenting); id. at 682 (Souter, J., dissenting).

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest.

Hawaii's law facially discriminates on the basis of race in determining which voters are qualified to vote in elections for the Office of Hawaiian Affairs. [FN9] Because the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial ***15**

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classifications -- or, at most, only rarely allows them -- the Court has held that racial classifications such as Hawaii's racial voting qualification are "presumptively invalid" and subject to strict scrutiny under the Fourteenth Amendment, meaning that they can be upheld only if based upon an "extraordinary justification." Feeney, 442 U.S. at 272 (quoted in Shaw, 509 U.S. at 643- 44). Under the strict scrutiny standard, racial classifications thus violate the Equal Protection Clause unless they are both necessary and narrowly tailored to serve a compelling state interest. Shaw, 509 U.S. at 643; Croson, 488 U.S. at 509 (plurality) (Only in the "extreme case" may "some form of narrowly tailored racial preference ... be necessary.") (emphases added). [FN10]

FN9. When, as here, "the racial classification appears on the face of the statute," then "[n]o inquiry into legislative purpose is necessary" to determine whether the law is designed to harm members of a particular race. Shaw, 509 U.S. at 642; see Hunt, 1999 WL 303677; cf. Washington v. Davis, 426 U.S. 229 (1976).

FN10. See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality); id. at 286 (O'Connor, J., concurring); Palmore, 466 U.S. at 432 (classifications must be "necessary" to accomplishment of " " "compelling governmental interest"); Fullilove, 448 U.S. at 496 (Powell, J., concurring) ("racial classification ... is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); Loving, 388 U.S. at 11 (racial classifications, "if they are ever to be upheld, ... must be shown to be necessary to the accomplishment of some permissible state objective"). In some cases, the Court has used the term "necessary"; in some cases, the Court has used the term "narrowly tailored"; and in some cases, the Court has used both terms. The Court's consistent analysis incorporates both ideas. The Court has made it clear, for example, that past discrimination does not justify a racial classification if race-neutral alternatives are available.

These requirements impose a number of important barriers that a government entity must surmount before it may impose a racial classification. The rationale is simple: "If there is no duty to attempt ... to measure the recovery by the wrong ... our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members." Croson, 488 U.S. at 510-11 (plurality) (quoting Fullilove, 448 U.S. at 539 (Stevens, J., dissenting)). Taken together, as ***16** Justice Kennedy has pointed out, these stringent requirements explain why the strict scrutiny standard "operate[s] in a manner generally consistent with the imperative of race neutrality." Croson, 488 U.S. at 519 (Kennedy, J., concurring).

First, the government must show a compelling interest that justifies its racial classification. Except in situations where there is an imminent threat to life or limb (as in a prison race riot), racial classifications must be """strictly reserved for remedial settings." Id. at 494 (plurality); Metro Broadcasting, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); Wygant, 476 U.S. at 274- 76 (plurality). Furthermore, the bare desire to remedy societal discrimination is too "amorphous" a concept of injury to qualify as a "compelling interest." Croson, 488 U.S. at 497 (plurality) (quoting Bakke, 438 U.S. at 307 (Powell, J.)); see also Wygant, 476 U.S. at 274 (plurality) ("This Court never has held that societal discrimination alone is sufficient to

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justify a racial classification."). In order for the government to show that the classification is truly remedial, the classification must be preceded by """judicial, legislative, or administrative findings of constitutional or statutory violations." Croson, 488 U.S. at 497 (plurality) (quoting Bakke, 438 U.S. at 308-09 (Powell, J.)). [FN11] In Croson, for example, the Court explained that there was "nothing approaching ... a constitutional or statutory violation by anyone in the Richmond construction industry." Id. at 500.

FN11. Any legislative or executive findings must be strictly scrutinized, for "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." Croson, 488 U.S. at 501.

Second, the government must show that the classification remedies discrimination that was committed both within that jurisdiction, and within the industry or field in which the ***17** classification is imposed (such as school segregation in a district). Id. at 500, 504-05. The Court explained the point in Croson: "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond ... does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy." Id. at 505 (emphasis added). The Court added that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." Id. (emphasis added). The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another." Id.

Third, the government must show that the racial classification is necessary in the sense that race-neutral remedies have been or would be ineffective in remedying the discrimination. Adarand, 515 U.S. at 237-38 (court of appeals """did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means") (quotation omitted); Croson, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."); United States v. Paradise, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."); id. at 201 (O'Connor, J., dissenting) ("strict scrutiny requires ... that the District Court expressly evaluate the available alternative remedies."). The decision in Croson illustrated the importance of this requirement: Only in the "extreme case" may "some form of narrowly tailored racial preference ... be necessary ...." Croson, 488 U.S. at 509 (plurality) (emphases added). In Croson, the Court stated that a racial set- aside was not necessary because a "race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation" and remedy any discrimination that had occurred. Id. at 507.

***18** Fourth, the government must show that it cannot devise an individualized procedure to "tailor remedial relief to those who truly have suffered the effects of prior discrimination" -- in other words, that the racial classification is not simply a product of "administrative convenience." Id. at 508; cf. Korematsu, 323 U.S. at 241 (Murphy, J., dissenting) ("[n] o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal"). The interest in "avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." Croson, 488 U.S. at 508.

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Fifth, the government must show that it has minimized harm to innocent members of other racial groups. For this reason, a specific numerical quota, or outright racial exclusion, rarely (if ever) could satisfy the narrow tailoring requirement. See id. The Court applied this principle in Croson: "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur ... enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination." Id. (emphasis added); see also id. at 515 (Stevens, J., concurring) ("Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.").

Sixth, the government must show that the racial classification is tailored in terms of duration: that it "will not last longer than the discriminatory effects it is designed to eliminate." Adarand, 515 U.S. at 238 (quoting Fullilove, 448 U.S. at 513 (Powell, J., concurring)).

***19** C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny.

Based on the foregoing principles, it is plain that Hawaii's racial voting qualification violates the Equal Protection Clause for any one of a host of alternative and independent reasons.

At the outset, Justice Ginsburg's opinion in Adarand identified the simplest reason for holding this racial voting qualification violative of the Equal Protection Clause. As she explained, while this Court has not as yet held that the strict scrutiny standard is automatically fatal for all racial classifications, at a minimum "the strict scrutiny standard" is "fatal for classifications burdening groups that have suffered discrimination in our society." Adarand, 515 U.S. at 275 (Ginsburg, J., dissenting). The principle identified by Justice Ginsburg applies here. In elections for the Office of Hawaiian Affairs, Hawaii turns away would-be voters who are, for example, African-Americans, Japanese-Americans, Chinese-Americans, Mexican-Americans, and even American Indians -- all of whom belong to racial groups whose members """have suffered discrimination in our society" and some of whom have suffered discrimination in Hawaii. As Justice Ginsburg rightly suggested, therefore, the strict scrutiny analysis is "fatal" to Hawaii's racial voting qualification, and no further equal protection analysis is necessary.

Apart from that threshold point, the racial classification here fails to meet any of the specific requirements (much less all of them) that the government must meet in order to show that a racial classification is necessary and narrowly tailored to serve a compelling governmental interest.

First, Hawaii has not shown that its racial voting qualification remedies prior discrimination. In particular, Hawaii has not identified any competent judicial, legislative, or administrative findings of constitutional or statutory violations by any party to justify its racial voting qualification.

***20** Second, and as a necessary consequence of the first point, Hawaii obviously has not shown that its racial voting qualification remedies a prior denial or infringement of the ability of Hawaiians to vote in Hawaii. Hawaii's racial classification thus fails to meet a critical requirement under this Court's equal protection jurisprudence for a racial classification -- that it serve a compelling governmental interest in remedying prior discrimination in the jurisdiction and field in which the classification is imposed.

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Third, even had the State shown prior abridgements on the ability of Hawaiians to vote, it has not shown that a race-based voting scheme is necessary to remedy that discrimination. Indeed, an outright denial of the right to vote on the basis of race can never be sufficiently necessary to remedy past discrimination in voting. To be sure, there is a compelling governmental interest in remedying prior racial restrictions on the right to vote, but the constitutionally authorized remedy is imposition of a race-neutral voting scheme (and, if needed, the elimination of various race-neutral voting devices that can be a pretext for racial discrimination). See, e.g., 42 U.S.C. § 1973; Fullilove, 448 U.S. at 546-47 (Stevens, J., dissenting) (Voting Rights Act, if it required that 10% of elected officials be minorities, "would merely create the kind of inequality that an impartial sovereign cannot tolerate"); cf. Bazemore v. Friday, 478 U.S. 385, 407-09 (1986) (race-neutral admissions policy is constitutionally proper remedy for club's prior discriminatory admissions). In this regard, we cannot improve upon Judge Wisdom: "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." Anderson, 206 F. Supp. at 705 (Wisdom, J., dissenting).

Fourth, even assuming prior denials of the right to vote, Hawaii has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior voting discrimination -- ***21** in other words, to show that the racial classification is not simply a product of "administrative convenience" in grouping together all Hawaiians. Cf. Croson, 488 U.S. at 508.

Fifth, Hawaii has imposed a 100% racial voting set-aside in OHA elections that absolutely excludes members of races other than Hawaiian from the ballot. Faced with a 30% set-aside in Croson, the Court found "it obvious that such a program [wa]s not narrowly tailored to remedy the effects of prior discrimination." Id. at 508 (emphasis added). Given Hawaii's 100% exclusion of individuals who are not Hawaiian from the ballot in OHA elections (particularly when combined with the lack of findings of prior discrimination), the same conclusion applies here a fortiori.

Sixth, Hawaii's racial qualification is not limited in time. The State established it in 1978, and it is scheduled to last indefinitely. This qualification is not tailored "such that it will not last longer than the discriminatory effects it is designed to eliminate." Adarand, 515 U.S. at 238 (quotation omitted).

In sum, Hawaii's law satisfies none of the requirements this Court has imposed for holding a racial classification permissible under the Equal Protection Clause.

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship With Hawaiians Do Not Justify Hawaii's Racial Voting Qualification.

The State has constructed a tortured defense of its racial voting qualification that links (a) the racial restriction on the beneficiaries of OHA-controlled funds, (b) the racial qualifications to be an OHA officer, and (c) the racial qualifications for voting in elections for OHA officers. To begin with, this defense does not purport to meet the requirements this Court has imposed for racial classifications.

Even addressing the State's argument on its own terms, moreover, the short answer to it is fairly simple: Three blatant ***22** constitutional wrongs do not make a right. A massive unconstitutional scheme of racially restricted distribution of state funds, racial restrictions on serving in the state office that oversees and distributes those funds, and racially restricted elections to that office hardly makes the State's voting restriction more constitutionally palatable. See Stuart M.

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Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 594 (1996) ("""It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet [strict scrutiny] standards. The compelling interest requirement alone would pose an enormous hurdle.").

Hawaii has suggested that the racial voting qualification is constitutional because the racial restriction on the use of the OHA-controlled funds is constitutional and is not challenged here. As a matter of logic, that conclusion makes no sense even if the premise is accepted. If a state refused to hire a black teacher for an all-white school in 1952 because of his race, it could not have defended against a claimed equal protection violation by saying that the racial restriction on hiring was constitutional because the racially segregated schools were not challenged and had not yet been declared unconstitutional.

In addition, the racial restriction on the use of funds is itself unnecessary and not narrowly tailored to serve a compelling interest. Even assuming, for example, that the average Hawaiian suffers poverty to a greater extent than the average individual of another race, the State can institute a race-neutral social welfare program. It cannot engage, however, in a racially restricted distribution of funds that is both over-inclusive and under-inclusive.

Even if the State had a justification to pay monies to members of a racial group because of their race, a state does not have a compelling interest in establishing a racially restricted office whose members are elected in racially restricted elections in order to administer the program. In that regard, it ***23** bears emphasis that a racial voting qualification is perhaps the most pernicious of all racial classifications because it implies that "individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens." Miller, 515 U.S. at 914 (quotation omitted). This is the "precise use of race as a proxy the Constitution prohibits." Id.; cf. Powers, 499 U.S. at 410. Here, only by assuming that all Hawaiians think differently and vote differently from all other Hawaiian citizens can the categorical racial voting qualification be explained. Such an offensive assumption is patently unconstitutional under this Court's precedent.

Hawaii has invoked the term "trust" to describe its scheme and the term "trust lands" to describe lands transferred to the State by the 1959 Admission Act. But the terminology is simply camouflage for Hawaii's 1978 decision that certain state funds (derived both from the state lands and from other state funds) will be used to benefit a racially defined group -- even though the State is free to use those funds in a race-neutral way. [FN12] In any event, the existence of trust lands does not justify a racial qualification to vote in state elections for the state office that oversees and administers the lands.

> FN12. Even were the State compelled by federal law to impose a racial classification (which it is not), Adarand establishes that the constitutional analysis would remain the same.

Hawaii also has explained -- correctly -- that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But the State has no right to engage in a racially restricted distribution of state funds, or racial classifications on the right to vote in a ***24** state election, simply to preserve a particular "culture." [FN13] As Justice

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Kennedy has explained, "There is more than a fine line, however, between the voluntary association that leads to a political community ... and the forced separation that occurs when the government draws explicit political boundaries ...." Kiryas Joel, 512 U.S. at 730 (Kennedy, J., concurring in judgment).

FN13. As two leading political and social commentators said of Hawaii: "It is one thing to celebrate a cultural heritage and a sometimes tragic history, but it is another, as Canadians have learned, to widen splits and schisms in a state that more than almost any place in the world has proved that diverse people can live amicably and successfully together." Michael Barone & Grant Ujifusa, The Almanac of American Politics 439 (1998).

The dangers of allowing a state's cultural justifications to supersede the limitations of the Equal Protection Clause are quite evident: One need only change the state from Hawaii to Louisiana and the year from 1999 to 1896. See Plessy, 163 U.S. at 550 (legislature is free "to act with reference to the established usages, customs, and traditions of the people"). This Court has forbidden that kind of "cultural" justification for racial classifications in cases ranging from Brown v. Board of Education to Loving v. Virginia. Now is no time to return to an era when "cultural" justifications could trump the dictates of the Equal Protection Clause. Cf. Loving, 388 U.S. at 11 (ban on interracial marriage designed to "maintain White Supremacy").

E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed.

The lower courts suggested that American Indian tribes are exempt from the Equal Protection Clause (at least, treatment of Indian tribes that facilitates self-government is exempt), and that Hawaiians as a group are sufficiently similar to American Indian tribes that discrimination in favor of Hawaiians can be *25 permitted under the Equal Protection Clause. See, e.g., Pet. App. 13a-14a, 17a.

This argument is flawed at every turn. To begin with, it misconceives the basis for differential treatment of American Indian tribes under the Constitution. And it simultaneously creates from whole cloth a constitutional authorization for members of other racial and ethnic groups (for example, African-Americans, Latino-Americans, and Korean-Americans) to assert ipse dixit that they are "similar to American Indian tribes" for purposes of equal protection analysis.

1. American Indian tribes are a distinctive category in our law. See Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States -- and have been so considered since before the Constitution was ratified. The Commerce Clause thus provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. i, § 8. In addition, the Treaty Clause, which grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," has been a source of authority for the federal government to deal with American Indian tribes as sovereigns. U.S. Const. art. ii, § 2.

As mandated by the Constitution, this Court has drawn a clear constitutional distinction between (a) laws that benefit or burden Indian tribes (or tribal members) with respect to self-governance or activities on or near an Indian reservation and (b) laws that burden or benefit Indians solely because of their race and do not relate to tribal activities (in which case, American Indians are

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treated like members of other races).

Equal protection strict scrutiny thus applies to classifications by race of individuals who happen to be American Indian so long as the classification in question does not relate to their tribal membership and their activities on or near the reservation. In both Adarand and Croson, for *26 example, the Court held that a racial preference program that gave preferences to American Indians, as well as members of other racial groups, was subject to strict scrutiny. As the Court stated in Croson, "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." 488 U.S. at 506 (emphasis added). In Adarand as well, the program provided a preference for "Native Americans," but the Court held that all racial classifications are subject to strict scrutiny. (In dissent, Justice Stevens raised the subject of American Indians, 515 U.S. at 244-45 n.3, but the Court did not distinguish American Indians from the other racial groups.) So, too, in both Fullilove and Metro Broadcasting, the laws at issue gave a preference to American Indians, see Metro Broadcasting, 497 U.S. at 553 n.1; Fullilove, 448 U.S. at 454, but no member of this Court suggested that a racial preference for African-Americans is more strictly scrutinized than a preference for American Indians.

2. In holding Hawaii's special treatment of Hawaiians consistent with the Equal Protection Clause, the courts below erroneously relied in part on this Court's decision in Morton v. Mancari, 417 U.S. 535 (1974). In that case, the Court upheld a hiring preference granted to tribal Indians for employment in the Bureau of Indian Affairs.

Three points about Mancari are critical, however, and completely undercut the lower courts' reliance on it. First, the Court in Mancari stated that the justification for differential treatment for Indian tribes stemmed not from some idiosyncratic ordering of different racial groups, but "from the Constitution itself" -- namely, the Indian Commerce Clause and the Treaty Clause. Id. at 552; see also Adarand, 515 U.S. at 244-45 n.3 (Stevens, J., dissenting) (Mancari relied in part on "plenary power of Congress to legislate on behalf of Indian tribes"); United States v. Antelope, 430 U.S. 641, 646 (1977) (Mancari "involved preferences ... directly promoting Indian *27 interests in self-government.... Federal regulation of Indian tribes ... is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians.") (quotation omitted; emphasis added). So, too, the government's brief in Mancari, advocating the position that the Court adopted, cautioned that the Constitution "permits special arrangements [with respect to Indian tribes] that might not be appropriate with respect to other groups." Br. for Appellants, No. 73-362, at 33 (emphasis added). By linking its decision to the Indian Commerce Clause, the Court accepted that argument. The Court did not adopt, by contrast, the suggestion of an amicus curiae who argued that benign racial preferences are not subject to strict scrutiny, and that preferences to """members of a minority group" such as American Indians "are constitutional." Br. for Amicus Curiae Mexican American Legal Defense and Educational Fund, Nos. 73-362, 73- 364, at 22-23.

Second, consistent with its view of the proper scope of the equal protection exception for Indian tribes embodied in the Indian Commerce and Treaty Clauses, the Mancari Court went out of its way to make clear that the BIA preference applied only to Indians who were members of Indian tribes and thus "operate[d] to exclude many individuals who are racially to be classified as Indians." Mancari, 417 U.S. at 554 n.24. In particular, the Court relied on the definition of Indian used in BIA regulations, which expressly conditioned the preference on tribal membership. Id.; see Benjamin, 106 Yale L.J. at 612 n.38 ("One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory

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definition of 'Indian' and looked only to the BIA regulation's definition."); see also id. at n.121. The government stressed at oral argument, moreover, that the "preference is limited to Indians who are members of federally recognized [tribes]." Tr. of Oral Arg., Nos. 73-362, 73-364, at 7. The government pointed out that members of terminated tribes or never-recognized tribes were not eligible for the preference and noted *28 that "there are many Indians, many people who racially could be considered an Indian who don't get this preference." Id. at 13.

Third, the Court treated the preference as an aspect of constitutionally authorized Indian self-governance. See 417 U.S. at 553 (preference provision designed to give "Indians a greater control of their own destinies"). Indeed, as the government pointed out at argument, some 11,500 BIA employees out of approximately 14,000 at the time worked on the reservations. Tr. of Oral Arg. at 5-6. Moreover, the preference had actually begun as a substitute for a proposal to provide Indian tribes an absolute veto over any person the BIA proposed to send to work on the reservation. Id. at 12. The Court took all of that into account, noting that an "obviously more difficult question ... would be presented" by a general Indian preference in government employment. 417 U.S. at 554. [FN14]

> FN14. That "question," which was unanswered at the time, was whether the same level of scrutiny afforded racial discrimination against minorities would apply to racial preferences for minorities -- a question before the Court that Term, Defunis v. Odegaard, 416 U.S. 312 (1974), and which was subsequently addressed in cases such as Bakke, Fullilove, Croson, and Adarand.

In reaching its conclusion, the Court stated that the BIA classification was not "in this sense" a "racial" preference. Id. at 553 & n.24. By that, the Court clearly meant that a classification involving Indian tribes (or involving Indian tribal members engaged in activities of self-governance or activities on or near a reservation) must be analyzed differently from purely racial classifications.

Mancari is thus simply another in the line of cases in which the Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that *29 might otherwise be constitutionally offensive." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) (quotation omitted; emphasis added).

3. Hawaii's attempts to analogize Hawaiians to Indian tribes for purposes of this case are unavailing for two main reasons.

First, the Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause. Pet. App. 14a. Under the Constitution, therefore, a state's differential treatment of Hawaiians is no more acceptable than a state's differential treatment of Croatian-Americans or African-Americans or Italian-Americans.

Second, Hawaiians are not a federally recognized Indian tribe such that Hawaiians could receive the same treatment as American Indian tribes under the Constitution. Since the annexation in 1898, the United States has not dealt with Hawaiians as a sovereign nation. To be sure, certain federal statutes refer to Hawaiians, just as certain statutes refer to African-Americans, but Congress has never established that Hawaiians are an Indian tribe. This is not a trivial point. Without such recognition, a group of people united by race or ethnicity is not entitled to the

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same treatment as an American Indian tribe. As the BIA puts it, express federal recognition as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; see Rachael Paschal, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 Wash. L. Rev. 209, 215-16 (1991).

As a matter of law and tradition, moreover, federal courts do not grant tribal status that neither Congress nor the Executive has granted. United States v. Holliday, 70 U.S. 407, 419 (1865); see *30Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1496 (D.C. Cir. 1997). Therefore, this Court cannot simply declare that Hawaiians are an American Indian tribe.

Indeed, the constitutional constraints on Congress and the Executive in recognizing tribes, as well as existing BIA regulations, establish that Hawaiians could not possibly qualify as a tribe. See 25 C.F.R. § 83; Price v. Hawaii, 764 F.2d 623, 628 (9th Cir. 1985) (group of Hawaiians not a tribe and thus could not sue under jurisdictional statute granting Indian tribes right to sue); Benjamin, 106 Yale L.J. at 574, 576 ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and """there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe' ...."). Even the courts below recognized that Hawaiians have not and could not at this time receive formal recognition as an Indian tribe. Pet. App. 14a.

In any event, even were Hawaiians a recognized Indian tribe, the OHA's racial restriction on voting in elections for a state government office dealing with such an "Indian tribe" would still be unconstitutional. The "unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, ... [but] States do not enjoy the same unique relationship with Indians ...." Yakima Nation, 439 U.S. at 500-01 (quotation omitted; emphases added).

For all of these reasons, the State's attempt to analogize Hawaiians to American Indians does not justify its racial voting qualification in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,1999.
Rice v. Cayetano
1999 WL 345639

Briefs and Other Related Documents (Back to top)

- 1999 WL 955376, 68 USLW 3288 (Oral Argument) Oral Argument (Oct. 06, 1999)
- 1999 WL 691999 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Sep. 03, 1999)
- 1999 WL 557073 (Appellate Brief) BRIEF FOR RESPONDENT (Jul. 28, 1999)
- 1999 WL 557268 (Appellate Brief) BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII (Jul. 28, 1999)

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• 1999 WL 557271 (Appellate Brief) BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT (Jul. 28, 1999)

• 1999 WL 557275 (Appellate Brief) BRIEF OF AMICI CURIAE STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, HUI K?AKO'O =BQP:0003='?AINA HO'OPULAPULA, KALAMA'ULA HOMESTEAD ASSOCIATION AND HAWAIIAN HOMES COMMISSION IN SUPPORT OF RESPONDENT=EQP:0003= (Jul. 28, 1999)

• 1999 WL 557279 (Appellate Brief) BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 557287 (Appellate Brief) BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY CO UNCIL, HA HAWAII, HUI KALAIAINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS AMICI CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

• 1999 WL 557289 (Appellate Brief) BRIEF FOR THE HAWAI'I CONGRESSIONAL DELEGATION AS AMICUS CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

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• 1999 WL 569475 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT (Jul. 23, 1999)

• 1999 WL 374574 (Appellate Brief) BRIEF FOR PETITIONER (May. 27, 1999)

• 1999 WL 374578 (Appellate Brief) BRIEF OF AMICI CURIAE, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES (May. 27, 1999)

• 1999 WL 374577 (Appellate Brief) BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER (May. 26, 1999)

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Briefs and Other Related Documents

Supreme Court of the United States

Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of Hawaii.

No. 98-818.

Argued Oct. 6, 1999.
Decided Feb. 23, 2000.

Citizen of Hawai'i brought § 1983 action against state officials, challenging eligibility requirement for voting for trustees for Office of Hawaiian Affairs (OHA). The United States District Court of the District of Hawai'i, David A. Ezra, J., 963 F.Supp. 1547, upheld voter qualification. Citizen appealed. The Court of Appeals for the Ninth Circuit, Rymer, Circuit Judge, 146 F.3d 1075, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated Fifteenth Amendment by using ancestry as proxy for race, and thereby enacting a race-based voting qualification; (2) exclusion of non-Hawaiians from voting for OHA trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes; (3) voting qualification was not permissible under cases holding that one-person, one-vote rule did not pertain to certain special purpose districts; and (4) voting qualification was not saved from unconstitutionality on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust.

Reversed.

Justice Breyer filed an opinion concurring in the result, in which Justice Souter joined.

Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined in part.

Justice Ginsburg filed a dissenting opinion.

West Headnotes

[1] **Constitutional Law 82(8)**
92k82(8) Most Cited Cases

Fifteenth Amendment, which prohibits federal government and the states from denying or abridging the right to vote on account of race, grants protection to all persons, not just members of a particular race. U.S.C.A. Const.Amend. 15.

[2] **Constitutional Law 82(8)**
92k82(8) Most Cited Cases

[2] **States 46**
360k46 Most Cited Cases

Provision of Hawai'i Constitution governing election of trustees for Office of Hawaiian Affairs (OHA), under which voter eligibility was limited to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian" as defined by statute, violated Fifteenth Amendment, since voting structure granted the vote to persons of defined ancestry and to no others, and ancestry was a proxy for race, to extent that object of statutory definitions in question was to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[3] **States 46**
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA) was not permissible under cases allowing the differential treatment of certain members of Indian tribes, since, even assuming there was authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress could not authorize a State to create a voting scheme which excluded whole classes of citizens from decisionmaking in critical state affairs based on their race. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[4] **Constitutional Law 82(8)**
92k82(8) Most Cited Cases

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[4] Constitutional Law 215.3
92k215.3 Most Cited Cases

[4] States 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA), which constituted a race-based abridgement of the right to vote, was not permissible under cases holding that the one-person, one-vote rule did not pertain to certain special purpose districts, since compliance with Fourteenth Amendment's one-person, one-vote rule did not excuse noncompliance with the Fifteenth Amendment. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[5] Constitutional Law 82(8)
92k82(8) Most Cited Cases

[5] States 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA) was not saved from being struck down under Fifteenth Amendment on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust, and thus that the restriction was based on beneficiary status rather than race; it was not clear that voting classification was symmetric with beneficiaries of programs administered by OHA, and, in any event, State's argument rested on demeaning premise that citizens of a particular race were somehow more qualified than others to vote on certain matters, a premise inconsistent with the Fifteenth Amendment. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

****1045 *495** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. The agency administers programs designed for the benefit of two subclasses of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defines "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the islands before 1778, and "Hawaiians"--a larger class that includes "native Hawaiians"--as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The trustees are chosen in a statewide election in which only "Hawaiians" may vote. Petitioner Rice, a Hawaiian citizen without the requisite ancestry to be a "Hawaiian" under state law, applied to vote in OHA trustee elections. When his application was denied, he sued respondent Governor (hereinafter State), claiming, *inter alia,* that the voting exclusion was invalid under the Fourteenth and Fifteenth Amendments. The Federal District Court granted the State summary judgment. Surveying the history of the islands and their people, it determined that Congress and Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which is analogous to the relationship between the United States and Indian tribes. It examined the voting qualifications with the latitude applied to legislation passed pursuant to Congress' power over Indian affairs, see *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290, and found that the electoral scheme was rationally related to the State's responsibility under its Admission Act to utilize a part of the proceeds from certain public lands for the native Hawaiians' benefit. The Ninth Circuit affirmed, finding that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." 146 F.3d 1075, 1079.

Held: Hawaii's denial of Rice's right to vote in OHA trustee elections violates the Fifteenth Amendment. Pp. 1054-1060.

****1046** (a) The Amendment's purpose and command are set forth in explicit and comprehensive language. The National Government and the States may not deny or abridge the right to vote on account of race. The Amendment reaffirms the equality of races at the most basic level ***496** of the democratic process, the exercise of the voting franchise. It protects all persons, not just members of a particular race. Important precedents give instruction in the instant case. The Amendment was quite sufficient to invalidate a grandfather clause that did not mention race but instead used ancestry in an attempt to

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confine and restrict the voting franchise, *Guinn v. United States,* 238 U.S. 347, 364-365, 35 S.Ct. 926, 59 L.Ed. 1340; and it sufficed to strike down the white primary systems designed to exclude one racial class (at least) from voting, see, *e.g., Terry v. Adams,* 345 U.S. 461, 469-470, 73 S.Ct. 809, 97 L.Ed. 1152. The voting structure in this case is neither subtle nor indirect; it specifically grants the vote to persons of the defined ancestry and to no others. Ancestry can be a proxy for race. It is that proxy here. For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. The provisions at issue reflect the State's effort to preserve that commonality to the present day. In interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582. The very object of the statutory definition here is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The history of the State's definition also demonstrates that the State has used ancestry as a racial definition and for a racial purpose. The drafters of the definitions of "Hawaiian" and "native Hawaiian" emphasized the explicit tie to race. The State's additional argument that the restriction is race neutral because it differentiates even among Polynesian people based on the date of an ancestor's residence in Hawaii is undermined by the classification's express racial purpose and its actual effects. The ancestral inquiry in this case implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities. The State's ancestral inquiry is forbidden by the Fifteenth Amendment for the further reason that using racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. The State's electoral restriction enacts a race-based voting qualification. Pp. 1054-1057.

(b) The State's three principal defenses of its voting law are rejected. It argues first that the exclusion of non-Hawaiians from voting is permitted under this Court's cases allowing the differential treatment of Indian tribes. However, even if Congress had the authority, delegated ***497** to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of the sort created here. Congress may not authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens. The elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. *Morton v. Mancari, supra,* distinguished. The State's further contention that the limited voting franchise is sustainable under this Court's cases holding that the one-person, one-vote rule does ****1047** not pertain to certain special purpose districts such as water or irrigation districts also fails, for compliance with the one- person, one-vote rule of the Fourteenth Amendment does not excuse compliance with the Fifteenth Amendment. Hawaii's final argument that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. While the bulk of the funds appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for trustees. The argument fails on more essential grounds; it rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Pp. 1057- 1060.

146 F.3d 1075, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, AND THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the result, in which SOUTER, J., joined, *post,* p. 1060. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post,* p. 1062. GINSBURG, J., filed a dissenting opinion, *post,* p. 1073.

Theodore B. Olson, Washington, DC, for petitioner.

John G. Roberts, Jr., Washington, DC, for respondent.

***498** Edwin S. Kneedler, Washington, DC, for

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United States, as amicus curiae, by special leave of the Court.

Justice KENNEDY delivered the opinion of the Court.

A citizen of Hawaii comes before us claiming that an explicit, race-based voting qualification has barred him from voting in a statewide election. The Fifteenth Amendment to the Constitution of the United States, binding on the National Government, the States, and their political subdivisions, controls the case.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose ***499** the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. Haw. Const., Art. XII, § 5. The agency administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as "native Hawaiians," defined by statute, with certain supplementary language later set out in full, as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778. Haw.Rev.Stat. § 10-2 (1993). The second, larger class of persons benefited by OHA programs is "Hawaiians," defined to be, with refinements contained in the statute we later quote, those persons who are descendants of people inhabiting the Hawaiian Islands in 1778. *Ibid.* The right to vote for trustees is limited to "Hawaiians," the second, larger class of persons, which of course includes the smaller class of "native Hawaiians." Haw. Const., Art. XII, § 5.

Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a "Hawaiian" in terms of the statute; so he may not vote in the trustee election. The issue presented by this case is whether Rice may be so barred. Rejecting the State's arguments that the classification in question is not racial or that, if it is, it is nevertheless valid for other reasons, we hold Hawaii's denial of petitioner's ****1048** right to vote to be a clear violation of the Fifteenth Amendment.

I

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ***500** ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources. See L. Fuchs, Hawaii Pono: An Ethnic and Political History (1961) (hereinafter Fuchs); 1-3 R. Kuykendall, The Hawaiian Kingdom (1938); (1953); (1967) (hereinafter Kuykendall).

The origins of the first Hawaiian people and the date they reached the islands are not established with certainty, but the usual assumption is that they were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. Fuchs 4; 1 Kuykendall 3; see also G. Daws, Shoal of Time: A History of the Hawaiian Islands xii-xiii (1968) (Marquesas Islands and Tahiti). When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion. Agriculture and fishing sustained the people, and, though population estimates vary, some modern historians conclude that the population in 1778 was about 200,000-300,000. See Fuchs 4; R. Schmitt, Historical Statistics of Hawaii 7 (1977) (hereinafter Schmitt). The accounts of Hawaiian life often remark upon the people's capacity to find beauty and pleasure in their island existence, but life was not altogether idyllic. In Cook's time the islands were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering. Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject. The society was one, however, with its own identity, its own cohesive forces, its own history.

In the years after Cook's voyage many expeditions would follow. A few members of the ships' companies remained on ***501** the islands, some as

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authorized advisers, others as deserters. Their intermarriage with the inhabitants of Hawaii was not infrequent.

In 1810, the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I. It is difficult to say how many settlers from Europe and America were in Hawaii when the King consolidated his power. One historian estimates there were no more than 60 or so settlers at that time. 1 Kuykendall 27. An influx was soon to follow. Beginning about 1820, missionaries arrived, of whom Congregationalists from New England were dominant in the early years. They sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.

The 1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom. Rights to land became a principal concern, and there was unremitting pressure to allow non-Hawaiians to use and to own land and to be secure in their title. Westerners were not the only ones with pressing concerns, however, for the disposition and ownership of land came to be an unsettled matter among the Hawaiians themselves.

****1049** The status of Hawaiian lands has presented issues of complexity and controversy from at least the rule of Kamehameha I to the present day. We do not attempt to interpret that history, lest our comments be thought to bear upon issues not before us. It suffices to refer to various of the historical conclusions that appear to have been persuasive to Congress and to the State when they enacted the laws soon to be discussed.

When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our own cases as "feudal." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 166, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). A well-known description of the King's early decrees is contained ***502** in an 1864 opinion of the Supreme Court of the Kingdom of Hawaii. The court, in turn, drew extensively upon an earlier report which recited, in part, as follows:

> " 'When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.... The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust.' " *In re Estate of Kamehameha IV*, 2 Haw. 715, 718-719 (quoting Principles Adopted by the Board of Commissioners to Quiet Land Titles, 2 Stat. Laws 81-82 (Haw. Kingdom 1847)).

Beginning in 1839 and through the next decade, a successive ruler, Kamehameha III, approved a series of decrees and laws designed to accommodate demands for ownership and security of title. In the words of the Hawaiian Supreme Court, "[t]he subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished." 2 Haw., at 721. ***503** Arrangements were made to confer freehold title in some lands to certain chiefs and other individuals. The King retained vast lands for himself, and directed that other extensive lands be held by the government, which by 1840 had adopted the first Constitution of the islands. Thus was effected a fundamental and historic division, known as the Great Mahele. In 1850, foreigners, in turn, were given the right of land ownership.

The new policies did not result in wide dispersal of ownership. Though some provisions had been attempted by which tenants could claim lands, these proved ineffective in many instances, and ownership became concentrated. In 1920, the Congress of the United States, in a Report on the bill establishing the Hawaiian Homes Commission, made an assessment of Hawaiian land policy in the following terms:

> "Your committee thus finds that since the institution of private ownership of lands in Hawaii the native Hawaiians, outside of the King and the

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chiefs, were granted and have held but a very small portion of the lands of the Islands. Under the homestead laws somewhat more ****1050** than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws. Thus the tax returns for 1919 show that only 6.23 per centum of the property of the Islands is held by native Hawaiians and this for the most part is lands in the possession of approximately a thousand wealthy Hawaiians, the ***504** descendents of the chiefs." H.R.Rep. No. 839, 66th Cong., 2d Sess., 6 (1920).

While these developments were unfolding, the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first "articles of arrangement" between the United States and the Kingdom of Hawaii were signed in 1826, 8 Department of State, Treaties and Other International Agreements of the United States of America 1776-1949, p. 861 (C. Bevans comp.1968), and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887, see Treaty with the Hawaiian Islands, 9 Stat. 977 (1849) (friendship, commerce, and navigation); Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875) (commercial reciprocity); Supplementary Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 25 Stat. 1399 (1887) (same). The United States was not the only country interested in Hawaii and its affairs, but by the later part of the century the reality of American dominance in trade, settlement, economic expansion, and political influence became apparent.

Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and western business interests and property owners on the other. The conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the right to vote to non-Hawaiians. 3 Kuykendall 344-372.

Tensions continued through 1893, when they again peaked, this time in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects. A so-called ***505** Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. On December 18 of the same year, President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for restoration of the Hawaiian monarchy. Message of the President to the Senate and House of Representatives, reprinted in H.R.Rep. No. 243, 53d Cong., 2d Sess., 3-15 (1893). The Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated her throne a year later.

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. 30 Stat. 750. According to the Joint Resolution, the Republic of Hawaii ****1051** ceded all former Crown, government, and public lands to the United States. *Ibid.* The resolution further provided that revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.* Two years later the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands "in the possession, use, and control of the government of the Territory of Hawaii ... until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159.

In 1993, a century after the intervention by the Committee of Safety, the Congress of the United States reviewed this history, and in particular the role of Minister Stevens. Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people. 107 Stat. 1510.

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***506** Before we turn to the relevant provisions two other important matters, which affected the demographics of Hawaii, must be recounted. The first is the tragedy inflicted on the early Hawaiian people by the introduction of western diseases and infectious agents. As early as the establishment of the rule of Kamehameha I, it was becoming apparent that the native population had serious vulnerability to diseases borne to the islands by settlers. High mortality figures were experienced in infancy and adulthood, even from common illnesses such as diarrhea, colds, and measles. Fuchs 13; see Schmitt 58. More serious diseases took even greater tolls. In the smallpox epidemic of 1853, thousands of lives were lost. *Ibid.* By 1878, 100 years after Cook's arrival, the native population had been reduced to about 47,500 people. *Id.*, at 25. These mortal illnesses no doubt were an initial cause of the despair, disenchantment, and despondency some commentators later noted in descendents of the early Hawaiian people. See Fuchs 13.

The other important feature of Hawaiian demographics to be noted is the immigration to the islands by people of many different races and cultures. Mostly in response to the demand of the sugar industry for arduous labor in the cane fields, successive immigration waves brought Chinese, Portuguese, Japanese, and Filipinos to Hawaii. Beginning with the immigration of 293 Chinese in 1852, the plantations alone drew to Hawaii, in one estimate, something over 400,000 men, women, and children over the next century. *Id.*, at 24; A. Lind, Hawaii's People 6-7 (4th ed.1980). Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands. See E. Nordyke, The Peopling of Hawai'i 28-98 (2d ed.1989). The 1990 census figures show the resulting ethnic diversity of the Hawaiian population. U.S. Dept. of Commerce, Bureau of Census, 1990 Census of Population, ***507** Supplementary Reports, Detailed Ancestry Groups for States (Oct. 1992).

With this background we turn to the legislative enactments of direct relevance to the case before us.

II

Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. See H.R.Rep. No. 839, at 2-6; Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii before the House Committee on the Territories, 66th Cong., 2d Sess. (1920). Reciting its purpose to rehabilitate the native Hawaiian population, see H.R.Rep. No. 839, at 1-2, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. Act of ****1052** July 9, 1921, ch. 42, 42 Stat. 108. The Act defined "native Hawaiian [s]" to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Ibid.*

Hawaii was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. Pub.L. 86-3, § § 4, 7, 73 Stat. 5, 7 (Admission Act); see Haw. Const., Art. XII, § § 1-3. In addition, the United States granted Hawaii title to all public lands and public property within the boundaries of the State, save those which the Federal Government retained for its own use. Admission Act § § 5(b)-(d), 73 Stat. 5. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million additional acres of land. Brief for United States as *Amicus Curiae* 4.

The legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to ***508** be held "as a public trust" to be "managed and disposed of for one or more of" five purposes:

> "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [,][4] for the making of public improvements, and [5] for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6.

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

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In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs, Haw. Const., Art. XII, § 5, which has as its mission "[t]he betterment of conditions of native Hawaiians ... [and] Hawaiians," Haw.Rev.Stat. § 10-3 (1993). Members of the 1978 constitutional convention, at which the new amendments were drafted and proposed, set forth the purpose of the proposed agency:

> "Members [of the Committee of the Whole] were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, p. 1018 (1980).

***509** Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer "for the betterment of the conditions of native Hawaiians," Haw.Rev.Stat. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. See generally Haw.Rev.Stat. § § 10-1 to 10-16. (The 200,000 acres set aside under the Hawaiian Homes Commission Act are administered by a separate agency. See Haw.Rev.Stat. § 26-17 (1993).) The Hawaiian Legislature has charged OHA with the mission of "[s]erving as the principal public agency ... responsible for the performance, development, and coordination of programs and activities relating ****1053** to native Hawaiians and Hawaiians," "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a receptacle for reparations." § 10-3.

OHA is overseen by a nine-member board of trustees, the members of which "shall be Hawaiians" and--presenting the precise issue in this case-- shall be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const., Art. XII, § 5; see Haw.Rev.Stat. § § 13D-1, 13D- 3(b)(1) (1993). The term "Hawaiian" is defined by statute:

> " 'Hawaiian' means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." § 10-2.

The statute defines "native Hawaiian" as follows:

> ***510** " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Ibid.*

Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 natives, and so he is neither "native Hawaiian" nor "Hawaiian" as defined by the statute. Rice applied in March 1996 to vote in the elections for OHA trustees. To register to vote for the office of trustee he was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." Affidavit on Application for Voter Registration, Lodging by Petitioner, Tab 2. Rice marked through the words "am also Hawaiian and," then checked the form "yes." The State denied his application.

Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii. (The Governor was sued in his official capacity, and the Attorney General of Hawaii defends the challenged enactments. We refer to the respondent as "the State.") Rice contested his exclusion from voting in elections for OHA trustees and from voting in a special election relating to native Hawaiian sovereignty which was held in August 1996. After the District Court rejected the latter challenge, see *Rice v. Cayetano*, 941 F.Supp. 1529 (1996) (a decision not before us), the parties moved for summary judgment on the claim that the Fourteenth and Fifteenth Amendments to the United States Constitution invalidate the law excluding Rice from the OHA trustee elections.

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***511** The District Court granted summary judgment to the State. 963 F.Supp. 1547 (D.Haw.1997). Surveying the history of the islands and their people, the District Court determined that Congress and the State of Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which the court found analogous to the relationship between the United States and the Indian tribes. *Id.*, at 1551-1554. On this premise, the court examined the voting qualification with the latitude that we have applied to legislation passed pursuant to Congress' power over Indian affairs. *Id.*, at 1554-1555 (citing *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). Finding that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of ****1054** Native Hawaiians," the District Court held that the voting restriction did not violate the Constitution's ban on racial classifications. 963 F.Supp., at 1554- 1555.

The Court of Appeals affirmed. 146 F.3d 1075 (C.A.9 1998). The court noted that Rice had not challenged the constitutionality of the underlying programs or of OHA itself. *Id.*, at 1079. Considering itself bound to "accept the trusts and their administrative structure as [it found] them, and assume that both are lawful," the court held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Ibid.* The court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes "contain a racial classification on their face." *Ibid.*

We granted certiorari, 526 U.S. 1016, 119 S.Ct. 1248, 143 L.Ed.2d 346 (1999), and now reverse.

III

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. ***512** The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race. Color and previous condition of servitude, too, are forbidden criteria or classifications, though it is unnecessary to consider them in the present case.

[1] Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom. Vital as its objective remains, the Amendment goes beyond it. Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. "[B]y the inherent power of the Amendment the word white disappeared" from our voting laws, bringing those who had been excluded by reason of race within "the generic grant of suffrage made by the State." *Guinn v. United States*, 238 U.S. 347, 363, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); see also *Neal v. Delaware*, 103 U.S. 370, 389, 26 L.Ed. 567 (1881). The Court has acknowledged the Amendment's mandate of neutrality in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese*, 92 U.S. 214, 218, 23 L.Ed. 563 (1876).

***513** Though the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks. We have cataloged before the "variety and persistence" of these techniques. *South Carolina v. Katzenbach*, 383 U.S. 301, 311-312, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (citing, *e.g.*, *Guinn, supra* (grandfather clause); *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349 (1915) (same); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) ("procedural hurdles"); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (white primary); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (same); ****1055** *United States v. Thomas*, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535 (1960) *(per curiam)* (registration

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challenges); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering); *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) ("interpretation tests")). Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter. See 383 U.S., at 313-315, 86 S.Ct. 803.

Important precedents did emerge, however, which give instruction in the case now before us. The Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise. In 1910, the State of Oklahoma enacted a literacy requirement for voting eligibility, but exempted from that requirement the " 'lineal descendant[s]' " of persons who were " 'on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation.' " *Guinn, supra*, at 357, 35 S.Ct. 926. Those persons whose ancestors were entitled to vote under the State's previous, discriminatory voting laws were thus exempted from the eligibility test. Recognizing that the test served only to perpetuate those old laws and to effect a transparent racial exclusion, the Court invalidated it. 238 U.S., at 364-365, 35 S.Ct. 926.

More subtle, perhaps, than the grandfather device in *Guinn* were the evasions attempted in the white primary cases; but the Fifteenth Amendment, again by its own terms, sufficed to strike down these voting systems, systems designed ***514** to exclude one racial class (at least) from voting. See *Terry, supra*, at 469-470, 73 S.Ct. 809; *Allwright, supra*, at 663-666, 64 S.Ct. 757 (overruling *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)). The Fifteenth Amendment, the Court held, could not be so circumvented: "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy ... not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." *Terry, supra*, at 467, 73 S.Ct. 809.

[2] Unlike the cited cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others. The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. Brief for Respondent 38-40. The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti. *Id.*, at 38-39, and n. 15. Furthermore, the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date. *Ibid.* These factors, it is said, mean the restriction is not a racial classification. We reject this line of argument.

Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. But that is not this case. For centuries Hawaii was isolated from migration. 1 Kuykendall 3. The inhabitants shared common physical characteristics, ***515** and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. Hawaii Senate ****1056** Journal, Standing Committee Rep. No. 784, at 1354; see *ibid.* ("Modern scholarship also identified such race of people as culturally distinguishable from other Polynesian peoples"). The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al--Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

The history of the State's definition demonstrates the point. As we have noted, the statute defines "Hawaiian" as

> "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands

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> in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993).

A different definition of "Hawaiian" was first promulgated in 1978 as one of the proposed amendments to the State Constitution. As proposed, "Hawaiian" was defined as "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, at 1018. Rejected as not ratified in a valid manner, see *Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979), ***516** the definition was modified and in the end promulgated in statutory form as quoted above. See Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1350, 1353-1354; *id.*, Conf. Comm. Rep. No. 77, at 998. By the drafters' own admission, however, any changes to the language were at most cosmetic. Noting that "[t]he definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races,' " the drafters of the revised definition "stress[ed] that this change is non-substantive, and that 'peoples' does mean 'races.' " *Ibid.*; see also *id.*, at 999 ("[T]he word 'peoples' has been substituted for 'races' in the definition of 'Hawaiian'. Again, your Committee wishes to emphasize that this substitution is merely technical, and that 'peoples' does mean 'races' ").

The next definition in Hawaii's compilation of statutes incorporates the new definition of "Hawaiian" and preserves the explicit tie to race:

> " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993).

This provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." *Ibid.*

As for the further argument that the restriction differentiates even among Polynesian people and is based simply on the date of an ancestor's residence in Hawaii, this too is insufficient to prove the classification is nonracial in purpose and operation. Simply because a class defined by ancestry does not include all members of the race does not suffice to ***517** make the classification race neutral. Here, the State's argument is undermined by its express ****1057** racial purpose and by its actual effects.

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State's electoral restriction enacts a race-based voting qualification.

IV

The State offers three principal defenses of its voting law, any of which, it contends, allows it to prevail even if the classification is a racial one under the Fifteenth Amendment. We examine, and reject, each of these arguments.

***518** A

[3] The most far reaching of the State's arguments is that exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes. The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi- sovereign authority, even after cession of

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their lands to the United States. See *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 425, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (plurality opinion); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). The retained tribal authority relates to self-governance. *Brendale, supra*, at 425, 109 S.Ct. 2994 (plurality opinion). In reliance on that theory the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. *Mancari*, 417 U.S., at 553-555, 94 S.Ct. 2474. The *Mancari* case, and the theory upon which it rests, are invoked by the State to defend its decision to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians.

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State--and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993--has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the ****1058**Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, ***519**Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996). We can stay far off that difficult terrain, however.

The State's argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.

Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 673, n. 20, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (treaties securing preferential fishing rights); *United States v. Antelope*, 430 U.S. 641, 645-647, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (distribution of tribal property); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (Indian immunity from state taxes); *Fisher v. District Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390-391, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) *(per curiam)* (exclusive tribal court jurisdiction over tribal adoptions). As we have observed, "every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians." *Mancari, supra*, at 552, 94 S.Ct. 2474.

Mancari, upon which many of the above cases rely, presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference which favored individuals who were " 'one-fourth or more degree Indian blood and ... member[s] of a Federally-recognized tribe.' " 417 U.S., at 553, n. 24, 94 S.Ct. 2474 (quoting 44 BIAM 335, 3.1 (1972)). Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,' " but rather "only to members of 'federally ***520** recognized' tribes." 417 U.S., at 553, n. 24, 94 S.Ct. 2474. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Ibid.*; see also *id.*, at 554, 94 S.Ct. 2474 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"). Because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. *Id.*, at 555, 94 S.Ct. 2474. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as "*sui generis*." *Id.*, at 554, 94 S.Ct. 2474.

Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA--and the challenged voting provision--is to afford Hawaiians a measure of self- governance," and so it

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fits the model of *Mancari.* Brief for Respondent 34. It does not follow from *Mancari,* however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

The tribal elections established by the federal statutes the State cites illuminate its error. See Brief for Respondent 22 (citing, *e.g.,* the Menominee Restoration Act, 25 U.S.C. § 903b, and the Indian Reorganization Act, 25 U.S.C. § 476). If a ****1059** non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations. See Haw. Const., Art. XII, § § 5-6. The Hawaiian Legislature has declared that OHA exists to serve "as the principal public agency in th[e] ***521** State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." Haw.Rev.Stat. § 10-3(3) (1993); see also Lodging by Petitioner, Tab 6, OHA Annual Report 1993-1994, p. 5 (May 27, 1994) (admitting that "OHA is technically a part of the Hawaii state government," while asserting that "it operates as a semi-autonomous entity"). Foremost among the obligations entrusted to this agency is the administration of a share of the revenues and proceeds from public lands, granted to Hawaii to "be held by said State as a public trust." Admission Act § § 5(b), (f), 73 Stat. 5, 6; see Haw. Const., Art. XII, § 4.

The delegates to the 1978 constitutional convention explained the position of OHA in the state structure:

> "The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor's cabinet. The status of the Office of Hawaiian Affairs is to be unique and special .... The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645.

Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State.

The validity of the voting restriction is the only question before us. As the Court of Appeals did, we assume the validity ***522** of the underlying administrative structure and trusts, without intimating any opinion on that point. Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.

B

[4] Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. See *Ball v. James,* 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.,* 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973). Just as the *Mancari* argument would have involved a significant extension or new application of that case, so too it is far from clear that the *Salyer* line of cases would be at all applicable to statewide elections for an agency with the powers and responsibilities of OHA.

We would not find those cases dispositive in any event, however. The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment. Our special purpose district cases have not suggested that compliance with the one-person, one-****1060** vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment. We reject that argument here. We held four decades ago that state authority over the boundaries of political subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution." *Gomillion,* 364 U.S., at 345, 81 S.Ct. 125. The Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to

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vote on account of race, and this law does so.

***523** C

[5] Hawaii's final argument is that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. Thus, the contention goes, the restriction is based on beneficiary status rather than race.

As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.

Hawaii's argument fails on more essential grounds. The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry,* 345 U.S., at 468, 73 S.Ct. 809. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry. Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, ***524** the Amendment was designed to eliminate. The voting restriction under review is prohibited by the Fifteenth Amendment.

* * *

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice SOUTER joins, concurring in the result.

I agree with much of what the Court says and with its result, but I do not agree with the critical rationale that underlies that result. Hawaii seeks to justify its voting scheme by drawing an analogy between ****1061** its Office of Hawaiian Affairs (OHA) and a trust for the benefit of an Indian tribe. The majority does not directly deny the analogy. It instead at one point assumes, at least for argument's sake, that the "revenues and proceeds" at issue are from a " 'public trust.' " *Ante,* at 1059. It also assumes without deciding that the State could "treat Hawaiians or native Hawaiians as tribes." *Ante,* at 1058. Leaving these issues undecided, it holds that the Fifteenth Amendment forbids Hawaii's voting scheme, because the "OHA is a state agency," and thus ***525** election to the OHA board is not "the internal affair of a quasi sovereign," such as an Indian tribe. *Ante,* at 1059.

I see no need, however, to decide this case on the basis of so vague a concept as "quasi sovereign," and I do not subscribe to the Court's consequently sweeping prohibition. Rather, in my view, we should reject Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.

The majority seems to agree, though it does not decide, that the OHA bears little resemblance to a trust for native Hawaiians. It notes that the Hawaii

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Constitution uses the word "trust" when referring to the 1.2 million acres of land granted in the Admission Act. *Ante,* at 1052, 1053-1054. But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are "native." Admission Act § 5(f).

Moreover, OHA funding comes from several different sources. See, *e.g.,* OHA Fiscal 1998 Annual Report 38 (hereinafter Annual Report) ($15 million from the 1.2 million acres of public lands; $11 million from "[d]ividend and interest income"; $3 million from legislative appropriations; $400,000 from federal and other grants). All of OHA's funding is authorized by ordinary state statutes. See, *e.g.,* Haw.Rev.Stat. § § 10-4, 10-6, 10-13.5 (1993); see also Annual Report 11 ("OHA's fiscal 1998-99 legislative budget was passed as Acts 240 and 115 by the 1997 legislature"). The amounts of funding and funding sources are thus subject to change by ordinary legislation. OHA spends most, but not all, of its money to benefit native Hawaiians in many different ways. See Annual Report (OHA projects support education, housing,***526** health, culture, economic development, and nonprofit organizations). As the majority makes clear, OHA is simply a special purpose department of Hawaii's state government. *Ante,* at 1058-1059.

As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1998). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA electorate.

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or ****1062** Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll--but in the far less distant past. See, *e.g.,* Constitution of the Choctaw Nation of Oklahoma, Art. II (membership consists of persons on final rolls approved in 1906 and their lineal descendants); Constitution of the Sac and Fox Tribe of Indians of Oklahoma, Art. II (membership consists of persons on official roll of 1937, children since born to two members of the Tribe, and children born to one member ***527** and a nonmember if admitted by the council); Revised Constitution of the Jicarilla Apache Tribe, Art. III (membership consists of persons on official roll of 1968 and children of one member of the Tribe who are at least three-eighths Jicarilla Apache Indian blood); Revised Constitution Mescalero Apache Tribe, Art. IV (membership consists of persons on the official roll of 1936 and children born to at least one enrolled member who are at least one-fourth degree Mescalero Apache blood).

Of course, a Native American tribe has broad authority to define its membership. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72, n. 32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members--leaving some combination of luck and interest to determine which potential members become actual voters--goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.

These circumstances are sufficient, in my view, to destroy the analogy on which Hawaii's justification must depend. This is not to say that Hawaii's definitions themselves independently violate the Constitution, cf. *post,* at 1066-1068, n. 11 (Justice STEVENS, dissenting); it is only to say that the analogies they here offer are too distant to save a

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race-based voting definition that in their absence would clearly violate the Fifteenth Amendment. For that reason I agree with the majority's ultimate conclusion.

Justice STEVENS, with whom Justice GINSBURG joins as to Part II, dissenting.

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application ***528** to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.

I

According to the terms of the federal Act by which Hawaii was admitted to the Union, and to the terms of that State's Constitution and laws, the Office of Hawaiian Affairs (OHA) is charged with managing vast acres of land held in trust for the descendants of the Polynesians who occupied the Hawaiian Islands before the 1778 arrival of Captain Cook. In addition to administering the proceeds from these assets, OHA is responsible for programs providing special benefits for native Hawaiians. Established in 1978 by an amendment to the State Constitution, OHA was intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past ****1063** wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival. As explained by the senior Senator from Hawaii, Senator Inouye, who is not himself a native Hawaiian but rather (like petitioner) is a member of the majority of Hawaiian voters who supported the 1978 amendments, the amendments reflect "an honest and sincere attempt on the part of the people of Hawai'i to rectify the wrongs of the past, and to put into being the mandate [of] our Federal government--the betterment of the conditions of Native Hawaiians." [FN1]

FN1. App. E to Brief for Hawaii Congressional Delegation as *Amicus Curiae* E-3. In a statement explaining the cultural motivation for the amendments, Senator Akaka pointed out that the "fact that the entire State of Hawaii voted to amend the State Constitution in 1978 to establish the Office of Hawaiian Affairs is significant because it illustrates the recognition of the importance of Hawaiian culture and traditions as the foundation for the *Aloha* spirit." *Id.*, at E-5.

***529** Today the Court concludes that Hawaii's method of electing the trustees of OHA violates the Fifteenth Amendment. In reaching that conclusion, the Court has assumed that the programs administered by OHA are valid. That assumption is surely correct. In my judgment, however, the reasons supporting the legitimacy of OHA and its programs in general undermine the basis for the Court's decision holding its trustee election provision invalid. The OHA election provision violates neither the Fourteenth Amendment nor the Fifteenth.

That conclusion is in keeping with three overlapping principles. First, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians, whose lands are now a part of the territory of the United States. In addition, there exists in this case the State's own fiduciary responsibility--arising from its establishment of a public trust--for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians. Finally, even if one were to ignore the more than two centuries of Indian law precedent and practice on which this case follows, there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any.

II

Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of Native Americans [FN2] and the fiduciary character of the special ***530** federal relationship with descendants of those once sovereign peoples. [FN3] The source of the Federal Government's responsibility toward the Nation's native inhabitants, who were subject to European and then American military conquest, has been explained by this Court in the crudest terms, but they remain instructive nonetheless.

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FN2. See, *e.g.*, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531, n. 6, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998); *United States v. Wheeler*, 435 U.S. 313, 319, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-565, 23 S.Ct. 216, 47 L.Ed. 299 (1903); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

FN3. See, *e.g.*, *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *Kagama*, 118 U.S., at 384-385, 6 S.Ct. 1109; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831).

"These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights .... From their very weakness and helplessness, ****1064** so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States v. Kagama*, 118 U.S. 375, 383-384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) (emphasis in original).

As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special " 'care and protection.' " [FN4] With respect to the Pueblos in New Mexico, for example, "public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction." *United States v. Sandoval*, 231 U.S. 28, 39- 40, 34 S.Ct. 1, 58 L.Ed. 107 (1913). Today, the Federal Bureau of Indian Affairs (BIA) administers countless modern programs responding to comparably pragmatic concerns, including health, education, housing, and impoverishment. See Office of the Federal Register, United States Government Manual 1999/2000, pp. 311-312. Federal regulation in this area is not limited to the strictly practical ***531** but has encompassed as well the protection of cultural values; for example, the desecration of Native American graves and other sacred sites led to the passage of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

FN4. *Sandoval*, 231 U.S., at 45, 34 S.Ct. 1; *Kagama*, 118 U.S., at 384-385, 6 S.Ct. 1109.

Critically, neither the extent of Congress' sweeping power nor the character of the trust relationship with indigenous peoples has depended on the ancient racial origins of the people, the allotment of tribal lands, [FN5] the coherence or existence of tribal self-government, [FN6] or the varying definitions of "Indian" Congress has chosen to adopt. [FN7] Rather, when it comes to the exercise of Congress' plenary power in Indian affairs, this Court has taken account of the "numerous occasions" on which "legislation that singles out Indians for particular and special treatment" has been upheld, and has concluded that as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation ***532** towards the Indians, such legislative judgments will not be disturbed." *Morton v. Mancari*, 417 U.S. 535, 554-555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

FN5. See, *e.g.*, *United States v. Celestine*, 215 U.S. 278, 286-287, 30 S.Ct. 93, 54 L.Ed. 195 (1909).

FN6. See *United States v. John*, 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them"); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 82, n. 14, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (whether or not federal statute providing financial benefits to descendants of Delaware Tribe included nontribal Indian beneficiaries, Congress' choice need only be " 'tied rationally to the fulfillment of Congress' unique obligation toward the

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Indians' " (quoting *Morton v. Mancari,* 417 U.S., at 555, 94 S.Ct. 2474)).

FN7. See generally F. Cohen, Handbook of Federal Indian Law 19-20 (1982). Compare 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians") with § 1603(c)(3) (Indian is any person "considered by the Secretary of the Interior to be an Indian for any purpose").

As the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming. Shortly before its annexation in 1898, the Republic of Hawaii (installed ****1065** by United States merchants in a revolution facilitated by the United States Government) expropriated some 1.8 million acres of land that it then ceded to the United States. In the Organic Act establishing the Territory of Hawaii, Congress provided that those lands should remain under the control of the territorial government "until otherwise provided for by Congress," Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159. By 1921, Congress recognized that the influx of foreign infectious diseases, mass immigration coupled with poor housing and sanitation, hunger, and malnutrition had taken their toll. See *ante,* at 1051. Confronted with the reality that the Hawaiian people had been "frozen out of their lands and driven into the cities," H.R.Rep. No. 839, 66th Cong., 2d Sess., 4 (1920), Congress decided that 27 specific tracts of the lands ceded in 1898, comprising about 203,500 acres, should be used to provide farms and residences for native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat. 108. Relying on the precedent of previous federal laws granting Indians special rights in public lands, Congress created the Hawaiian Homes Commission to implement its goal of rehabilitating the native people and culture. [FN8] Hawaii was required to adopt this Act as a condition ***533** of statehood in the Hawaii Statehood Admissions Act (Admissions Act), § 4, 73 Stat. 5. And in an effort to secure the Government's duty to the indigenous peoples, § 5 of the Admissions Act conveyed 1.2 million acres of land to the State to be held in trust "for the betterment of the conditions of native Hawaiians" and certain other public purposes. § 5(f), *id.,* at 1049-1050.

FN8. See H.R.Rep. No. 839, 66th Cong., 2d Sess., 4, 11 (1920). Reflecting a compromise between the sponsor of the legislation, who supported special benefits for "all who have Hawaiian blood in their veins," and plantation owners who thought that only "Hawaiians of the pure blood" should qualify, Hawaiian Homes Commission Act: Hearings before the Senate Committee on the Territories, H.R.Rep. No. 13500, 66th Cong., 3d Sess., 14-17 (1920), the statute defined a "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," 42 Stat. 108.

The nature of and motivation for the special relationship between the indigenous peoples and the United States Government was articulated in explicit detail in 1993, when Congress adopted a Joint Resolution containing a formal "apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." 107 Stat. 1510. Among other acknowledgments, the resolution stated that the 1.8 million acres of ceded lands had been obtained "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." *Id.,* at 1512.

In the end, however, one need not even rely on this official apology to discern a well-established federal trust relationship with the native Hawaiians. Among the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited. [FN9] By classifying native Hawaiians as "Native Americans" for purposes of these statutes, Congress has made clear that native Hawaiians enjoy many of "the same rights and privileges accorded to American Indian, Alaska ***534** Native, Eskimo, and Aleut communities." 42 U.S.C. § 11701(19). See also § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters

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affecting the aboriginal or indigenous peoples of ****1066** the United States includes the authority to legislate in matters affecting the native peoples of ... Hawaii").

FN9. See Brief for Hawaii Congressional Delegation as *Amicus Curiae* 7, and App. A; see also, *e.g.*, American Indian Religious Freedom Act, 42 U.S.C. § 1996 *et seq.*; Native American Programs Act of 1974, 42 U.S.C. § § 2991-2992; Comprehensive Employment and Training Act, 29 U.S.C. § 872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. § 1177; Cranston-Gonzalez National Affordable Housing Act, § 958, 104 Stat. 4422; Indian Health Care Amendments of 1988, 25 U.S.C. § 1601 *et seq.*

While splendidly acknowledging this history--specifically including the series of agreements and enactments the history reveals--the majority fails to recognize its import. The descendants of the native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States. It follows that legislation targeting the native Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that "special treatment ... be tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples. 417 U.S., at 555, 94 S.Ct. 2474.

Declining to confront the rather simple logic of the foregoing, the majority would seemingly reject the OHA voting scheme for a pair of different reasons. First, Congress' trust-based power is confined to dealings with tribes, not with individuals, and no tribe or indigenous sovereign entity is found among the native Hawaiians. *Ante,* at 1057-1059. Second, the elections are "elections of the State," not of a tribe, and upholding this law would be "to permit a State, by racial classification, to fence out whole classes of citizens from decision-making in critical state affairs." *Ante,* at 1058- 1059. In my view, neither of these reasons overcomes the otherwise compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian ***535** Islands whose historical sufferings and status parallel those of the continental Native Americans.

Membership in a tribe, the majority suggests, rather than membership in a race or class of descendants, has been the *sine qua non* of governmental power in the realm of Indian law; *Mancari* itself, the majority contends, makes this proposition clear. *Ante,* at 1058. But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court's opinion upholding the BIA preferences in *Mancari;* the hiring preference at issue in that case not only extended to nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood. [FN10] Indeed, the Federal Government simply has not been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone. See nn. 6, 7, *supra.* In light of this precedent, it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government--a possibility of which history and the actions of this Nation have deprived them. [FN11]

FN10. See, *e.g.*, Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L.Rev. 1754, 1761-1762 (1997). As is aptly explained, the BIA preference in that case was based on a statute that extended the preference to ethnic Indians-- identified by blood quantum--who were not members of federally recognized tribes. 25 U.S.C. § 479. Only the implementing regulation included a mention of tribal membership, but even that regulation required that the tribal member also " 'be one-fourth or more degree Indian blood.' " *Mancari,* 417 U.S., at 553, n. 24, 94 S.Ct. 2474.

FN11. Justice BREYER suggests that the OHA definition of native Hawaiians (*i.e.,* Hawaiians who may vote under the OHA scheme) is too broad to be "reasonable." *Ante,* at 1062 (opinion concurring in result). This suggestion does not identify a constitutional defect. The issue in this case

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is *Congress'* power to define who counts as an indigenous person, and *Congress'* power to delegate to States its special duty to persons so defined. (Justice BREYER's interest in *tribal* definitions of membership--and in this Court's holding that tribes' power to define membership is at the core of tribal sovereignty and thus "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)--is thus inapposite.) Nothing in federal law or in our Indian law jurisprudence suggests that the OHA definition of native is anything but perfectly within that power as delegated. See *supra*, at 1064-1066, and nn. 6-7. Indeed, the OHA voters match precisely the set of people to whom the congressional apology was targeted.

Federal definitions of "Indian" often rely on the ability to trace one's ancestry to a particular group at a particular time. See, *e.g.*, 25 CFR, ch. 1, § 5.1 (1999) (extending BIA hiring preference to "persons of Indian descent who are ... (b) [d]escendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"); see also n. 7, *supra*. It can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be "reasonable." The singular federal statute defining "native" to which Justice BREYER points, 43 U.S.C. § 1602(b) (including those defined by blood quantum without regard to membership in any group), serves to underscore the point that membership in a "tribal" structure *per se*, see *ante*, at 1061, is not the acid test for the exercise of federal power in this arena. See R. Clinton, N. Newton, & M. Price, American Indian Law 1054-1058 (3d ed.1991) (describing provisions of the Alaska Native Claims Settlement Act creating geographic regions of natives with common heritage and interest, 43 U.S.C. § 1606, requiring those regions to organize a native corporation in order to qualify for settlement benefits, § 1607, and establishing the Alaska Native Fund of federal moneys to be distributed to "enrolled natives," § § 1604-1605); see also *supra*, at 1066, and n. 10. In the end, what matters is that the determination of indigenous status or "real group membership," *ante*, at 1062 (BREYER, J., concurring in result), is one to be made by Congress--not by this Court.

****1067 *536** Of greater concern to the majority is the fact that we are confronted here with a state constitution and legislative enactment--passed by a majority of the entire population of Hawaii--rather than a law passed by Congress or a tribe itself. See, *e.g.*, *ante*, at 1058-1060. But as our own precedent makes clear, this reality does not alter our analysis. As I have explained, OHA and its trustee elections can hardly be characterized simply as an "affair of the State" alone; they are the instruments for implementing the Federal ***537** Government's trust relationship with a once sovereign indigenous people. This Court has held more than once that the federal power to pass laws fulfilling the federal trust relationship with the Indians may be delegated to the States. Most significant is our opinion in *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 500-501, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), in which we upheld against a Fourteenth Amendment challenge a state law assuming jurisdiction over Indian tribes within a State. While we recognized that States generally do not have the same special relationship with Indians that the Federal Government has, we concluded that because the state law was enacted "in response to a federal measure" intended to achieve the result accomplished by the challenged state law, the state law itself need only " 'rationally further the purpose identified by the State.' " *Id.*, at 500, 99 S.Ct. 740 (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) *(per curiam)*).

The state statutory and constitutional scheme here was without question intended to implement the express desires of the Federal Government. The Admissions Act in § 4 mandated that the provisions of the Hawaiian Homes Commission Act "shall be adopted," with its multiple provisions expressly benefiting native Hawaiians and not others. 73 Stat. 5. More, the Admissions Act required that the proceeds from the lands granted to the State "shall be held by said State as a public trust for ... the betterment of the conditions of native Hawaiians," and that those proceeds "shall be managed and disposed of ... in such manner as the constitution and laws of said State may provide, and their use for any

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other object shall constitute a breach of trust for which suit may be brought by the United States." § 5, *id.*, at 6. The terms of the trust were clear, as was the discretion granted to the State to administer the ****1068** trust as the State's laws "may provide." And Congress continues to fund OHA on the understanding that it is thereby furthering the federal trust obligation.

***538** The sole remaining question under *Mancari* and *Yakima* is thus whether the State's scheme "rationally further[s] the purpose identified by the State." Under this standard, as with the BIA preferences in *Mancari*, the OHA voting requirement is certainly reasonably designed to promote "self-government" by the descendants of the indigenous Hawaiians, and to make OHA "more responsive to the needs of its constituent groups." *Mancari*, 417 U.S., at 554, 94 S.Ct. 2474. The OHA statute provides that the agency is to be held "separate" and "independent of the [State] executive branch," Haw.Rev.Stat. § 10-4 (1993); OHA executes a trust, which, by its very character, must be administered for the benefit of Hawaiians and native Hawaiians, § § 10-2, 10-3(1), 10-13.5; and OHA is to be governed by a board of trustees that will reflect the interests of the trust's native Hawaiian beneficiaries, Haw. Const., Art. XII, § 5 (1993); Haw.Rev.Stat. § 13D-3(b) (1993). OHA is thus "directed to participation by the governed in the governing agency." *Mancari*, 417 U.S., at 554, 94 S.Ct. 2474. In this respect among others, the requirement is "reasonably and directly related to a legitimate, nonracially based goal." *Ibid.*

The foregoing reasons are to me more than sufficient to justify the OHA trust system and trustee election provision under the Fourteenth Amendment.

III

Although the Fifteenth Amendment tests the OHA scheme by a different measure, it is equally clear to me that the trustee election provision violates neither the letter nor the spirit of that Amendment. [FN12]

> FN12. Just as one cannot divorce the Indian law context of this case from an analysis of the OHA scheme under the Fourteenth Amendment, neither can one pretend that this law fits simply within our non-Indian cases under the Fifteenth Amendment. As the preceding discussion of *Mancari* and our other Indian law cases reveals, this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates. It is only by refusing to face this Court's entire body of Indian law, see *ante*, at 1053-1054, that the majority is able to hold that the OHA qualification denies non-"Hawaiians" the right to vote "on account of race."

***539** Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15.

As the majority itself must tacitly admit, *ante*, at 1055-1056, the terms of the Amendment itself do not here apply. The OHA voter qualification speaks in terms of ancestry and current residence, not of race or color. OHA trustee voters must be "Hawaiian," meaning "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples have thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993). The ability to vote is a function of the lineal *descent* of a modern-day resident of Hawaii, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the "peoples" from whom that descendant arises.

The distinction between ancestry and race is more than simply one of plain language. The ability to trace one's ancestry to a particular progenitor at a single distant point in time may convey no information about one's own apparent or acknowledged race today. Neither does it of necessity imply one's own identification ****1069** with a particular race, or the exclusion of any others "*on account of race.*" The terms manifestly carry distinct meanings, and ancestry was not included by the Framers in the Amendment's prohibitions.

Presumably recognizing this distinction, the majority relies on the fact that "[a]ncestry can be a proxy for race." *Ante*, at 1055. That is, of course, true, but it by no means ***540** follows that ancestry is always a

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proxy for race. Cases in which ancestry served as such a proxy are dramatically different from this one. For example, the literacy requirement at issue in *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), relied on such a proxy. As part of a series of blatant efforts to exclude blacks from voting, Oklahoma exempted from its literacy requirement people whose ancestors were entitled to vote prior to the enactment of the Fifteenth Amendment. The *Guinn* scheme patently "served only to perpetuate ... old [racially discriminatory voting] laws and to effect a transparent racial exclusion." *Ante,* at 1055. As in *Guinn,* the voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens--a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.

That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies. In *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), for example, the Court held that the Amendment proscribed the Texas "Jaybird primaries" that used neutral voting qualifications "with a single proviso--Negroes are excluded," *id.,* at 469, 73 S.Ct. 809. Similarly, in *Smith v. Allwright,* 321 U.S. 649, 664, 64 S.Ct. 757, 88 L.Ed. 987 (1944), it was the blatant "discrimination against Negroes" practiced by a political party that was held to be state action within the meaning of the Amendment. Cases such as these that "strike down these voting systems ... designed to exclude one racial class (at least) from voting," *ante,* at 1055, have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries ***541** of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778. A trust whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept. See 2 A. Scott & W. Fratcher, Law of Trusts § 108.3 (4th ed.1987). The Committee that drafted the voting qualification explained that the trustees here should be elected by the beneficiaries because "people to whom assets belong should have control over them .... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." [FN13] The described purpose of this aspect of the classification thus exists wholly apart from race. It is directly focused on promoting both the delegated federal mandate, and the terms of the State's own trustee responsibilities.

FN13. 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, p. 644.

The majority makes much of the fact that the OHA trust--which it assumes is legitimate--should be read as principally intended to benefit the smaller class of ****1070** "native Hawaiians," who are defined as at least one-half descended from a native islander circa 1778, Haw.Rev.Stat. § 10-2 (1993), not the larger class of "Hawaiians," which includes "any descendant" of those aboriginal people who lived in Hawaii in 1778 and "which peoples thereafter have continued to reside in Hawaii," *ibid.* See *ante,* at 1060. It is, after all, the majority notes, the larger class of Hawaiians that enjoys the suffrage right in OHA elections. There is therefore a mismatch in interest alignment between the trust beneficiaries and the trustee electors, the majority contends, and it thus cannot be said that the class of qualified voters here is defined solely by beneficiary status.

***542** While that may or may not be true depending upon the construction of the terms of the trust, there is surely nothing racially invidious about a decision to enlarge the class of eligible voters to include "any descendant" of a 1778 resident of the Islands. The broader category of eligible voters serves quite practically to ensure that, regardless how "dilute" the *race* of native Hawaiians becomes--a phenomenon also described in the majority's lavish historical summary, *ante,* at 1051--there will remain a voting interest whose ancestors were a part of a political, cultural community, and who have inherited through participation and memory the set of traditions the trust seeks to protect. The putative mismatch only underscores the reality that it cannot be purely a racial interest that either the trust or the election provision seeks to secure; the political and cultural

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interests served are--unlike *racial* survival--shared by both native Hawaiians and Hawaiians. [FN14]

FN14. Of course, the majority's concern about the absence of alignment becomes salient only if one assumes that something other than a *Mancari*-like political classification is at stake. As this Court has approached cases involving the relationship among the Federal Government, its delegates, and the indigenous peoples--including countless federal definitions of "classes" of Indians determined by blood quantum, see n. 7, *supra*--any "racial" aspect of the voting qualification here is eclipsed by the political significance of membership in a once-sovereign indigenous class.
Beyond even this, the majority's own historical account makes clear that the inhabitants of the Hawaiian Islands whose descendants constitute the instant class are identified and remain significant as much because of culture as because of race. By the time of Cook's arrival, "the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure ... well-established traditions and customs and ... a polytheistic religion." *Ante,* at 1048. Prior to 1778, although there "was no private ownership of land," *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the native Hawaiians "lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion," 42 U.S.C. § 11701(4). According to Senator Akaka, their society "was steeped in science [and they] honored their *'aina* (land) and environment, and therefore developed methods of irrigation, agriculture, aquaculture, navigation, medicine, fishing and other forms of subsistence whereby the land and sea were efficiently used without waste or damage. Respect for the environment and for others formed the basis of their culture and tradition.' " App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E-4. Legends and oral histories passed from one generation to another are reflected in artifacts such as carved images, colorful feathered capes, songs, and dances that survive today. For some, Pele, the God of Fire, still inhabits the crater of Kilauea, and the word of the Kahuna is still law. It is this culture, rather than the Polynesian race, that is uniquely Hawaiian and in need of protection.

543** Even if one refuses to recognize the beneficiary status of OHA trustee voters entirely, [FN15] it cannot be said that the ancestry-*1071** based voting qualification here simply stands in the ***544** shoes of a classification that would either privilege or penalize "on account of " race. The OHA voting qualification--part of a statutory scheme put in place by democratic vote of a multiracial majority of all state citizens, including those non-"Hawaiians" who are not entitled to vote in OHA trustee elections-- appropriately includes every resident of Hawaii having at least one ancestor who lived in the islands in 1778. That is, among other things, the audience to whom the congressional apology was addressed. Unlike a class including only full-blooded Polynesians--as one would imagine were the class strictly defined in terms of race--the OHA election provision *excludes* all full-blooded Polynesians currently residing in Hawaii who are not descended from a 1778 resident of Hawaii. Conversely, unlike many of the old southern voting schemes in which any potential voter with a "taint" of non-Hawaiian blood would be excluded, the OHA scheme excludes no descendant of a 1778 resident because he or she is also part European, Asian, or African as a matter of race. The classification here is thus both too inclusive and not inclusive enough to fall strictly along racial lines.

FN15. Justice BREYER's even broader contention that "there is no 'trust' for native Hawaiians here," *ante,* at 1061, appears to make the greater mistake of conflating the public trust established by Hawaii's Constitution and laws, see *supra,* at 1067-1068, with the "trust" relationship between the Federal Government and the indigenous peoples. According to Justice BREYER, the "analogy on which Hawaii's justification must depend," *ante,* at 1062, is "destroy[ed]" in part by the fact that OHA is not a trust (in the former sense of a trust) for native Hawaiians alone. Rather than looking to the terms of the public trust itself for this proposition, Justice BREYER relies on the terms of the land conveyance to Hawaii in

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part of the Admissions Act. But the portion of the trust administered by OHA does not purport to contain in its corpus all 1.2 million acres of federal trust lands set aside for the benefit of all Hawaiians, including native Hawaiians. By its terms, only "[t]wenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians." Haw.Rev.Stat. § 10-13.5 (1993). This portion appears to coincide precisely with the one-fifth described purpose of the Admissions Act trust lands to better the conditions of native Hawaiians. Admissions Act § 5(f), 73 Stat. 6. Neither the fact that native Hawaiians have a specific, beneficial interest in only 20% of trust revenues, nor the fact that the portion of the trust administered by OHA is supplemented to varying degrees by nontrust moneys, negates the existence of the trust itself.

Moreover, neither the particular terms of the State's public trust nor the particular source of OHA funding "destroys" the centrally relevant trust "analogy" on which Hawaii relies--that of the relationship between the Federal Government and indigenous Indians on this continent, as compared with the relationship between the Federal Government and indigenous Hawaiians in the now United States-owned Hawaiian Islands. That trust relationship--the only trust relevant to the Indian law analogy--includes the power to delegate authority to the States. As we have explained, *supra,* at 1064-1066, the OHA scheme surely satisfies the established standard for testing an exercise of that power.

At pains then to identify at work here a singularly "racial purpose," *ante,* at 1056, 1057--whatever that might mean, although one might assume the phrase a "proxy" for "racial discrimination"--the majority next posits that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Ante,* at 1057. That is, of course, true when ancestry is the basis for denying or abridging one's right to vote or to share the blessings of freedom. But it is quite wrong to ignore the relevance of ancestry to claims of ***545** an interest in trust property, or to a shared interest in a proud heritage. There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees. Such a law would be equally benign, regardless of whether those descendants happened to be members of the same race. [FN16]

FN16. Indeed, "[i]n one form or another, the right to pass on property--to one's family in particular--has been part of the Anglo-American legal system since feudal times." *Hodel v. Irving,* 481 U.S. 704, 716, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. *Id.,* at 713-717. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.

****1072** In this light, it is easy to understand why the classification here is not "demeaning" at all, *ante,* at 1060, for it is simply not based on the "premise that citizens of a particular race are somehow more qualified than others to vote on certain matters," *ibid.* It is based on the permissible assumption in this context that families with "any" ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.

It thus becomes clear why the majority is likewise wrong to conclude that the OHA voting scheme is

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likely to "become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry ***546** is disclosed by their ethnic characteristics and cultural traditions." *Ante,* at 1057. The political and cultural concerns that motivated the nonnative majority of Hawaiian voters to establish OHA reflected an interest in preserving through the self-determination of a particular people ancient traditions that they value. The fact that the voting qualification was established by the entire electorate in the State--the vast majority of which is not native Hawaiian--testifies to their judgment concerning the Court's fear of "prejudice and hostility" against the majority of state residents who are not "Hawaiian," such as petitioner. Our traditional understanding of democracy and voting preferences makes it difficult to conceive that the majority of the State's voting population would have enacted a measure that discriminates against, or in any way represents prejudice and hostility toward, that self-same majority. Indeed, the best insurance against that danger is that the electorate here retains the power to revise its laws.

IV

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the "political consensus" the majority claims it seeks, *ante,* at 1060--a consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii. This was the considered and correct view of the District Judge for the United States District Court for the District of Hawaii, as well as the three Circuit Judges on the Court of Appeals for the Ninth Circuit. [FN17] As Judge Rymer explained:

> FN17. Indeed, the record indicates that none of the 20-plus judges on the Ninth Circuit to whom the petition for rehearing en banc was circulated even requested a vote on the petition. App. to Pet. for Cert. 44a.

***547** "The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity.... Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs.... Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and 'a board of trustees chosen from among those who are interested parties would be the best ****1073** way to insure proper management and adherence to the needed fiduciary principles.' " 18 The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that [petitioner's] right to vote has been denied or abridged in violation of the Fifteenth Amendment. " 18 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because 'people to whom assets belong should have control over them.... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary.' *Id."*
146 F.3d 1075, 1081-1082 (C.A.9 1998).

In my judgment, her reasoning is far more persuasive than the wooden approach adopted by the Court today.

Accordingly, I respectfully dissent.

Justice GINSBURG, dissenting.

I dissent essentially for the reasons stated by Justice STEVENS in Part II of his dissenting opinion. *Ante,* at 1063-1068 (relying on established federal authority over Native ***548** Americans). Congress' prerogative to enter into special trust relationships with indigenous peoples, *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), as Justice STEVENS cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, whom Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples. See *ante,* at 1065-1066 and n. 9 (STEVENS, J., dissenting). That federal trust responsibility, both the Court and Justice STEVENS recognize, has been delegated by Congress to the

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State of Hawaii. Both the Office of Hawaiian Affairs and the voting scheme here at issue are "tied rationally to the fulfillment" of that obligation. See *Mancari*, 417 U.S., at 555, 94 S.Ct. 2474. No more is needed to demonstrate the validity of the Office and the voting provision under the Fourteenth and Fifteenth Amendments.

120 S.Ct. 1044, 528 U.S. 495, 145 L.Ed.2d 1007, 68 USLW 4138, 00 Cal. Daily Op. Serv. 1341, 2000 Daily Journal D.A.R. 1881, 2000 CJ C.A.R. 898, 13 Fla. L. Weekly Fed. S 105

Briefs and Other Related Documents (Back to top)

• 1999 WL 955376, 68 USLW 3288 (Oral Argument) Oral Argument (Oct. 06, 1999)

• 1999 WL 691999 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Sep. 03, 1999)

• 1999 WL 557073 (Appellate Brief) BRIEF FOR RESPONDENT (Jul. 28, 1999)

• 1999 WL 557268 (Appellate Brief) BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII (Jul. 28, 1999)

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• 1999 WL 557279 (Appellate Brief) BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 557287 (Appellate Brief) BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY CO UNCIL, HA HAWAII, HUI KALAIAINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS AMICI CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

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• 1999 WL 374574 (Appellate Brief) BRIEF FOR PETITIONER (May. 27, 1999)

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9/27/99 Wall St. J. A35

1999 WL-WSJ 24915329

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Monday, September 27, 1999

Rule of Law

Are Hawaiians Indians? The Justice Department Thinks So

By Brett M. **Kavanaugh**

The Aloha state has two classes of citizens: there are Hawaiians and then there are real Hawaiians.

At least that's the message of the state Office of Hawaiian Affairs, which doles out money to certain citizens solely because of their race -- in this case, only to Hawaiians of Polynesian origin ("native Hawaiians," for short). By law, OHA officers must be native Hawaiians and only native Hawaiians can vote in the statewide elections for officers. Hawaiians of all other ethnic backgrounds (whether Latino or African-American or Caucasian, for example) are barred because of their race from receiving OHA funds, voting in OHA elections, or serving as OHA officers.

Sound blatantly unconstitutional? It did to Harold Rice, who was born and bred in Hawaii, but is not of the preferred race (he is white). Rice brought a case against the state contesting this racial scheme, in particular, the state's racial voting qualification.

Mr. Rice's case has now reached the Supreme Court, which is scheduled to hear arguments on Oct. 6. Rice v. Cayetano has implications far beyond the 50th state. Hawaii's naked racial-spoils system, after all, makes remedial set- asides and hiring and admissions preferences look almost trivial by comparison. And if Hawaii is permitted to offer these extraordinary privileges to residents on the basis of race or ethnic heritage, so will every other state.

The Clinton Justice Department nonetheless has filed a brief contending that one's race (at least, if you're a native Hawaiian) can be the sole basis for voting in a state election, serving in a state office, and receiving awards of state money. As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency. And the simple constitutional question posed by Rice is whether Hawaii, by denying citizens the right to vote in a state election on account of race, has violated the 14th and 15th Amendments, which prohibit states from denying individuals the right to vote on account of race.

No doubt recognizing that Hawaii's racial spoils system, including its racial voting qualification, is constitutionally indefensible, the Justice Department has charted a novel legal course. Justice contends that native Hawaiians are the equivalent of an American Indian tribe because Hawaiians are descendants of an "indigenous people" just like American Indians. Therefore, Justice argues, Hawaii's racial scheme is equivalent to constitutionally permissible legislation that singles out Indian tribes and tribal members for special benefits.

But the Justice Department's argument is seriously flawed both as a legal and historical matter. The Constitution expressly established special rules for Indian tribes because the Founders considered Indian tribes to be separate sovereigns. To convert this express recognition of Indian tribal sovereignty into a sweeping license for favorable race-based treatment of the descendants of indigenous people is to allow political correctness to trump the Constitution. A group of people must, in fact, constitute an Indian tribe in order to qualify for the special treatment afforded tribes under the Constitution. The Department of Interior has established strict criteria governing recognition of Indian tribes. Those regulations specify that federal recognition as a tribe is a "prerequisite to the

protection, services and benefits of the Federal government available to Indian tribes."

But neither the Congress nor the Department of Interior has recognized native Hawaiians as an Indian tribe. What's more, Hawaiians have never even applied for recognition as an Indian tribe. The reason is obvious. Native Hawaiians couldn't possibly qualify. They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or in territorial enclaves. They don't even live together in Hawaii. Native Hawaiians are dispersed throughout the state of Hawaii and the United States. In short, native Hawaiians bear none of the indicia necessary to qualify as an Indian tribe.

If Hawaii can enact special legislation for native Hawaiians by analogizing them to Indian tribes, why can't a state do the same for African-Americans? Or for Croatian-Americans? Or for Irish-Americans? After all, Hawaiians originally came from Polynesia, yet the department calls them "indigenous," so why not the same for groups from Africa or Europe? It essentially means that any racial group with creative reasoning can qualify as an Indian tribe. The Justice Department's theory of tribal status thus threatens to end-run the constitutional restrictions on racial classifications that the Supreme Court has reinforced in the last decade.

And that's not all. By claiming that native Hawaiians deserve special privileges because their ancestors lived in Hawaii, the Justice Department's position is also fiercely anti-immigrant, flouting the principle that all American citizens have equal rights regardless of when they became citizens.

At his 1858 Fourth of July address, President Lincoln emphasized that all citizens, whether descended from signers of the Declaration of Independence or new arrivals, were the same in the eyes of the law. As to the new arrivals, he said, "when they look through that old Declaration they find, 'We hold these truths to be self-evident, that all men are created equal,' and then they feel that that moral sentiment evidences their relation to those men, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration, and so they are." But now the Justice Department has turned its back on that bedrock American ideal by arguing that some Hawaiians can't vote in certain state elections solely because their ancestors didn't live in Hawaii.

Rice v. Cayetano, then, is of great moment. The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe. Rather, the Court should rule for Harold Rice and adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: "Under our Constitution there can be no such thing as either a creditor or a debtor race . . . . In the eyes of government, we are just one race here. It is American."

Mr. **Kavanaugh** is an attorney in Washington and together with Robert H. Bork filed an amicus brief in Rice v. Cayetano supporting Harold Rice.

(See related letter: "Letters to the Editor: Righting the Wrongs Perpetrated in Hawaii" -- WSJ Oct. 18, 1999)

---- INDEX REFERENCES ----

NEWS SUBJECT: Editorial & Columns; Public-Policy and Regulatory Issues; Politics; Wall Street Journal (EDC PBP PLT WSJ)

GOVERNMENT: Justice Department; State Government (JUS STE)

REGION: Hawaii; North America; Pacific Rim; United States; Western U.S. (HI NME PRM US USW)

LAYOUT CODES: Op-Ed Articles; Rule of Law (OED RLW)

Word Count: 1089

VI. Product Liability Cases

Brett Kavanaugh – Product Liability

Allegation: Mr. Kavanaugh took the side of big business by filing an amicus brief before the Supreme Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1998), in an attempt to deny recovery to a family who lost its daughter when she fell off a boat and was killed by the propeller.

Facts:

- **The amicus brief filed by Mr. Kavanaugh's client, General Motors Corporation, was consistent with the unanimous opinion of the court below – the Eleventh Circuit – and with the decisions of many other courts across the country.**
  - ✓ The Eleventh Circuit held that the Georgia law was impliedly preempted because the Coast Guard – which had exclusive authority in boat and equipment safety standards – determined that propeller guards should not be required because their use could actually increase the danger to boaters.
- **Numerous courts, both state and federal, already had adopted the position taken by Mr. Kavanaugh in the amicus brief – that state common law claims for negligence or product liability were either expressly or impliedly preempted by the Federal Boat Safety Act.**
  - ✓ At the time the amicus brief was submitted, courts in California, Georgia, Connecticut, Ohio, Illinois, and Michigan had come to the conclusion argued in the brief filed by Mr. Kavanaugh.
  - ✓ The district court judge in *Lewis v. Brunswick*, Carter appointee Judge Dudley Bowen, also came to the conclusion that the plaintiff's negligence and strict liability claims based on the lack of a propeller guard were preempted by the Boat Safety Act.
  - ✓ The U.S. Supreme Court did not decide the case because the parties settled the claims before a decision was issued.
- Mr. Kavanaugh's client was interested in the case only because it manufactured vehicles subject to the Motor Vehicle Safety Act, which included language identical to the Boat Safety Act preemption language at issue in *Lewis v. Brunswick.*
  - ✓ Congress, in the legislative history of the Boat Safety Act, explained that the preemption provision "also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." *Id.* at 1503 (citing S.Rep. No. 92-248).
- Although nearly four years later the Supreme Court did effectively overrule this Eleventh Circuit decision in another case, *Sprietsma v. Mercury Marine*, 537 U.S. 52 (2002), the Court did state that the arguments made by Mr. Kavanaugh's clients in the *Lewis* case - that such claims are implicitly preempted by the statute and by the Coast Guard decision not to regulate propeller guards - "[b]oth are viable pre-emption theories." *Id.* at 64.

No. 16-388

QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT 6

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE 10

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE 19

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: **Page**

American Airlines v. Wolens,
513 U.S. 219 (1995) 24-25
Asahi Metal Indus. Co. v. Superior Ct.,
480 U.S. 102 (1987) 15
Beatty v. Trailmaster Prods.,
625 A.2d 1005 (Md. 1993) 23
BMW of N. Am., Inc. v. Gore,
116 S. Ct. 1589 (1996) 16
Brooks v. Beech Aircraft Corp.,
902 P.2d 54 (N.M. 1995) 22-23
Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union,
468 U.S. 491 (1984) 27
CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) ..... *passim*
Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981) 29
Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) ..... *passim*
Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 4, 18, 19
Free v. Bland,
369 U.S. 663 (1962) 27
Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 5, 7, 26
International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 6, 7, 28
Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 15
Marks v. United States,
430 U.S. 188 (1977) 14-15

CASES - Continued: **Page**

Medtronic, Inc. v. Lohr,
116 S. Ct. 2240 (1996) ..... *passim*
Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 5, 24
New York Times v. Sullivan,
376 U.S. 254 (1964) 18
Pennsylvania R.R. v. Puritan Coal Mining Co.,
237 U.S. 121 (1915) 24, 25
Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 5, 25
Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 6, 25, 29, 30
San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,
359 U.S. 236 (1959) 16
Sheehan v. Cincinnati Shaper Co.,
555 A.2d 1352 (Pa. Super. 1989) 23
South Dakota v. Yankton Sioux Tribe,
No. 96-1581,
slip op. at 17 (U.S. Jan. 26, 1998) 25
Swift v. Tyson,
41 U.S. (16 Pet.) 1 (1842) 19
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 6, 28
United Gas Improvement Co. v. Continental Oil Co.,
381 U.S. 392 (1965) 15
Wagner v. Clark Equip. Co.,
700 A.2d 38 (Conn. 1997) 22

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const. art. VI, cl. 2 ..... 18, 27
The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994) *passim*
Federal Cigarette Labeling and Advertising Act,
79 Stat. 282 (1965) 12

STATUTES - Continued: **Page**

Federal Railroad Safety Act of 1970, 84 Stat. 971 13
Medical Device Amendments of 1976, 90 Stat. 539 14
National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) 1, 2, 7
Public Health Cigarette Smoking Act of 1969, 84 Stat. 87 ..... 12, 13
Rules of Decision Act, 28 U.S.C. § 1652 ..... 18, 19
15 U.S.C. § 1334(b) 12
21 U.S.C. § 360k(a) 14
45 U.S.C. § 434 13
Kan. Stat. Ann. § 60-3304(a) (1996) 22
Mich. Comp. L. Ann. § 600.2946(4) (West 1997) 22
33 C.F.R. Pts. 175, 177, 181, 183 (1997) 9,29
36 Fed. Reg. 15,764-65 (Aug. 11, 1971) 8, 9
37 Fed. Reg. 15,777-85 (Aug. 4, 1972) 9
38 Fed. Reg. 71 (Dec. 27, 1972) 9
38 Fed. Reg. 6914-15 (Mar. 8, 1973) 9, 10
S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 8,22,23

MISCELLANEOUS:

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales v. TWA*, (No. 90-1604) 24, 25
Guido Calabresi, *A Common Law for the Age of Statutes* (1982) 17
Melvin Eisenberg, *The Nature of the Common Law*, (1988) 17
Restatement (Third) of Torts: Products Liability § 4, cmt. (proposed final draft Apr. 1, 1997) 22
Transcript of Oral Argument, *Medtronic, Inc. v. Lohr* (No. 95-754) 15

No. 97-288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKI LEWIS, ET VIR., ETC.,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.[1]

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states

[1] Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. *Amicus curiae* General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local

conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. *See, e.g., Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an *ad hoc* collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311(g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. *See Medtronic*, 116 S. Ct. at 2259 (plurality opinion) (implied-

conflict preemption inquiry is proper); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); *CSX*, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain

exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually *has* this effect, for reasons that will be discussed in more detail in Sections II and III, *infra*.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. *See* U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. *See id.*

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. *Myrick* is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. *See* U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable." *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority

conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision

operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.[2]

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

[2] Contrary to the assertions made by the Solicitor General, *see* U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that *all* common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to *stare decisis* as the Court addresses it once again in this case.[3]

[3] The Solicitor General directly disagrees with the holdings of these cases, *see* U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in *Medtronic*, *CSX*, and *Cipollone* when discussing this point. *See* Petrs. Br. 24-28.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement"

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the

[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety

(continued...)

issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 2262 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 2259

[6](...continued)
hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

(Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, *Medtronic* (No. 95-754), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46. The Government offers no explanation for this abrupt about-face from its position in *Medtronic*.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in

[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. *See BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually

codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g.*, *Medtronic*, 116

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[8] The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* U.S. Br. 18-19. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. *Id.* We agree that the suggestion is absurd; it also is *irrelevant*. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioners and their *amici* put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of

decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. *See* Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in *Medtronic*, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. *See* 116 S. Ct. at 2255; *id.* at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. *See* 46 U.S.C. § 4306. This provision

establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or

a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense,

and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "[c]ompliance with . . . this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a

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[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, *see, e.g.*, *Beatty v. Trailmaster Prods.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *see, e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

complete "anti-preemption" clause, and *all* state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, *see* Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in *Medtronic*, the position urged by petitioners and their *amici* "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. *Id.* at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." *Id.* at 2259; *see also supra* Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act. *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales* (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." *South Dakota v. Yankton Sioux Tribe*, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting *Morales,* 504 U.S. at 384)).[10]

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

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[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." *See id.* at 21; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. *See* Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. *See* U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in *Cipollone*, *see* 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in *CSX*, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. *See* 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in *Myrick*, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. *This argument is without merit.*

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption analysis" in *Cipollone* itself, *id.* at 289, and had done so again in *CSX*, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, *see id.* After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. *See id.* at 287-88.

Finally, in *Medtronic*, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. *See, e.g.*, 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." *Id.* at 2259 (citing *Myrick*, 514 U.S. at 289). The statute at issue in *Medtronic*, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501

(1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry.[11]

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption.[12] For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing . . . a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted

[11] Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Cipollone*, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); *id.* at 544 (Scalia, J., concurring and dissenting in part) (same).

[12] The Solicitor General also appears to accept this proposition, for he states that "[u]nder our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, *amicus curiae* General Motors accepts the position taken by the Court of Appeals, *see* Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act.[13] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).[14]

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that

[13] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

[14] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 28-29 & n.19, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183.

requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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January 28, 1998

Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.

Vicky LEWIS, individually as parent, as next friend and as administrator of the
estate of Kathryn C. Lewis, Gary Lewis, individually as parent, as next friend
and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,
v.
BRUNSWICK CORPORATION, Defendant-Appellee.

No. 96-8130.

March 21, 1997.

Parents of recreational boat passenger who died after she fell or was thrown from boat and was struck by the boat's propeller brought suit in state court against manufacturer of boat's outboard engine, asserting negligence and strict liability claims based on absence of propeller guard. Parents also asserted fraudulent misrepresentation claims, based on contention that manufacturer misrepresented performance differences between guarded engines and unguarded engines to discourage government agencies from adopting safety standard requiring propeller guards. After removal, the United States District Court for the Southern District of Georgia, No. CV 195-096, Dudley H. Bowen, Jr., J., 922 F.Supp. 613, granted summary judgment in favor of manufacturer on ground that claims were preempted by the Federal Boat Safety Act (FBSA), and plaintiffs appealed. The Court of Appeals, Carnes, Circuit Judge, held that: (1) text of the FBSA does not provide clear manifestation of intent to preempt claims, and thus they were not expressly preempted; (2) position of Coast Guard rejecting propeller guard requirement is tantamount to a ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in the form of common-law state tort claims; and (3) Coast Guard position on propeller guards also preempted fraudulent misrepresentation claim.

Affirmed.

West Headnotes

[1] **Federal Courts** 776
170Bk776 Most Cited Cases

Decision of district court granting summary judgment on ground of preemption was subject to de novo review.

[2] **States** 18.5
360k18.5 Most Cited Cases

Any state law that conflicts with federal law is preempted by the federal law and is without effect under the supremacy clause of the Constitution. U.S.C.A. Const. Art. 6, cl. 2.

[3] **States** 18.11
360k18.11 Most Cited Cases

[3] **States** 18.13
360k18.13 Most Cited Cases

State regulation established under historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress; thus, intent of Congress is the touchstone of preemption analysis.

[4] **States** 18.3
360k18.3 Most Cited Cases

Congressional intent to preempt state law may be revealed in several ways: "express preemption," in which Congress defines explicitly extent to which its enactments preempt state law; "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law stands as an obstacle to the accomplishment and execution of the full purposes

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and objectives of Congress.

[5] **States** 18.13
360k18.13 Most Cited Cases

In areas traditionally regulated by the states through their police powers, Court of Appeals applies presumption in favor of narrow interpretation of an express preemption clause.

[6] **Shipping** 11
354k11 Most Cited Cases

[6] **States** 18.65
360k18.65 Most Cited Cases

Because the Federal Boat Safety Act preempts area of safety that historically has been regulated by the states through their police powers, Court of Appeals must construe the Act's preemption clause narrowly. 46 U.S.C.A. § 4306.

[7] **Products Liability** 62
313Ak62 Most Cited Cases

[7] **States** 18.65
360k18.65 Most Cited Cases

Express preemption clause of the Federal Boat Safety Act does not cover common- law state tort claims; although preemption clause could be read to cover such claims, savings clause indicates that at least some common-law claims survive express preemption, and resulting doubt must be resolved in favor of narrower interpretation; however, conflict between express preemption clause and savings clause precludes any conclusion that such claims are expressly saved. 46 U.S.C.A. § 4306.

[8] **Products Liability** 62
313Ak62 Most Cited Cases

[8] **States** 18.65
360k18.65 Most Cited Cases

State tort claims are impliedly preempted under the Federal Boat Safety Act (FBSA) if they prevent or hinder the FBSA from operating the way Congress intended it to operate; in deciding whether claims conflict with purposes of the FBSA, Court of Appeals does not apply presumption against preemption, even though common-law tort claims are mechanism of police powers of the state, as relative importance to the state of its own law is not material when there is a conflict with a valid federal law. 46 U.S.C.A. § 4301 et seq.

[9] **States** 18.3
360k18.3 Most Cited Cases

Federal decision to forego regulation in given area may imply an authoritative federal determination that area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.

[10] **States** 18.3
360k18.3 Most Cited Cases

Although federal decision not to regulate does not always have preemptive effect, it does have such where failure of federal officials affirmatively to exercise their full authority takes on character of a ruling that no such regulation is appropriate or approved pursuant to policy of statute.

[11] **Products Liability** 62
313Ak62 Most Cited Cases

[11] **States** 18.65
360k18.65 Most Cited Cases

State common-law negligence and product liability claims against manufacturer of boat engine, based on theory that engine was defective because it lacked a propeller guard, were impliedly preempted by the Federal Boat Safety Act; because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting propeller guard requirement is tantamount to ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in form of common-law tort claims. 46 U.S.C.A. § 4301 et seq.

[12] **Products Liability** 62
313Ak62 Most Cited Cases

[12] **States** 18.65
360k18.65 Most Cited Cases

Product liability claims based on defective design or installation of products that are already installed, as opposed to claims based on failure to install a certain device, are not impliedly preempted under the Federal Boat Safety Act (FBSA); permitting such

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claims against manufacturers for negligent or defective design of products required by the Coast Guard, or product provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and is consistent with the FBSA scheme; however, claims based on failure to install product that Coast Guard has decided should not be required would conflict with purpose of the FBSA to insure regulatory uniformity. 46 U.S.C.A. § 4301 et seq.

[13] **Products Liability** 62
313Ak62 Most Cited Cases

[13] **States** 18.65
360k18.65 Most Cited Cases

State law fraudulent misrepresentation claim against manufacturer of boat engine, seeking to impose liability upon manufacturer for attempting to persuade the Coast Guard and others that propeller guards are unsafe, was impliedly preempted by Coast Guard's position that propeller guards should not be required under the Federal Boat Safety Act; necessary element of causation in claim was that but for wrongful conduct of manufacturer, propeller guards would have been required by Coast Guard; however, such judgment conflicted with Coast Guard's position that propeller guards should not be required. 46 U.S.C.A. § 4301 et seq.

***1496** David E. Hudson, William James Keogh, III, Hull, Towill, Norman & Barrett, Augusta, GA, for plaintiffs-appellants.

***1497** Ronald L. Reid, James W. Hagan, Alston & Bird, Atlanta, GA, Daniel J. Connolly, Faegre & Benson, Minneapolis, MN, for defendant- appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before BIRCH, BLACK and CARNES, Circuit Judges.

CARNES, Circuit Judge:

Gary and Vicky Lewis appeal the district court's grant of summary judgment in favor of Brunswick Corporation ("Brunswick") on the Lewises' state common law negligence, product liability, and fraudulent misrepresentation claims. The Lewises sued Brunswick to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and then struck by a Brunswick engine propeller. According to the Lewises, the Brunswick engine involved in their daughter's death was defective because it lacked a propeller guard. Upon Brunswick's motion for summary judgment, the district court held that the Lewises' claims were preempted by the Federal Boat Safety Act, 46 U.S.C. § § 4301-4311 ("the FBSA" or "the Act"). We affirm.

In Part I of this opinion, we describe the facts and the procedural history of this case. We describe the standard of review in Part II, and we outline the Act and its regulatory scheme in Part III. In Part IV, we recount the actions taken by the Coast Guard regarding propeller guards. We then summarize the positions of the parties in Part V of the opinion. In Part VI, we describe in general terms how state law may be preempted. We then proceed to consider, in Parts VII and VIII of the opinion, whether the Lewises' claims are preempted by the Act.

As we will explain in Part VII, the preemption clause and the savings clause in the Act provide contradictory indications of congressional intent relating to whether the Lewises' claims are expressly preempted. Because the text of the FBSA does not provide a clear manifestation of intent to preempt the claims, we cannot hold that they are expressly preempted. On the other hand, due to the conflict between the preemption clause and the savings clause, we cannot hold that those claims are expressly saved from preemption either. Consequently, our resolution of the question of preemption in this case turns on whether the Lewises' claims are impliedly preempted by the Act. We hold that they are, because those claims conflict with the Coast Guard's position that propeller guards should not be required.

I. FACTS AND PROCEDURAL HISTORY

On June 6, 1993, Kathryn Lewis was spending the day with her boyfriend's family in a boat on Strom Thurmond Lake in Georgia. While the boat was pulling Kathryn's boyfriend on an inner tube, the driver made a right-hand turn. Kathryn fell or was thrown from the left side of the boat. Once in the water, Kathryn was struck repeatedly in the head and body by the propeller of an engine designed and manufactured by Brunswick. The engine did not have a propeller guard. Kathryn died instantly.

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The Lewises filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product. They also claim that Brunswick committed negligence by failing to install a propeller guard on the engine. The Lewises' third claim avers that Brunswick attempted to suppress the production of propeller guards by third persons and exaggerated the performance differences between guarded engines and unguarded engines to discourage government agencies from adopting a safety standard requiring propeller guards.

Brunswick removed this case to federal district court on diversity grounds and moved for summary judgment. In its summary judgment motion, Brunswick contended that all of the Lewises' claims were preempted by the FBSA. The district court agreed ***1498** and granted summary judgment in favor of Brunswick. The Lewises appeal.

II. STANDARD OF REVIEW

[1] We apply the same legal standards in our preemption analysis that the district court was required to apply in its order granting summary judgment; therefore, we review the district court's decision *de novo*. *E.g.*, *Southern Solvents, Inc. v. New Hampshire Ins. Co.*, 91 F.3d 102, 104 (11th Cir.1996).

III. THE FEDERAL BOAT SAFETY ACT

The FBSA was enacted in 1971 in part "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating--presently the Secretary of Transportation." *P.L. 92-75, Federal Boat Safety Act of 1971*, S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333. To implement that goal, the Act grants authority to the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302 (West Supp.1995). The Secretary of Transportation has delegated rulemaking authority under the FBSA to the United States Coast Guard. *See* 49 C.F.R. § 1.46(n)(1) (1996).

The FBSA requires the Coast Guard to follow certain guidelines and procedures when promulgating a regulation under 46 U.S.C. § 4302. For instance, the Coast Guard must consider certain available data and "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C.A. § § 4302(c)(1)-(2) (West Supp.1995). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C.A. § 4302(c)(3) (West Supp.1995). Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council ("the Advisory Council") on the need for regulation. 46 U.S.C. § 4302(c)(4).

IV. COAST GUARD CONSIDERATION OF A PROPELLER GUARD REGULATION

In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and safety disadvantages of propeller guards. In response, the Advisory Council appointed a Propeller Guard Subcommittee "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee 1 (1989). The Advisory Council also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." *Id.* at Appendix A.

The Advisory Council Subcommittee held hearings on three occasions and received information from a variety of individuals and groups interested in the topic of propeller guards. *See id.* at 2-4. One of the matters on which the Subcommittee received information was propeller guard litigation, and the Subcommittee devoted a section of its report to the topic. *Id.* at 4. That section states that, at the time of the hearings, propeller guard advocates were petitioning federal and state legislators to mandate propeller guards. According to the Subcommittee Report, a legislative or administrative mandate "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them"; therefore, feasibility was an important question before the Subcommittee. *Id.* at 5. The report also discusses the theories of liability that were being asserted by propeller guard victims and the defenses used by manufacturers. *Id.* at 4-5. Immediately ***1499**

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following that discussion, the report notes that "[m]anufacturers are opposed to mandatory propeller guards." *Id.* at 5.

The Subcommittee also considered the technical issues posed by propeller guards. After reviewing the available scientific data and testimony, the Subcommittee found that propeller guards affect boat operation adversely at speeds greater than 10 miles per hour. *Id.* at 21. Further, the Subcommittee found that propeller guards would not increase overall safety, because they increase the chances of contact between a blunt object and a person in the water. *Id.* at 20-21. The Subcommittee Report states:

> Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counter-productive and can create new hazards of equal or greater consequence.... Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at 23-24. The report also states that:

> boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.
>
> Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should not be mandated. The Subcommittee does not agree....

Id. at 20. In its conclusion, the Advisory Council Subcommittee Report recommends that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24.

The Subcommittee presented its report to the entire Advisory Council, which accepted the report and adopted the recommendations of the Subcommittee. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (Nov. 6-7, 1989). The Advisory Council then forwarded the report and recommendations to the Coast Guard. The Coast Guard adopted each of the Advisory Council's recommendations, giving explanations of the Coast Guard's position on each matter. *See* Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990). The Coast Guard's position on propeller guards, which is set out in that letter, is as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guard devices or other information on the state of the art.

Id. at 1.

V. POSITIONS OF THE PARTIES

The Lewises contend that the FBSA does not expressly or impliedly preempt state law ***1500** tort claims based on the absence of a propeller guard on a boat engine. According to the Lewises, common law claims are expressly saved from preemption by the Act's savings clause. Furthermore, the Lewises argue, the Act does not preempt any state law, regulation, or claims until the Coast Guard issues a formal regulation on the matter. There being no regulation on propeller guards, the Lewises assert they may proceed with their case.

In response, Brunswick argues that the FBSA expressly preempts any state regulation, including regulation through common law claims, that conflicts

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with a Coast Guard regulation or regulatory position. Brunswick contends that the Coast Guard has made a regulatory decision that propeller guards cannot be required. For that reason, Brunswick says, the Lewises' claims are expressly preempted by the Act. Furthermore, even if the Lewises' claims are not expressly preempted, Brunswick argues that the claims conflict with the Coast Guard's position that propeller guards should not be required. For that reason, Brunswick contends, the claims are preempted by implication.

VI. AN OVERVIEW OF PREEMPTION DOCTRINE

[2][3] Any state law that conflicts with federal law is preempted by the federal law and is without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). State regulation established under the historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress. *Id.* Accordingly, the intent of Congress is the touchstone of preemption analysis. *See id.*

[4] Congressional intent to preempt state law may be revealed in several ways: (1) "express preemption," in which Congress defines explicitly the extent to which its enactments preempt state law; (2) "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3) "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996) (citations omitted).

[5] By including an express preemption clause in the FBSA, Congress has demonstrated its intent that the Act preempt at least some state law. *See* 46 U.S.C. § 4306. Therefore, the issue in this case is not whether Congress intended for the FBSA to have any preemptive effect, but the intended scope of preemption--the extent to which the FBSA preempts state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, ----, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996). In areas traditionally regulated by the states through their police powers, we apply a presumption in favor of a narrow interpretation of an express preemption clause. *Id.* at ----, 116 S.Ct. at 2250.

VII. EXPRESS PREEMPTION

Brunswick contends that the Lewises' claims fall within the scope of the FBSA's express preemption clause, which provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or ***1501** circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C.A. § 4306 (West Supp.1995). According to Brunswick, the Lewises' claims, if successful, would result in a regulation imposing a propeller guard requirement. That regulation would not be identical to--in fact, it would be in conflict with--the Coast Guard's position that propeller guards should not be required. In Brunswick's view, the Coast Guard's position is equivalent to a "regulation prescribed under section 4302," which preempts state law. Following this reasoning, Brunswick argues that the Lewises' claims are preempted by the express terms of the FBSA preemption clause.

In response, the Lewises contend that the phrase "law or regulation" does not reach common law claims, because Congress did not mention "common law" specifically in the preemption clause. According to the Lewises, Congress' decision not to specify "common law" in the preemption clause demonstrates congressional intent to save common law claims. As Brunswick points out, however, the omission of the phrase "common law" in the preemption clause is not determinative, because "law" and "regulation" may be read to include state tort actions. *See Cipollone*, 505 U.S. at 520-30, 112 S.Ct. at 2619-25 (1992) (plurality opinion) (holding that the phrase "State law" in the Federal Cigarette Labeling and Advertising Act was intended to include common law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (common law claims

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fall within the scope of the phrases "law, rule, regulation, order, or standard"). In fact, the overwhelming majority of courts have held that common law claims fall within the scope of "law[s]" and "regulation[s]" expressly preempted by the FBSA. *See* Moss v. Outboard Marine Corp., 915 F.Supp. 183, 186 (E.D.Cal.1996); Davis v. Brunswick Corp., 854 F.Supp. 1574, 1580 (N.D.Ga.1993); Shield v. Bayliner Marine Corp., 822 F.Supp. 81, 84 (D.Conn.1993); Shields v. Outboard Marine Corp., 776 F.Supp. 1579, 1581 (M.D.Ga.1991); Mowery v. Mercury Marine, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); Farner v. Brunswick Corp., 239 Ill.App.3d 885, 180 Ill.Dec. 493, 497-98, 607 N.E.2d 562, 566-67 (1992); Ryan v. Brunswick Corp., 454 Mich. 20, 557 N.W.2d 541, 548-49 (1997). *Contra* Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 250 (Tex.), *cert. denied,* 513 U.S. 1057, 115 S.Ct. 664, 130 L.Ed.2d 599 (1994).

We agree that the terms "law" and "regulation" evidence an intent to include common law claims. However, we stop short of concluding that common law claims are expressly preempted by the FBSA, because another provision in the Act pulls us away from that conclusion. As the Lewises point out, Congress included a savings clause in the Act, which seems to save common law claims from preemption. That clause, which is found within the section of the Act entitled "Penalties and Injunctions," provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C.A. § 4311(g) (West Supp.1995).

[6][7] Because the FBSA preempts an area (safety) that historically has been regulated by the states through their police powers, we must construe the Act's preemption clause narrowly. *See* Medtronic, 518 U.S. at ----, 116 S.Ct. at 2250. The preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading. Instead, we must resolve doubts in favor of the narrower interpretation of the preemption clause and conclude that the express preemption clause does not cover common law claims. We hold that those claims are not expressly preempted.

The Lewises urge us to go further and hold that the savings clause demonstrates clear congressional intent to save common law claims from preemption. We find congressional ***1502** intent to be less than clear, given the conflicting language in the preemption and savings clauses. Just as the conflict between those provisions prevents us from concluding that the Lewises' claims are expressly preempted, so also does that conflict prevent us from concluding that those claims are expressly saved. *See* Taylor v. General Motors Corp., 875 F.2d 816, 825 (11th Cir.1989) (interpreting the National Traffic and Motor Vehicle Safety Act). The express terms of the FBSA simply fail to answer the question of whether Congress intended to preempt common law claims. As a result, our decision about preemption depends on whether the Lewises' claims are impliedly preempted by federal law. *See id.* at 827-28.

VIII. IMPLIED CONFLICT PREEMPTION

[8] The Lewises' claims are preempted impliedly by the FBSA to the extent that those claims conflict with the "accomplishment and execution of the full purposes and objectives of Congress." *See* Freightliner Corp. v. Myrick, 514 U.S. 280, ----, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). In other words, the Lewises' claims are preempted if they prevent or hinder the FBSA from operating the way Congress intended it to operate. In deciding whether the Lewises' claims conflict with the purposes of the FBSA, we do not apply a presumption against preemption, even though common law tort claims are a mechanism of the police powers of the state. Taylor, 875 F.2d at 826. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " Felder v. Casey, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988) (citations omitted).

According to Brunswick, the Lewises' claims are preempted by implication because those claims would interfere with the regulatory scheme enacted by Congress in the FBSA. Brunswick argues that the Coast Guard has the last say on whether a safety feature on boats or associated equipment should be required. Where the Coast Guard believes that a safety feature should not be required, Brunswick argues that states may not require the feature, even through common law claims.

[9][10] "[A] federal decision to forgo regulation in a

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given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis in original). Though a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 1355, 99 L.Ed.2d 582 (1988), it does "where [the] failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1978) (citations omitted).

[11] The Lewises argue that the rule of *Atlantic Richfield* does not apply here, because Congress did not intend for a mere decision not to regulate to have preemptive effect under the FBSA. In the Lewises' view, any state regulation on boat and equipment safety standards is permissible, unless the Coast Guard promulgates a regulation that conflicts with the state regulation. As the Lewises understand the FBSA regulatory scheme, a Coast Guard position not to impose a safety standard on a matter leaves room for states to impose safety standards on that matter. There being no regulation on propeller guards, the Lewises argue that their claims are not affected by the Coast Guard's position. For support, they point to ***1503***Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), a case in which the Supreme Court concluded that an absence of regulation on a safety matter did not preempt state common law claims imposing such standards.

In *Freightliner*, the Supreme Court considered whether common law claims based on the failure to install antilock brakes were expressly or impliedly preempted by the Vehicle Safety Act. *See id.* at ----, 115 S.Ct. at 1485. The preemption clause in the Vehicle Safety Act provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C.A. § 1392(d) (West 1982) (repealed 1994). The defendants in *Freightliner* argued that the failure-to-install claims were preempted, because the relevant agency had indicated its intent to regulate braking systems by promulgating a regulation on that matter. That regulation was struck down by an appellate court, but the defendants in *Freightliner* believed it still had preemptive effect, because it demonstrated the agency's intent to forbid state regulation on braking systems. *Id.* at ----, 115 S.Ct. at 1487.

The Supreme Court rejected that argument. First, the Court explained, there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Id.* In fact, the preemption clause in that act clearly implied that states could impose safety standards on auto manufacturers, until the federal government came forward with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect under the *Atlantic Richfield* doctrine; instead, the agency's failure to put into effect a valid regulation left the state common law intact. *Id.* Furthermore, the Court reasoned, *Atlantic Richfield* was inapposite because:

> the lack of federal regulation [on antilock brakes] did not result from an affirmative decision of agency officials to refrain from regulating air brakes. [The agency] did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state.

Id. (footnote omitted).

In contrast to the Vehicle Safety Act, the FBSA was intended to give its regulatory agency--the Coast Guard--exclusive authority to issue safety standards:

> This section [containing the preemption clause] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. At the same time, it was recognized that there may be serious hazards which are unique to a particular locale and which would justify variances at least with regard to the carriage or use of marine safety articles on boats. Therefore, the section does permit individual States to impose requirements with respect to carrying or using

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> marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances. A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity.
>
> The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1341. *See* ***1504***Elliott v. Brunswick Corp., 903 F.2d 1505, 1508 (11th Cir.1990) ("[T]he [FBSA] gives the Coast Guard the exclusive responsibility for establishing safety regulations.") (dicta); *Williams v. U.S. Dept. of Transportation,* 781 F.2d 1573, 1577 & n. 4 (11th Cir.1986) (with the FBSA Congress expressly preempted state regulation regarding performance and safety standards for boats and associated equipment) (dicta). While an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate. *Freightliner* is distinguishable for that reason.

Also in contrast to *Freightliner,* the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards. Unlike the agency in *Freightliner,* the Coast Guard did not try to promulgate a regulation, and then fail, under a statutory scheme that would leave state law intact in the absence of federal regulatory action. Instead, under a statutory scheme that forbids any state standard or regulation "not identical to" a federal regulation, the Coast Guard decided not to issue a regulation. After consulting with the Advisory Council and reviewing the available data, the Coast Guard reached a carefully considered decision that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats."

The Coast Guard decided not only that a federal regulation would be inappropriate, but that the scientific data counseled against any regulation requiring propeller guards. Given that Congress intended for the FBSA to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements. *See Ryan v. Brunswick Corp.,* 454 Mich. 20, 557 N.W.2d 541, 549-50 (1997). *See also Puerto Rico,* 485 U.S. at 503, 108 S.Ct. at 1355 ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn--not from federal inaction alone, but from inaction joined with action.") (emphasis in original). *Freightliner* does not require that we hold otherwise.

But the Lewises contend that even if *Freightliner* is not controlling here, we cannot find an implied conflict between their claims and the Act, because we know from the savings clause that Congress expected some common law claims to be brought in this area. About the savings clause, the Senate report says:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352.

[12] From the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme. In order to decide which claims, we must determine when product liability claims can be brought without upsetting the overall scheme Congress intended. Addressing that question, several courts have held that the only claims which do not present a conflict with the FBSA regulatory scheme are product liability claims based on the defective design or installation of products that are already installed, as opposed to claims based on the failure to install a certain safety device. *See Carstensen v. Brunswick Corp.,* 49 F.3d 430, 432 (8th Cir.), *cert. denied,* 516 U.S. 866, 116 S.Ct. 182, 133 L.Ed.2d 120 (1995); ***1505***Moss v. Outboard Marine Corp., 915 F.Supp. 183, 187 (E.D.Cal.1996); *Mowery v. Mercury Marine,* 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); *Rubin v. Brutus Corp.,* 487 So.2d 360, 363 (Fla.Dist.Ct.App.1986); *Farner v. Brunswick Corp.,* 239 Ill.App.3d 885, 180 Ill.Dec. 493, 498, 607 N.E.2d 562, 567 (1992); *Ryan v. Brunswick Corp.,* 209 Mich.App. 519, 531 N.W.2d 793, 796 n. 1

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(1995), *aff'd,* 454 Mich. 20, 557 N.W.2d 541 (1997); *Mulhern v. Outboard Marine Corp.,* 146 Wis.2d 604, 432 N.W.2d 130, 134-35 (1988). Permitting product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and to do any additional manufacturing, in a non-negligent and non-defective manner. Permitting such claims is consistent with the FBSA scheme, which is designed to ensure that boats and associated equipment are safe.

By contrast, claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA. Without doubt, the Lewises' product liability claims seek to impose a propeller guard requirement. *See Carstensen,* 49 F.3d at 432. That requirement conflicts with the FBSA's grant of exclusive regulatory authority to the Coast Guard, and for that reason those claims are in conflict with and are therefore preempted by the Act.

[13] The Lewises argue that their fraud claim should be treated differently from their other claims, because it would not create a propeller guard requirement beyond FBSA requirements. We disagree. If the Lewises succeeded with their fraud claim, a jury could impose liability upon Brunswick for attempting to persuade the Coast Guard and others that propeller guards are unsafe. The necessary element of causation in any such claim would be that but for the wrongful conduct of Brunswick, propeller guards would have been required by the Coast Guard. Such a judgment would conflict with the Coast Guard's position that propeller guards should not be required. Thus, the fraud claim is impliedly preempted by the Coast Guard's position and the preemptive effect given that position by the FBSA.

Regulatory fraud claims of this nature are impliedly preempted for fundamental, systemic reasons. Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in the various state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result. Ironically, such circumvention of the regulatory scheme likely would be more pronounced where, as here, Congress mandated more extensive industry input into the regulatory process. *See* 46 U.S.C. § 4302(c). Congress could not have intended for the process it so carefully put in place to be so easily and thoroughly undermined. [FN1]

> FN1. The Lewises' claim may be read to address alleged fraudulent misrepresentations by Brunswick to individuals and groups outside the federal government. To the extent that the Lewises intend to hold Brunswick liable for allegedly dissuading other manufacturers from installing propeller guards, their claim fails on causation grounds, because their daughter was struck by a propeller on a Brunswick motor. To the extent that the Lewises seek to hold Brunswick liable for alleged fraud upon state regulators, their fraud claim is preempted because state regulatory decisions of the propeller guard issue are themselves preempted.

In sum, we conclude that because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed. That position impliedly ***1506** preempts state law requirements of propeller guards, even in the form of common law claims. It also prevents plaintiffs from bringing fraud claims intended to demonstrate that the Coast Guard would have reached a different conclusion on the matter of propeller guards but for alleged industry manipulation or subversion of the federal regulatory process. We hold that each of the Lewises' claims is preempted by implication because it conflicts with the Coast Guard's position on propeller guards and would interfere with the FBSA regulatory process designed by Congress.

IX. CONCLUSION

The district court's grant of summary judgment to Brunswick is AFFIRMED.

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Briefs and Other Related Documents (Back to top)

• 1996 WL 33469334 (Appellate Brief) Reply Brief of Appellants/Plaintiffs (Jun. 04, 1996)

• 1996 WL 33469335 (Appellate Brief) Brief of Defendant/Appellee Brunswick Corporation (May. 20, 1996)

• 1996 WL 33469333 (Appellate Brief) Brief of Appellants (Apr. 10, 1996)

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H
Briefs and Other Related Documents

Supreme Court of the United States

Vicky LEWIS, et vir., etc.,
v.
BRUNSWICK CORPORATION.

No. 97-288.

May 15, 1998.

Case below, 11 Cir., 107 F.3d 1494.

The writ of certiorari in the above entitled case was dismissed today pursuant to Rule 46.1 of this Court.

118 S.Ct. 1793 (Mem), 523 U.S. 1113, 140 L.Ed.2d 933

Briefs and Other Related Documents (Back to top)

• 1998 WL 106133, 66 USLW 3618 (Oral Argument) Oral Argument (Mar. 02, 1998)

• 1998 WL 66036 (Appellate Brief) REPLY BRIEF OF PETITIONERS (Feb. 18, 1998)

• 1998 WL 32506 (Appellate Brief) BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT (Jan. 28, 1998)

• 1998 WL 35183 (Appellate Brief) BRIEF FOR THE RESPONDENT (Jan. 28, 1998)

• 1998 WL 35188 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT (Jan. 28, 1998)

• 1998 WL 35189 (Appellate Brief) BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT (Jan. 28, 1998)

• 1997 WL 793078 (Appellate Brief) BRIEF OF PETITIONERS (Dec. 29, 1997)

• 1997 WL 799992 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS (Dec. 29, 1997)

• 1997 WL 800060 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Dec. 29, 1997)

• 1997 WL 800064 (Appellate Brief) BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE. P.C., IN SUPPORT OF PETITIONERS (Dec. 29, 1997)

• 1997 WL 800068 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND US. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Dec. 24, 1997)

• 1997 WL 33557248 (Appellate Filing) Brief for the Respondent in Opposition (Oct. 15, 1997)

• 1997 WL 33549141 (Appellate Filing) Petition for Writ of Certiorari (Aug. 13, 1997)

END OF DOCUMENT

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Brett Kavanaugh – Products Liability

Allegation: In *Geier v. American Honda Motor Company*, Mr. Kavanaugh filed an amicus brief on behalf of the Alliance of Automobile Manufacturers to preclude a woman who received serious injuries in a car accident from recovering damages from the car manufacturer. The car manufacturer had not installed airbags in the car even though Washington, D.C. law required such airbags. 529 U.S. 861 (2000).

Facts:

- **In an opinion written by Justice Breyer, the U.S. Supreme Court agreed with a position taken by Mr. Kavanaugh's client in its brief.**
  - ✓ The Supreme Court held that safety standards promulgated by the Department of Transportation, pursuant to an Act of Congress, preempted the D.C. law requiring airbags, and that therefore the plaintiff could not bring an action under the D.C. law. *Geier v. American Honda Motor Company*, 529 U.S. 861, 875 (2000).
  - ✓ Federal Motor Vehicle Safety Standard (FMVSS) 208 required that auto manufacturers equip some but not all of their 1987 vehicles with passive restraints.
  - ✓ Because a universal airbag requirement like that in place in D.C. would directly conflict with the safety purposes behind enactment of FMVSS 208, the long-standing principle of preemption applied and the D.C. requirement could not be enforced.
  - ✓ The plaintiff's car in this case contained a restraint system explicitly authorized by Standard 208, and thus was in full compliance with the Federal regulation.
- **All of the circuit courts to consider the issue, including the 9th Circuit, agreed with either the implied or express preemption arguments set forth in the brief Mr. Kavanaugh filed on behalf of his client.**
  - ✓ District Judge William Bryant, appointed by President Johnson, granted American Honda summary judgment in this case based on the express preemption argument later set forth in the brief.
  - ✓ The D.C. Court of Appeals affirmed the lower court decision on implied preemption grounds in a unanimous opinion written by Clinton appointee Judge Judith Rogers.
  - ✓ Four other circuits came to the same conclusion as the D.C. Circuit.

- ✓ The 9th Circuit adopted the express preemption argument set forth in the brief submitted by Mr. Kavanaugh, that the Motor Vehicle Safety Act expressly preempted state tort suits brought on the basis of a lack of an airbag.

- ➢ **The Clinton Administration, through the office of Solicitor General, also argued in its brief that the state law claims were impliedly preempted by the federal standards promulgated by the Department of Transportation.**

For opinion see 120 S.Ct. 1913, 120 S.Ct. 519, 120 S.Ct. 33

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, INC., et al.
No. 98-1811.
November 8, 1999.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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*I QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988), or Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), preempts a state common law tort claim that an automobile manufactured in 1987 was defectively designed because it lacked an airbag.

*III TABLE OF CONTENTS

Interest of the United States ... 1

Statement ... 2

Summary of argument ... 8

Argument:

The Safety Act does not expressly preempt petitioners' tort claims, but the claims are impliedly preempted because a judgement for petitioners would frustrate the

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purposes of Standard 208 ... 10

A. The Safety Act does not expressly preempt petitioners' tort claims ... 11

B. Standard 208 impliedly preempts petitioners' tort claims ... 15

Conclusion ... 30

TABLE OF AUTHORITIES

Cases:

American Tel. & Tel. Co. v. Central Office Tel., 524 U.S. 214 (1998) ... 16, 23

Barnett Bank v. Nelson, 517 U.S. 25 (1996) ... 26

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) ... 12

California Fed. Sa. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) ... 16

Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) ... 16-17, 22, 26

Cipollone v. Liggett Group, 505 U.S. 504 (1992) ... 7, 12

City of Chicago v. Environmenial Defense Fund, 511 U.S. 328 (1994) ... 14

City of New York v. FCC, 486 U.S. 57 (1988) ... 17

*IV English v. General Elec. Co., 496 U.S. 72 (1990) ... 16

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982) ... 26

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) ... 17

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) ... 7, 11, 16, 26

Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992) ... 28

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Gustafson v. Alloyd Co., 513 U.S. 561 (1995) ... 13, 14

Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997) ... 10

Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707 (1985) ... 27

Hines v. Davidowitz, 312 U.S. 52 (1941) ... 26

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) ... 16, 25

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) ... 17-18

Jones v. Rath Packing Co., 430 U.S. 519(1977) ... 17

Malone v. White Motor Corp., 435 U.S. 497 (1978) ... 16

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) ... 11, 12, 15, 27

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) ... 3

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989) ... 10

Pacific Legal Found. v. DOT, 593 F.2d 1338 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979) ... 24

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) ... 12, 28

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) ... 15

***V** State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987) ... 3

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) ... 17

Wood v. General Motors Corp.:

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865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990) ... 10, 11, 20, 21, 26

494 U.S. 1065 (1990) ... 11, 26

Constitution, statutes and regulations:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) ... 9, 17, 27

Act of July 5, 1994, Pub. L. No. 103-272, 198 Stat. 745 (49 U.S.C. 30101 et seq.) ... 1

§ 1(a), 108 Stat. 745 ... 1

§ 1(e), 108 Stat. 941-973 ... 1

Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30101 et seq.:

49 U.S.C. 30103 ... 20

49 U.S.C. 30103(b) ... 20

49 U.S.C. 30103(b)(1) ... 2, 12, 13

49 U.S.C. 30103(e) ... 3, 13, 20

49 U.S.C. 30127 ... 3

49 U.S.C. 30127(f)(2) ... 3

Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (15 U.S.C. 1401(b) (1988)) ... 24

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988):

15 U.S.C. 1381 ... 1, 2, 22

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

15 U.S.C. 1391(2) ... 2, 13, 15, 21

15 U.S.C. 1392 ... 13, 22

15 U.S.C. 1392(a) ... 1, 2, 13

15 U.S.C. 1892(d) (§ 103(d)) ... 2, 8, 10, 12, 13, 14, 20

15 U.S.C. 1397 ... 22

15 U.S.C. 1397(k) (§ 108(c)) ... passim

***VI** 49 C.F.R. (1987):

Section 571.105 ... 21

Section 571.125 ... 21-22

Section 571.208 ... 1, 3

Section 571.208.S4.1.3.1 ... 3

Section 571.208.S4.1.3.2 ... 3

Section 571.208.S4.1.3.3 ... 3

Section 571.208.S4.1.3.4 ... 5

Section 571.208.S4.1.4 ... 3

Section 571.208.S4.1.5.3 ... 3

Section 571.212 ... 23

Miscellaneous:

112 Cong. Rec. (1966):

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

p. 14,230 ... 19

p. 19,663 ... 20

p. 21,487 ... 19, 21

p. 21,490 ... 19

49 Fed. Reg. (1984):

p. 28,972 ... 26

p. 28,987 ... 24

pp. 28,987-28,997 ... 24

p. 28,996 ... 4

p. 28,997 ... 5

pp. 28,999-29,000 ... 6, 30

p. 29,000 ... 5, 25

p. 29,000-29,001 ... 24

pp. 29,000-29,002 ... 4

p. 29,001 ... 4, 24

H.R. Rep. No. 1776, 89th Cong., 2d Sess. (1966) ... 14, 19, 20

S. Rep. No. 1301, 89th Cong., 2d Sess. (1966) ... 12, 19, 25, 29

Webster's Third New International Dictionary (1993) ... 12

***1** INTEREST OF THE UNITED STATES

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The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988), requires the Secretary of Transportation to promulgate motor vehicle safety standards. 15 U.S.C. 1392(a). [FN1] This case concerns the preemptive effect of the Act and one of those standards, Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), which governs occupant crash protection. The Court's decision may affect the manner in which the Secretary exercises his regulatory authority under the Act.

FN1. The Act was recodified, along with other Acts governing transportation, on July 5, 1994, "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745; see § 1(e), 108 Stat. 941-973 (codifying new 49 U.S.C. 30101 et seq.). Like the court of appeals and petitioners, we generally refer to the earlier version of the Act.

*2 STATEMENT

1. Congress enacted the National Traffic and Motor Safety Vehicle Act of 1966 (Safety Act or Act) to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. The Act directs the Secretary of Transportation to "establish by order motor vehicle safety standards," 15 U.S.C. 1392(a), which are defined as "minimum standard[s] for motor vehicle performance or motor vehicle equipment performance," 15 U.S.C. 1391(2). Each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a).

The Safety Act contains a preemption provision, which provides in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. 1392(d). [FN2] The Act also contains a provision, which petitioners refer to as a savings clause, that describes *3 the effect of compliance with federal standards on common law liability. That clause provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k). [FN3]

FN2. As we explain in note 1, supra, the Safety Act was amended and recodified in 1994 without substantive change. Section 1392(d) is now codified at 49 U.S.C. 30103(b)(1) and states in relevant part:

> When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

FN3. Section 1397(k) is now codified at 49 U.S.C. 30103(e), which states: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

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2. Federal Motor Vehicle Safety Standard 208 regulates occupant crash protection. 49 C.F.R. 571.208. The Secretary promulgated the version of Standard 208 at issue in this case in 1984, after nearly 15 years of analysis, rulemaking, and litigation. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-38 (1983); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 477-478 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Beginning with the 1987 model year (in which petitioners' car was manufactured), Standard 208 phased in a requirement that all new passenger cars have some type of passive restraint system, i.e., a device that works automatically, without any action by the occupants, to help protect occupants from injury during a collision. Standard 208 required manufacturers to install some type of passive restraint in at least 10% of their 1987 model year cars. 49 C.F.R. 571.208.S4.1.3.1. [FN4] ***4** The rule did not, however, require installation of any particular type of passive restraint. Instead, it gave manufacturers the option to install automatic seatbelts, airbags, or any other suitable technology that they might develop, provided they met the performance requirements specified in the rule.

> FN4. The percentages increased each year until the 1990 model year. Beginning in that model year, all new cars were required to have a passive restraint system. 49 C.F.R. 571.208.S4.1.3.2, 571.208.S4.1.3.3, 571.208.S4.1.4. In response to the Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30127, the Secretary has amended Standard 208 to require that, beginning in the 1998 model year, all new cars have an airbag at the driver's and right front passenger's position. 49 C.F.R. 571.208.S4.1.5.3. Section 30127(f)(2) provides that "[t]his section and the amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without [airbags]."

In adopting that standard, the Secretary expressly considered, and rejected, a proposal to require airbags in all cars. See 49 Fed. Reg. 29,000-29,002 (1984). The Secretary reasoned that some people had serious concerns about airbags, and, if airbags were required in all cars, there could be a public backlash in which some people disabled the airbags, thus eliminating their safety benefit. Id. at 29,001. The Secretary also concluded that, although airbags and seatbelts together may provide greater safety benefits than automatic seatbelts alone, the effectiveness of an airbag system is "substantially diminished" if, as then often occurred, the occupant does not wear the seatbelt. Id. at 28,996. Further, airbags were found "unlikely to be as cost effective" as automatic seatbelts, and, because of the high replacement cost of airbags, some people might not replace them after deployment, leaving no automatic protection for front seat occupants. Id. at 29,001. Finally, little developmental work had been done to install airbags in smaller cars, and the Secretary found that unrestrained occupants, particularly children, could be injured by the deployment of airbags in those cars. Ibid.

In light of those concerns, the Secretary determined that manufacturers should have a choice of ways to ***5** comply with the passive restraint requirement. 49 Fed. Reg. at 28,997. The Secretary anticipated that manufacturers would respond to that choice by using a variety of passive restraints, including airbags and automatic seatbelts. Although airbags were more expensive than automatic seatbelts, the Secretary expected manufacturers to install airbags in some cars because one manufacturer had already begun to offer airbags, others had indicated plans to do so, and the rule provided an incentive to use airbags and other non-belt

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technologies. Ibid. [FN5]

FN5. In determining whether a manufacturer installed passive restraints in the requisite percentage of its fleet during the phase-in period, Standard 208 counted each car with an airbag or other non-belt passive restraint as the equivalent of 1.5 cars with automatic seatbelts. 49 C.F.R. 571.208.S4.1.3.4; 49 Fed. Reg. at 29,000.

The Secretary concluded that installation of a variety of passive restraint systems would have several safety advantages. The latitude provided the industry would enable manufacturers to "develop the most effective systems" and would "not discourag[e] the development of other technologies." 49 Fed. Reg. at 28,997. In addition, the availability of alternative devices would enable the industry to "overcome any concerns about public acceptability by permitting some public choice." Ibid. Customers who did not like airbags could buy a car with automatic seatbelts, and those who did not want the automatic belts could select a car with airbags. Ibid. Finally, widespread use of both airbags and automatic seatbelts was "the only way to develop definitive data" about which alternative is more effective. Ibid. [FN6]

FN6. The Secretary also concluded that a gradual phase-in of the passive restraint requirement would better serve the Act's safety purpose than a uniform implementation on a single future date. One purpose of the phase-in was to achieve the installation of passive restraints in some cars earlier than if a single effective date had been established, since it would have taken longer for all cars to be redesigned to include a passive restraint. The phase-in also increased the likelihood that manufacturers would use airbags, which required a longer lead time for redesign. Finally, the phase-in gave consumers and the agency time to develop more information about the benefits of passive restraints, thus enhancing the opportunity to overcome public resistance. 49 Fed. Reg. at 28,999-29,000.

*6 3. In January 1992, while driving a 1987 Honda Accord, petitioner Alexis Geier collided with a tree in the District of Columbia. Although she was wearing her seatbelt, she sustained "serious and grievous injuries." J.A. 2-5. Ms. Geier and her parents (also petitioners) sued respondent American Honda Motor Company, Inc., in the United States District Court for the District of Columbia. Pet. App. 2 n.1. Alleging that their car was negligently and defectively designed because it lacked a driver's-side airbag in addition to a manual seatbelt, they sought damages under the common law of the District of Columbia. Pet. Br. 12.

The district court granted respondent's motion for summary judgment. Pet. App. 17-20. The court held that petitioners' tort claims were expressly preempted by the Safety Act because recovery on the claims would be "equivalent to a safety standard promulgated by the state legislature or a state regulatory body." Id. at 19.

4. The court of appeals affirmed, but it employed a different preemption analysis. Pet. App. 1-16. The court acknowledged that the term "standard" in the Safety Act's preemption provision could be read in isolation to encompass requirements imposed by common law tort verdicts, but the court recognized that the preemption clause must be interpreted in light of the entire Safety Act, including the savings clause. Id. at 9-*7 11. The court ultimately found it unnecessary to resolve the express preemption question, because it concluded that a verdict in petitioners'

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favor "would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives, and consequently, the Act impliedly preempts [the] lawsuit." Id. at 12.

The court of appeals rejected petitioners' claim that this Court's decision in Cipollone v. Liggett Group, 505 U.S. 504 (1992), prevents courts from conducting implied preemption analysis when a statute has an express preemption provision and a savings clause. Pet. App. 12-13. The court of appeals noted that this Court rejected a similar argument in Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), in which the Court engaged in implied preemption analysis after concluding that the Safety Act did not expressly preempt the state tort claim at issue.

Applying implied preemption analysis, the court of appeals determined that "allowing liability for the absence of airbags would 'interfer[e] with the method by which Congress intended to meet its goal of increasing automobile safety.' " Pet. App. 14 (citation omitted). The court explained:

A successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety.

Ibid. (citation omitted). The Secretary had decided that a choice among passive restraint systems would advance public safety by "allowing consumers to adjust to *8 the new technology and by permitting experimentation with designs for even safer systems." Id. at 15. The court therefore concluded that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." Ibid.

SUMMARY OF ARGUMENT

Petitioners' tort claims are not expressly preempted by the Safety Act, but they are impliedly preempted because they conflict with Standard 208. The Safety Act's preemption clause, 15 U.S.C. 1392(d), does not bar the claims, because, particularly when read in conjunction with the Act's savings clause, 15 U.S.C. 1397(k), it expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency. Although the reference in the preemption provision to a state "standard" could, in isolation, be understood to encompass common law tort rules, that reading is not consistent with the remainder of the Act, including the express reference to "common law" in Section 1397(k). Moreover, if Section 1392(d) preempted all common law actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k), which provides that compliance with a federal safety standard does not "exempt" a person from common law liability.

The Secretary of Transportation has therefore long taken the view that, although state legislatures and administrative agencies may not adopt a safety standard that differs from a federal standard governing the same aspect of performance, state courts are not necessarily precluded from entering tort judgments that a *9 vehicle was defectively designed with respect to that aspect of performance. That interpretation could create some tension within the Safety Act, but any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims.

There is no danger that tort liability will undermine the Act, because common law claims still must yield if they conflict with federal safety standards. Section 1397(k) does not preserve those claims because it neither refers to preemption nor

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states that common law liability is preserved even if it conflicts with a federal standard. Congress legislates against the background of the Supremacy Clause, which provides that state law yields if it conflicts with federal law. Thus, absent a solid basis to believe that Congress intended to alter traditional preemption analysis, a statute should not be interpreted to permit state laws to operate in a manner that conflicts with federal law.

Petitioners' claims conflict with Federal Motor Vehicle Safety Standard 208, because a judgment for petitioners would stand as an obstacle to the accomplishment of the full purposes and objectives of the Standard. In promulgating the version of Standard 208 that was in effect when petitioners' car was manufactured, the Secretary rejected a proposal to require airbags in all cars, because she determined that safety would best be served if manufacturers were permitted at that time to install a variety of passive restraints. Petitioners' attempt to hold a manufacturer liable for failing to install a particular type of passive restraint--an airbag--would conflict with that policy of encouraging a diversity of passive restraints. Petitioners' claims are therefore preempted.

*10 ARGUMENT

In cases addressing whether the Safety Act or Standard 208 preempts tort claims that an automobile is defectively or negligently designed because it does not contain an airbag, the parties, and some courts, have tended to take an all-or-nothing view of preemption. Manufacturers have argued, and some courts have held, that Section 1392(d) preempts any common law ruling imposing a standard of care greater than the standard set by federal law. See, e.g., Harris v. Ford Motor Co., 110 F.3d 1410, 1413-1415 (9th Cir. 1997); Wood v. General Motors Corp., 865 F.2d 395, 412-413 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990). In contrast, plaintiffs have argued (as do petitioners in this case) that a federal safety standard can never preempt a tort claim because Section 1397(k) preserves all common law actions.

We agree with neither approach. As this Court has explained, when a federal regulatory scheme preserves a role for state law, "conflict-pre-emption analysis must be applied sensitively *** to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515 (1989).

The Secretary's longstanding view is that, read in the full statutory context, Section 1392(d) prohibits state legislative or administrative bodies from prescribing safety standards different from those prescribed by the Secretary but does not expressly preempt state tort *11 claims. At the same time, the Secretary's view has been that Section 1397(k) does not preserve tort claims that actually conflict with a federal standard but rather provides that compliance with federal standards does not, in itself, immunize manufacturers from liability. See U.S. Amicus Br. at 16 & n.10, 28-29, Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); U.S. Amicus Br. at 7-16, Wood v. General Motors Corp., 494 U.S 1065 (1990) (No. 89-46). That view is entitled to "substantial weight." Medtronic, Inc., v. Lohr, 518 U.S. 470, 496 (1996); id. at 505-506 (Breyer, J., concurring).

Petitioners' tort claims that their vehicle was defectively and negligently designed because it lacked an airbag are thus not expressly preempted by the Safety Act. Their claims are, however, preempted by implication, because a judgment for petitioners would frustrate Standard 208's policy of encouraging a variety of passive restraints.

A. The Safety Act Does Not Expressly Preempt Petitioners' Tort Claims.

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In 1987, when petitioners' automobile was manufactured, the Safety Act's preemption clause stated:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

***12** 15 U.S.C. 1392(d). [FN7] It is our view that, read in its statutory context, this provision expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency.

FN7. As explained at notes 1-2, supra, that provision has been amended and recodified at 49 U.S.C. 30103(b)(1), but the amendments were not intended to be substantive.

The term "standard," construed in isolation, could be read to encompass duties imposed by tort law. The common law of torts is sometimes described in general terms as articulating "standards of care" to be applied on a case-by-case basis to assess a defendant's conduct and fault. See S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966); cf. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (legal duties imposed by common law fall within scope of "law, rule, regulation, order, or standard relating to railroad safety"); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-247 (1959). However, "standard" may also connote a prescriptive criterion, adopted in advance by responsible authorities, such as legislative or administrative bodies. [FN8] Consideration of the Safety Act as a whole confirms that this is the meaning of "standard" as used in the express preemption provision of Section 1392(d).

FN8. See Webster's Third New International Dictionary 2223 (1993) (def. 3a "something that is established by authority, custom, or general consent as a model or example to be followed: CRITERION, TEST;" def. 4 "something that is set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality").

Unlike the statute in CSX, which preempted any relevant "law, rule, regulation, order or standard" (507 U.S. at 664), and thus reached every method by which a State can impose legal obligations, or the statutes in Cipollone v. Liggett Group, 505 U.S. 504 (1992), and Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), ***13**Section 1392(d) preempts only "safety standard[s]," which is also the term used to describe the administrative requirements promulgated by the Secretary. See 15 U.S.C. 1392(a). Moreover, Section 1392(d) uses the verb "establish" to describe the enactment of the state standards it preempts, just as the Safety Act uses that verb to describe the promulgation of standards by the Secretary. See 15 U.S.C. 1392. [FN9] It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotation marks omitted). Further, Section 1392(d) preempts standards established by a "State or political subdivision of a State," a phrase not normally used to describe a court in a common law damages action. Finally, the Act defines standards as providing "objective criteria," 15 U.S.C. 1391(2); see also 15 U.S.C. 1392(a) ("objective terms"), a description that would appear to exclude tort judgments, which are case-specific

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determinations of liability and damages.

FN9. The recodification uses "prescribe" to describe the enactment of both state and federal standards. See 49 U.S.C. 30103(b)(1); note 2, supra. The use of "prescribe," which was not intended as a substantive change from the use of "establish" in the former 15 U.S.C. 1392(d) (see note 1, supra), confirms that "standards" are limited to positive enactments.

Our interpretation of Section 1392(d) is further buttressed by the specific reference to common law in Section 1397(k), which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." [FN10] The reference to common law liability in that Section suggests that Congress ***14** would have referred to common law expressly in Section 1392(d) if it had wanted to preempt all common law actions involving the same aspect of performance as a federal safety standard. See, e.g., City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994).

FN10. As we have explained in notes 1 & 3, supra, this Section is now codified as amended at 49 U.S.C. 30103(e), but the changes were not intended to alter the substance of the provision.

Finally, if Section 1392(d) preempted all common law tort actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k). That Section provides that compliance with a federal safety standard does not "exempt" a person from, i.e., provide a defense to, common law liability. See 15 U.S.C. 1397(k); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) ("compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law"). There is, however, no need to negate a defense to claims that have already been preempted. And the only claims that would not be preempted under the broad reading of Section 1392(d) are those that involve an aspect of performance not addressed by any federal standard. Yet no court would otherwise have held that compliance with a federal standard provided a defense to such a suit. Congress could not have intended the preemption provision to sweep so broadly that it renders superfluous another provision in the Act. See, e.g., Gustafson, 513 U.S. at 574. [FN11]

FN11. The only remaining role for Section 1397(k) would be to disavow congressional intent to occupy the field and thereby displace all tort actions involving motor vehicle safety. But even that role is unnecessary because the preemption provision itself makes the lack of field preemption clear by permitting States to establish standards identical to the federal standards and standards covering aspects of performance not addressed by the federal standards. See 15 U.S.C. 1892(d).

For those reasons, the Safety Act prohibits state legislatures and administrative agencies from adopting ***15** prescriptive safety standards that differ from a federal standard governing the same aspect of performance. It does not, however, necessarily preclude state courts from entering tort judgments that a vehicle was defectively designed with respect to that aspect of performance.

That interpretation could create some tension within the Safety Act, because

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allowing manufacturers to be held liable for design defects in vehicles that comply with federal standards could run counter to Congress's interest in uniform performance standards. But any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims, embodied both in the savings clause (15 U.S.C. 1397(k)) and in the definition of a federal standard as a "minimum standard" (15 U.S.C. 1391(2)). See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). Moreover, tort suits can sometimes complement federal regulations and the Act's safety purpose by supplying manufacturers with an additional incentive to design a safe product. See Medtronic, 518 U.S. at 495. Finally, there is no danger that tort liability will impair the purpose of the Act, because, as we explain below, common law claims still must yield if they conflict with federal standards. Cf. Silkwood, 464 U.S. at 256 (conflict preemption analysis still applies despite congressional intent generally to preserve state tort actions).

B. Standard 208 Impliedly Preempts Petitioners' Tort Claims.

State law is impliedly preempted if it is "impossible for a private party to comply with both state and federal requirements *** or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [federal law].' " ***16** English v. General Elec. Co., 496 U.S. 72, 79 (1990) (citations omitted). Petitioners' tort claims are preempted under that analysis. Holding respondent liable for not installing airbags in petitioners' car would frustrate Standard 208's policy of encouraging a variety of passive restraints.

1. Contrary to petitioners' contention (Br. 25-41), the Safety Act's savings clause, 15 U.S.C. 1397(k), does not foreclose implied preemption analysis.

a. As an initial matter, any suggestion (see Pet. Br. 37-38) that the presence of a savings clause automatically precludes implied preemption analysis is incorrect. Savings clauses vary significantly in both phraseology and context, and, as with any other statutory provision, a court must ascertain the meaning of the specific clause. Cf. Freightliner, 514 U.S. at 289. [FN12] Thus, this Court frequently conducts implied preemption analysis even though a statute contains a savings clause. Indeed, the Court hesitates to read a savings clause to authorize claims that conflict with federal law. See, e.g., American Telephone & Telegraph Co. (AT&T) v. Central Office Telephone, 524 U.S. 214, 227-228 (1998); International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); ***17**Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328 (1981); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

FN12. Petitioners' reliance (Br. 38) on Malone v. White Motor Corp., 435 U.S. 497 (1978), and California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), is unpersuasive. In Malone, the issue was essentially field preemption, and the Court held that two savings provisions (more broadly worded than the one at issue here) indicated that the federal labor statutes did not foreclose all state regulation of pension plans. 435 U.S. at 504-505. In Guerra, the plurality examined the savings provisions in the Civil Rights Act of 1964 and found that "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law" (479 U.S. at 281); see also id. at 295-296 (Scalia, J., concurring).

There is good reason for that approach. Conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art. VI, Cl. 2), rather than from a specific intent to displace state law. Thus, "[a] holding of federal

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exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). Similarly, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of intent to supersede state law-making authority. See Jones v. Rath Packing Co., 430 U.S. 519, 540-543 (1977). Those implied preemption principles are equally applicable to conflicts between state laws and federal regulations. Whether or not Congress has addressed preemption, "[t]he statutorily authorized regulations of an agency will pre- empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." City of New York v. FCC, 486 U.S. 57, 64 (1988).

Because Congress enacts laws against the background of the Supremacy Clause, a court should assume that Congress believes that federal law (whether enacted directly by Congress or promulgated by a federal agency pursuant to statutory authorization) will prevail in any collision with state law. Of course, Congress is free to change the general rule and to allow state laws to operate in the place of conflicting federal law. But absent a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis," ***18**John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 99 (1993), a statute should not be interpreted to permit state laws to operate in conflict with federal law. [FN13]

FN13. Petitioners therefore err in suggesting (Br. 38-39) that the presumption that cautions against unduly broad construction of preemption provisions favors their reading of the savings clause. The presumption against preemption of state laws that can coexist harmoniously with federal law is quite different from a presumption in favor of preservation of state laws that conflict with federal law.

The presumption that Congress does not intend to alter traditional principles of conflict preemption is particularly appropriate when Congress enacts a statute such as the Safety Act that takes effect through administrative action. Congress did not itself prescribe motor vehicle safety standards in the Safety Act. Instead, it delegated their promulgation (and revision in light of experience) to the Secretary of Transportation. Thus, Congress could not know what federal standards would be promulgated, and it could not predict whether or how States might adopt conflicting measures.

b. The Act's savings clause, Section 1397(k), provides no sound basis to conclude that Congress intended to alter the general rule that federal law preempts conflicting state law. Nothing in the text of the clause suggests that common law liability is saved from preemption even if it conflicts with a federal safety standard. Indeed, the language of the clause does not directly address preemption at all. It states that "[c]ompliance with any Federal motor vehicle safety standard issued under [the Safety Act] does not exempt any person from any liability under common law." 15 U.S.C. 1397(k). [FN14] As we have explained, the ***19** clause thus preserves common law liability in the sense that a manufacturer cannot invoke its compliance with federal law as an automatic defense against a claim that a car was defectively designed. See p. 14, supra. The clause does not, however, preserve common law liability that conflicts with federal law.

FN14. The recodification substituted the modifier "a" for "any," note 3,

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supra, without intending substantive change, note 1, supra. The fact that Congress perceived no distinction between the use of the words "a" and "any" refutes the suggestion (see Pet. Br. 25) that the use of "any" was intended to signal a broad construction of the clause.

The legislative history supports that interpretation. The provision originated in the House of Representatives, and the House Report expressly states that the clause "establishes[] that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law." See H.R. Rep. No. 1776, supra, at 24 (emphasis added). Other references in the legislative history are consistent with the understanding that Section 1397(k) negates a substantive defense to liability and does not directly address preemption. [FN15] Petitioners have not identified, ***20** and we have not found, any statement in the legislative history that describes Section 1397(k) as preserving from preemption common law claims that conflict with federal law. [FN16]

FN15. See, e.g., S. Rep. No. 1301, supra, at 12 (explaining that federal standards "need not be interpreted as restricting State common law standards of care" so that compliance with federal standards "would thus not necessarily shield any person from product liability at common law") (emphasis added); 112 Cong. Rec. 14,230 (1966) (Sen. Magnuson) (also using qualifier "not necessarily"); id. at 21,487 (Sen. Magnuson) (stating that Senate conferees adopted the House provision, which "makes explicit, in the bill, a principle developed in the Senate report"); ibid. (explaining that the provision does not prevent use of compliance or noncompliance as "evidence"); id. at 21,490 (Sen. Cotton) ("proof of compliance" may be offered "for such relevance and weight as courts and juries may give it"). Petitioners also rely (Br. 29) on the comments of a witness at House hearings who expressed the concern that manufacturers would respond to lawsuits with a claim that "Our product meets Government standards." Comments by members of the public reveal little about congressional intent. In any event, the witness's concern was precisely that manufacturers would use compliance with federal standards as a substantive defense to liability.

FN16. As noted in the text, the House Report states that "compliance with federal standards is not to be a defense or otherwise to affect the rights of parties under common law." H.R. Rep. No. 1776, supra, at 24 (emphasis added). The context suggests that the italicized language refers to substantive changes to common law rules rather than the possibility of preemption. Petitioners also note (Br. 29) that Senator Magnuson stated that "[t]he common law on product liability still remains as it was." That statement too is properly understood as explaining that the Act made no change to the substance of product liability law. Finally, petitioners rely (Br. 30-31) on a statement by Representative Dingell that "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser." 112 Cong. Rec. at 19,663. Mr. Dingell made that statement to explain why he opposed an amendment that would have criminalized willful violations of federal standards. Thus, the statement indicates only that common law actions based on the violation of federal standards are preserved; it does not indicate that actions that would conflict with federal standards are similarly preserved. See Wood, 865 F.2d at 407 n.14.

That interpretation of Section 1397(k) is reinforced by the fact that Congress did

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not include the savings clause in the Section of the Safety Act that addresses preemption (Section 103(d) (codified at 15 U.S.C. 1392(d))) but inserted it five sections later (Section 108(c) (codified at 15 U.S.C. 1397(k))). Thus, the structure of the Act confirms that the savings clause was not intended directly to address preemption. [FN17]

FN17. The recodification included both provisions in 49 U.S.C. 30103 (entitled "Relationship to other laws") but in separate subsections, one entitled "Preemption" (49 U.S.C. 30103(b)) and the other entitled "Common law liability" (49 U.S.C. 30103(e)).

***21** Our interpretation does not render the savings clause meaningless, as petitioners contend (Br. 26-27). Petitioners' argument would have force only if the preemption clause applied to common law claims, a reading that we reject. See ibid.; pp. 11-15, supra. Instead, our interpretation preserves an important role for Section 1397(k): In cases in which tort liability does not conflict with a federal standard, Section 1397(k) makes clear that compliance with the standard does not immunize a manufacturer from liability. Those cases can arise frequently, since state tort law does not conflict with a federal "minimum standard" (15 U.S.C. 1391(2)) merely because state law imposes a more stringent requirement. [FN18] For example, Federal Motor Vehicle Safety Standard 105, 49 C.F.R. 571.105, which establishes requirements for brake performance, does not require anti-lock brakes in addition to airbrakes in all vehicles, but the Secretary has not determined that requiring anti-lock brakes would disserve safety. Section 1397(k) makes clear that compliance with Standard 105 is not a defense to a common law tort claim that a vehicle is defectively designed because it lacks anti-lock brakes. Federal Motor Vehicle Safety Standard 125, ***22**49 C.F.R. 571.125, provides multiple options for the design of reflective devices to warn approaching traffic of the presence of a stopped vehicle, but the Secretary did not determine that the availability of options was necessary to promote safety. Section 1397(k) makes clear that compliance with Standard 125 is not a defense to a common law tort claim that the reflective device is defectively designed unless it uses one rather than another of those options. Thus, under our reading, Section 1397(k) has a sensible and important role. [FN19]

FN18. We therefore agree with petitioners (Br. 46-47) that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose. We disagree, however, with the contention (Br. 44, 46) that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. See Wood, 865 F.2d at 416-417; 112 Cong. Rec. at 21,487 (Sen. Magnuson) (performance standards expected to affect design). As we explain at pages 23-26, infra, the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

FN19. Petitioners contend (Br. 27 n.11) that there was no need for Congress to specify that compliance with federal standards is not a defense to common law liability because every State already provided that compliance with a federal regulation is not a defense to a design defect claim. But even if Congress understood that to be the common law rule, it could not be certain

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that rule would not change. It therefore had ample reason to assure that the Safety Act would not be construed to create a new, automatic federal defense.

c. It is petitioners' reading of the clause as preserving tort claims even if they conflict with federal safety standards that would have anomalous results. The Safety Act's purpose "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and Congress chose to carry out that purpose by empowering the Secretary to issue safety standards, 15 U.S.C. 1392, 1397. In some instances, such as the present case, holding a manufacturer liable for what a jury might find to be a design defect would significantly impair the Secretary's efforts to promote safety. Reading the savings clause to preserve that liability from preemption would impermissibly allow courts to second-guess the Secretary's judgment on matters "entrusted to [his] informed discretion" (Kalo Brick & Tile Co., 450 U.S. at 330) and ***23** lead the Act "to destroy itself" (AT&T, 524 U.S. at 228).

For example, the Secretary has established windshield retention requirements in Federal Motor Vehicle Safety Standard 212, 49 C.F.R. 571.212, in order to prevent occupants from being thrown from their cars in crashes. If manufacturers could be held liable under state tort law on a theory that it is a design defect for windshields in those vehicles to be retained in a crash because passengers could be injured if they struck the windshields, it would be impossible for manufacturers to comply with both the federal standard and the duties imposed by state tort law. Thus, if the tort claims were not preempted, the Secretary would have to rescind the federal standard, or manufacturers would have to continue to produce windshields that do not eject in order to comply with Standard 212, while paying tort judgments based on the theory that the federally mandated failure of the windshields to release in a crash rendered their cars defectively designed. There is no indication that Congress intended that startling result.

2. a. This case does not pose that type of conflict, but it poses a closely related one. In issuing the version of Standard 208 in effect when petitioners' car was manufactured, the Secretary rejected a rule requiring airbags in all cars in favor of a rule encouraging manufacturers to offer a variety of passive restraints. The Secretary determined--based on the history of consumer (and congressional) responses to passive restraint requirements--that diversity would best promote safety by helping to ensure public acceptance of passive protection systems, [FN20] encouraging the development ***24** of new and improved technologies, [FN21] and enabling the agency to acquire more data to make regulatory decisions. See 49 Fed. Reg. at 28,987-28,997, 29,000-29,001. The Secretary also determined that the high replacement costs of airbags could cause some consumers to decline to replace them after they were deployed, which would leave occupants without passive protection. Id. at 29,000-29,001. At the same time, the Secretary took steps that she reasonably determined would prompt manufacturers to install airbags in some ***25** of their cars. See p. 5 & n. 5, supra. Standard 208 thus embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.

FN20. In 1972, the Secretary adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seatbelts were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on the agency's future efforts to require restraints other than seatbelts. Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482

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(codified at 15 U.S.C. 1401(b) (1988)). Given the public's adverse reaction to the interlock system, one factor the Secretary properly considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See Pacific Legal Found. v. DOT, 593 F.2d 1338, 1345-1346 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). "Airbags engendered the largest quantity of, and most vociferously worded, comments" during the rulemaking. 49 Fed. Reg. at 29,001. Commenters expressed concerns that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, and that airbags would not deploy during an accident. Ibid. Given those widespread concerns, the Secretary concluded that "[i]f airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." Ibid.

FN21. The Secretary determined that experience could show that automatic seatbelts would be used more frequently than anticipated, and that manufacturers might develop better and more acceptable automatic seatbelt systems. That development could result in automatic seatbelts that were as effective as airbags but cost less. The Secretary also concluded that requiring airbags in all cars would unnecessarily stifle further innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

That policy of affirmatively encouraging diversity would be frustrated if manufacturers could be held liable for not installing airbags. If, when the Secretary promulgated the rule in 1984, respondent and other manufacturers had known that they could later be held liable for failure to install airbags, the prospect of sizable compensatory and punitive damage awards, combined with the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, supra, at 12, would likely have led them to install airbags in all cars. That outcome would have eliminated the diversity that the Secretary found necessary at that time to promote motor vehicle safety. At the very least, holding manufacturers liable for not installing airbags would have "interfere[d] with the methods by which [Standard 208] was designed to reach [its] goal." Ouellette, 479 U.S. at 494. [FN22] Therefore, tort claims like *26 petitioners', which are based on the theory that a car (subject to the version of Standard 208 in effect in 1987) was defectively designed because it lacked an airbag, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [Standard 208]." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

FN22. Petitioners mistakenly argue (Br. 16, 44) that their tort claims would not interfere with the Secretary's chosen methods because, they assert (Br. 2, 10-11), the Secretary intended tort liability to provide an incentive for manufacturers to install airbags. In support of that assertion, petitioners cite the Secretary's statement that "potential liability for any deficient systems" would discourage manufacturers from "us[ing] the cheapest system to comply with an automatic restraint requirement." 49 Fed. Reg. at 29,000. Petitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed defective passive restraints. The Secretary did not mean that manufacturers could be held liable for choosing one type of passive restraint rather than another. Petitioners' amici (Missouri Br. 6; Ass'n of Trial Lawyers Br. 29) also mistakenly rely on a public comment that the Secretary summarized in the

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description of comments in the preamble. 49 Fed. Reg. at 28,972. An agency does not endorse a comment merely by describing it.

For those reasons, the Secretary has long taken the view that Standard 208 preempts such claims. [FN23] See U.S. Amicus Br. at 28-29, Freightliner Corp. v. Myrick, supra; U.S. Amicus Br. at 11-15, Wood v. General Motors Corp., supra. That view is consistent with this Court's decisions holding that when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted. See, e.g., Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 154-155 (1982); Kalo Brick & Tile Co., 450 U.S. at 326.

FN23. Not all tort claims involving airbags would be preempted. A claim that a manufacturer installed an airbag that deployed improperly would not be preempted because it would not frustrate the purposes of Standard 208. Even a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car (see Nat'l Conf. of State Leg. Br. 12) would not necessarily frustrate Standard 208's purposes.

The Secretary's view is entitled to substantial weight. "Because the [Department of Transportation] is the federal agency to which Congress has delegated its authority to implement the [Safety] Act, the [Secretary] is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to *27 the accomplishment and execution of the full purposes and objectives of Congress.' " Medtronic, 518 U.S. at 496; id. at 506 (Breyer, J., concurring) (administering agency has "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives"). [FN24]

FN24. Petitioners and their amici contend (Pet Br. 40-41, 49-50; Nat'l Conf. of State Leg. Br. 24-25; Leflar Br. 21-22) that there can be no implied conflict preemption here because, when the Secretary adopted Standard 208, she neither plainly stated her intent to preempt tort liability nor provided notice and comment on the question. That contention rests on a misunderstanding of the basis for conflict preemption. Unlike field preemption, which arises when agencies "intend for their regulations to be exclusive," Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985), conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. See p. 17, supra. Here, because conflict preemption is at issue, neither a statement of preemptive intent nor notice and comment on preemption was required. For the same reasons, the argument that the Secretary lacks authority to give any particular federal standard preemptive force (Nat'l Conf. of State Leg. Br. 24) is wide of the mark. We do not contend that petitioners' claims in this case are preempted because the Secretary decided that Standard 208 should preempt common law liability. We contend that the claims are preempted because they conflict with, and would frustrate implementation of, the policy judgment embodied in the Standard that a choice of passive restraints would best promote safety.

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b. Petitioners mistakenly contend (Br. 16, 47-48) that their claims do not conflict with the Secretary's goal of allowing consumers to adjust to new airbag technology because tort liability would not lead manufacturers to change their conduct. To the contrary, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." ***28** Garmon, 359 U.S. at 247. Indeed, petitioners' amici acknowledge that tort law "has a deterrence function." Nat'l Conf. of State Leg. Br. 14; see Ass'n of Trial Lawyers Br. 10-12; Leflar Br. 12-13, 17; Missouri Br. 6, 13. [FN25]

FN25. That tort law also has other purposes (such as compensation) does not mean tort rules cannot conflict with federal law (Nat'l Conf. of State Leg. Br. 14-15; Leflar Br. 17-19). Conflict preemption flows from the effects of the state law, not its purposes. See Gade v. National Solid Waste Mgmt. Ass'n, 505 U.S. 88, 105-106 (1992).

Petitioners also argue (Br. 16, 47-48) that, if manufacturers had changed their conduct and installed airbags, they would have promoted public acceptance of those devices. That may be true, but the Secretary reasonably determined at that time that experience with a variety of passive restraints would best promote public acceptance. In any event, speculation of the sort advanced by petitioners cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208. [FN26]

FN26. Petitioners suggest (Br. 16, 44) that a tort rule requiring airbags is consistent with Standard 208 because the Secretary determined that airbags were technologically the most effective passive restraint and provided an incentive to encourage manufacturers to install them (see note 5, supra). That contention overlooks the Secretary's conclusion that airbags would not be effective in practice if they were installed in all cars because of the likely public reaction and potential safety dangers in small cars. It also overlooks the Secretary's determination that further research and development could lead to more cost-effective restraints. And it overlooks the Secretary's reason for providing the incentive to install airbags--to ensure a variety of passive restraints, not to maximize the number of cars with airbags.

Petitioners further err in contending (Br. 48-49) that their claims do not conflict with the goal of encouraging innovation and development of more effective restraint ***29** systems. Contrary to petitioners' suggestion, the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would, because of the potential for large damage awards and the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, supra, at 12. This Court should decline petitioners' invitation to second-guess that reasonable determination.

Finally, petitioners argue (Br. 44-45) that their claims do not conflict with Standard 208 because their car was manufactured during the phase-in period (when Standard 208 required the installation of some type of passive restraint system in some, but not all, cars) and their car did not have any passive restraint. Those facts do not, however, alter the preemption analysis, because petitioners do not claim that their car was defectively designed because it lacked any type of passive

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restraint. Rather, they claim that the car was defectively designed because it lacked one particular type of passive restraint--an airbag. See Pet. i; Pet. Br. i. Thus, petitioners cannot prevail without a ruling that a car manufactured in 1987 was defectively designed unless it had an airbag. For the reasons we have described, that ruling would conflict with the Secretary's determination that no particular type of passive restraint should be required in any car because the use of a variety of passive restraints would best promote safety. [FN27]

FN27. This Court therefore need not decide whether Standard 208 would preempt a claim that a car manufactured during the phase-in is defective if it lacks any passive restraint. The Secretary believes that it would preempt such a claim, because the claim would frustrate the safety purposes for which the Secretary adopted the phase-in. See note 6, supra. A tort rule that effectively required passive restraints in all cars during the phase-in would likely have resulted in the nearly exclusive use of automatic seatbelts rather than airbags and impeded the development of data about the benefits of passive restraints that could help prevent a public backlash against them. See 49 Fed. Reg. at 28,999-29,000. Contrary to petitioners' contention (Br. 45), the fact that the claim involved a car manufactured in 1987 or a crash that occurred after the phase-in would not save the claim from preemption. The relevant question is not what manufacturers would do after the jury verdict in question but what they would have done when the relevant version of Standard 208 was promulgated if they had anticipated that they could later be held liable.

*30 CONCLUSION

The judgment of the court of appeals should be affirmed.

U.S.Amicus.Brief,1999.
Geier v. American Honda Motor Co., Inc.
1999 WL 1045115

Briefs and Other Related Documents (Back to top)

- 1999 WL 1140848, 68 USLW 3335 (Oral Argument) Oral Argument (Dec. 07, 1999)
- 1999 WL 1076223 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Nov. 30, 1999)
- 1999 WL 1049890 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT (Nov. 19, 1999)
- 1999 WL 1049891 (Appellate Brief) BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Nov. 19, 1999)
- 1999 WL 1049893 (Appellate Brief) BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE (Nov. 19, 1999)
- 1999 WL 1049895 (Appellate Brief) BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)
- 1999 WL 1049898 (Appellate Brief) BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

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• 1999 WL 1049900 (Appellate Brief) BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049905 (Appellate Brief) BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049906 (Appellate Brief) BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1050049 (Appellate Brief) BRIEF FOR RESPONDENTS (Nov. 19, 1999)

• 1999 WL 966486 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966514 (Appellate Brief) BRIEF AMICUS CURIAE OF ROBERT B LEFLAR, ROBERT S. ADLER, MICHAEL GREEN, AND JOSEPH A. PAGE IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966529 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Oct. 22, 1999)

• 1999 WL 966532 (Appellate Brief) BRIEF FOR PETITIONERS (Oct. 22, 1999)

• 1999 WL 973859 (Appellate Brief) BRIEF AMICI CURIAE OF THE STATES OF MISSOURI, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, IOWA, KANSAS, MONTANA, NEW HAMPSHIRE, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT AND WASHINGTON IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 988261 (Appellate Brief) BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Oct. 20, 1999)

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Briefs and Other Related Documents

Supreme Court of the United States

Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, INC., et al.

No. 98-1811.

Argued Dec. 7, 1999.
Decided May 22, 2000.

Injured motorist brought defective design action against automobile manufacturer under District of Columbia tort law, contending that manufacturer was negligent in failing to equip automobile with driver's side airbag. The United States District Court for the District of Columbia, William B. Bryant, J., entered summary judgment in favor of manufacturer. Motorist appealed. The District of Columbia Court of Appeals, Rogers, Circuit Judge, 166 F.3d 1236, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) action was not pre-empted by express preemption provision of National Traffic and Motor Vehicle Safety Act; but (2) Act's savings clause did not foreclose or limit operation of ordinary preemption principles; and (3) action was preempted since it actually conflicted with Department of Transportation standard requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles, abrogating *Drattel v. Toyota Motor Corp.*; *Minton v. Honda of America Mfg., Inc.*; *Munroe v. Galati*; *Wilson v. Pleasant*; *Tebbetts v. Ford Motor Co.*

Affirmed.

Justice Stevens dissented and filed opinion in which Justices Souter, Thomas, and Ginsburg joined.

West Headnotes

[1] Products Liability 35.1
313Ak35.1 Most Cited Cases

[1] States 18.65
360k18.65 Most Cited Cases

Express preemption provision of National Traffic and Motor Vehicle Safety Act did not preempt common law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag; finding that action was not preempted gave actual meaning to Act's saving clause while leaving adequate room for state tort law to operate, for example, where federal law created only minimum safety standard. National Traffic and Motor Vehicle Safety Act of 1966, § § 103(d), 108(k), 15 U.S.C.A. § § 1392(d), 1397(k).

[2] Consumer Protection 11
92Hk11 Most Cited Cases

[2] States 18.65
360k18.65 Most Cited Cases

Savings clause of National Traffic and Motor Vehicle Safety Act did not foreclose or limit operation of ordinary preemption principles insofar as those principles instructed courts to read statutes as preempting state laws that actually conflicted with Act or federal standards promulgated thereunder. National Traffic and Motor Vehicle Safety Act of 1966, § 108(k), 15 U.S.C.A. § 1397(k).

[3] Products Liability 35.1
313Ak35.1 Most Cited Cases

[3] States 18.65
360k18.65 Most Cited Cases

Express preemption provision of National Traffic and Motor Vehicle Safety Act did not foreclose possibility of implied conflict preemption of state law causes of action. National Traffic and Motor Vehicle Safety Act of 1966, § 103(d), 15 U.S.C.A. § 1392(d).

[4] States 18.5
360k18.5 Most Cited Cases

The Supreme Court declines to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

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[5] Products Liability 35.1
313Ak35.1 Most Cited Cases

[5] States 18.65
360k18.65 Most Cited Cases

Neither the express preemption clause of the National Traffic and Motor Vehicle Safety Act, nor the Act's savings clause, nor both together, created any "special burden" with respect to preemption of state common law tort claims beyond that inherent in ordinary preemption principles. National Traffic and Motor Vehicle Safety Act of 1966, § § 103(d), 108(k), 15 U.S.C.A. § § 1392(d), 1397(k).

[6] Products Liability 35.1
313Ak35.1 Most Cited Cases

[6] States 18.65
360k18.65 Most Cited Cases

Common law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag was preempted in that it actually conflicted with Department of Transportation standard, promulgated under National Traffic and Motor Vehicle Safety Act, requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles; rule of state law imposing duty to install airbag would have presented obstacle to variety and mix of safety devices and gradual passive restraint phase-in sought by standard; abrogating *Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 677 N.Y.S.2d 17, 699 N.E.2d 376; *Minton v. Honda of America Mfg., Inc.*, 80 Ohio St.3d 62, 684 N.E.2d 648; *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114; *Wilson v. Pleasant*, 660 N.E.2d 327; *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345. National Traffic and Motor Vehicle Safety Act of 1966, § 1 et seq., 15 U.S.C.A. § 1381 et seq.

[7] States 18.5
360k18.5 Most Cited Cases

Conflict pre-emption turns on the identification of actual conflict, and not on an express statement of pre-emptive intent.

[8] States 18.5
360k18.5 Most Cited Cases

While pre-emption fundamentally is a question of congressional intent, the Supreme Court traditionally distinguishes between express and implied pre-emptive intent, and treats conflict pre-emption as an instance of the latter.

[9] States 18.5
360k18.5 Most Cited Cases

A court should not find pre-emption too readily in the absence of clear evidence of a conflict.

[10] States 18.9
360k18.9 Most Cited Cases

A specific expression of agency intent to pre-empt, made after notice-and- comment rulemaking, is not required before conflict pre-emption can be found.

****1914** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation (DOT) promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. Petitioner Alexis Geier was injured in an accident ****1915** while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, *inter alia*, that respondents (hereinafter American Honda) were negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court granted American Honda summary judgment. In affirming, the Court of Appeals concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit.

Held: Petitioners' "no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act. Pp. 1918-1928.

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(a) The Act's pre-emption provision, 15 U.S.C. § 1392(d), does not expressly pre-empt this lawsuit. The presence of a saving clause, which says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law," § 1397(k), requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations. The saving clause assumes that there are a significant number of common-law liability cases to save. And reading the express pre-emption provision to exclude common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate where, for example, federal law creates only a minimum safety standard. P. 1918.

(b) However, the saving clause does *not* bar the ordinary working of conflict pre-emption principles. Nothing in that clause suggests an intent to save state tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt" sound as if they simply ***862** bar a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute, or a minimum, requirement. This interpretation does not conflict with the purpose of the saving provision, for it preserves actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. Moreover, this Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law, a concern applicable here. The pre-emption provision and the saving provision, read together, reflect a neutral policy, not a specially favorable or unfavorable one, toward the application of ordinary conflict pre-emption. The pre-emption provision itself favors pre-emption of state tort suits, while the saving clause disfavors pre-emption at least some of the time. However, there is nothing in any natural reading of the two provisions that would favor one policy over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. Pp. 1919-1922.

(c) This lawsuit actually conflicts with FMVSS 208 and the Act itself. DOT saw FMVSS 208 not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance--all of which would promote FMVSS 208's safety objectives. The standard's history helps explain why and how DOT sought these objectives. DOT began instituting passive restraint requirements in 1970, but it always permitted passive restraint options. Public resistance to an ignition interlock device that in effect forced occupants to buckle up their manual belts influenced DOT's subsequent initiatives. The 1984 version of FMVSS 208 ****1916** reflected several significant considerations regarding the effectiveness of manual seatbelts and the likelihood that passengers would leave their manual seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public's resistance to the installation or use of then-available passive restraint devices. Most importantly, it deliberately sought variety, rejecting an "all airbag" standard because perceived or real safety concerns threatened a backlash more easily overcome with a mix of several different devices. A mix would also help develop data on comparative effectiveness, allow the industry time to overcome safety problems and high production costs associated with airbags, and facilitate the development of alternative, cheaper, and safer passive restraint systems, thereby building public confidence necessary to avoid an interlock-type fiasco. The 1984 standard also deliberately sought to gradually phase in passive ***863** restraints, starting with a 10% requirement in 1987 vehicles. The requirement was also conditional and would stay in effect only if two-thirds of the States did not adopt mandatory buckle-up laws. A rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed. It would also have made adoption of state mandatory seatbelt laws less likely. This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related considerations as whether a private party would ignore state legal obligations or how likely it is that state law actually would be enforced. Finally, some weight is placed upon DOT's interpretation of FMVSS 208's objectives and its conclusion that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives. DOT is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements. Because there is no reason to suspect that the Solicitor General's representation of these views

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reflects anything other than the agency's fair and considered judgment on the matter, DOT's failure in promulgating FMVSS 208 to address pre- emption explicitly is not determinative. Nor do the agency's views, as presented here, lack coherence. Pp. 1922-1928.

166 F.3d 1236, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, THOMAS, and GINSBURG, JJ., joined, *post,* p. 1928.

Arthur H. Bryant, Washington, DC, for petitioners.

Malcolm E. Wheeler, Denver, CO, for respondents.

Lawrence G. Wallace, Washington, DC, for United States as amicus curiae, by special leave of this Court.

***864** Justice BREYER delivered the opinion of the Court.

This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.). The standard, FMVSS 208, required auto manufacturers to equip some but not all of their ***865** 1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless ****1917** have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

I

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car's manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag. App. 3. The District Court dismissed the lawsuit. The court noted that FMVSS 208 gave car manufacturers a choice as to whether to install airbags. And the court concluded that petitioners' lawsuit, because it sought to establish a different safety standard--*i.e.,* an airbag requirement--was expressly pre-empted by a provision of the Act which pre-empts "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance, 15 U.S.C. § 1392(d) (1988 ed.); Civ. No. 95-CV-0064 (D.D.C., Dec. 9, 1997), App. 17. (We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion; it has been recodified at 49 U.S.C. § 30101 *et seq.*)

The Court of Appeals agreed with the District Court's conclusion but on somewhat different reasoning. It had doubts, given the existence of the Act's "saving" clause, 15 U.S.C. § 1397(k) (1988 ed.), that petitioners' lawsuit involved the potential ***866** creation of the kind of "safety standard" to which the Safety Act's express pre-emption provision refers. But it declined to resolve that question because it found that petitioners' state- law tort claims posed an obstacle to the accomplishment of FMVSS 208's objectives. For that reason, it found that those claims conflicted with FMVSS 208, and that, under ordinary pre-emption principles, the Act consequently pre- empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F.3d 1236, 1238-1243 (C.A.D.C.1999).

Several state courts have held to the contrary, namely, that neither the Act's express pre-emption nor FMVSS 208 pre-empts a "no airbag" tort suit. See, *e.g., Drattel v. Toyota Motor Corp.,* 92 N.Y.2d 35, 43-53, 677 N.Y.S.2d 17, 699 N.E.2d 376, 379-386 (1998); *Minton v. Honda of America Mfg., Inc.,* 80 Ohio St.3d 62, 70-79, 684 N.E.2d 648, 655-661 (1997); *Munroe v. Galati,* 189 Ariz. 113, 115-119, 938 P.2d 1114, 1116-1120 (1997); *Wilson v. Pleasant,* 660 N.E.2d 327, 330-339 (Ind.1995); *Tebbetts v. Ford Motor Co.,* 140 N.H. 203, 206-207, 665 A.2d 345, 347-348 (1995). All of the Federal Circuit Courts that have considered the question, however, have found pre-emption. One rested its

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conclusion on the Act's express pre-emption provision. See, *e.g.*, *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-1415 (C.A.9 1997). Others, such as the Court of Appeals below, have instead found pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to FMVSS 208's objectives, and thus to the Act itself. See, *e.g.*, *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (C.A.10 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121-1125 (C.A.3 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 825-827 (C.A.11 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 412-414 (C.A.1 1988). We granted certiorari to resolve these differences. We now hold that this kind of "no airbag" lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and is therefore pre-empted by the Act.

***867** In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision ****1918** pre- empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself? We hold that it does.

II

[1] We first ask whether the Safety Act's express pre-emption provision pre-empts this tort action. The provision reads as follows:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (1988 ed.).

American Honda points out that a majority of this Court has said that a somewhat similar statutory provision in a different federal statute--a provision that uses the word "requirements"--may well expressly pre-empt similar tort actions. See, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 502-504, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion); *id.*, at 503-505, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509-512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part). Petitioners reply that this statute speaks of pre-empting a state-law "safety *standard*," not a "requirement," and that a tort action does not involve a safety *standard*. Hence, they conclude, the express pre-emption provision does not apply.

We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the Act contains another provision, which resolves the ***868** disagreement. That provision, a "saving" clause, says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988 ed.). The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate--for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. See, *e.g.*, Brief for United States as *Amicus Curiae* 21 (explaining that common-law claim that a vehicle is defectively designed because it lacks antilock brakes would not be pre-empted by 49 C.F.R. § 571.105 (1999), a safety standard establishing minimum requirements for brake performance). Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.

****1919 *869** III

[2][3] We have just said that the saving clause *at*

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least removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder? *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Petitioners concede, as they must in light of *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) "any possibility of implied [conflict] pre-emption," *id.*, at 288, 115 S.Ct. 1483 (discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-518, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). But they argue that the saving clause has that very effect.

We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. See *Freightliner, supra*, at 287, n. 3, 115 S.Ct. 1483 (declining to address whether the saving clause prevents a manufacturer from "us[ing] a federal safety standard to immunize itself from state common-law liability"). We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. See ***870**Restatement (Third) of Torts: Products Liability § 4(b), Comment *e* (1997) (distinguishing between state-law compliance defense and a federal claim of pre-emption). It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does our interpretation conflict with the purpose of the saving provision, say, by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. See *supra*, at 1917-1918.

[4] Moreover, this Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, *ante*, at 106-107, 120 S.Ct. 1135; see *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) *(AT&T)*; *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907). We find this concern applicable in the present case. And we conclude that the saving clause foresees--it does not foreclose--the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts. We do not understand the dissent to disagree, for it acknowledges ****1920** that ordinary pre-emption principles apply, at least sometimes. *Post*, at 1934- 1936 (opinion of STEVENS, J.).

[5] Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles--which "special burden" would specially disfavor pre-emption here. Cf. *post*, at 1934-1935. The two provisions, read together, reflect a neutral policy, not a specially ***871** favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. See H.R.Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966) ("Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather

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than by a multiplicity of diverse standards"); S.Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966). This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. ***872** See, *e.g.*, 49 C.F.R. § 571.212 (1999). Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to " 'destroy itself.' " *AT&T, supra,* at 228, 118 S.Ct. 1956 (quoting *Abilene Cotton, supra,* at 446, 27 S.Ct. 350). We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. Cf. *post,* at 1935, n. 16. But there is no reason to believe Congress has done so here.

The dissent, as we have said, contends nonetheless that the express pre- emption and saving provisions here, taken together, create a "special burden," which a court must impose "on a party" who claims conflict pre-emption under those principles. *Post,* at 1934-1935. But nothing in the Safety Act's language refers to any "special burden." Nor can one find the basis for a "special burden" in this Court's precedents. ****1921** It is true that, in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), the Court said, in the context of interpreting the Safety Act, that "*[a]t best* " there is an "inference that an express pre-emption clause forecloses implied pre-emption." *Id.,* at 289, 115 S.Ct. 1483 (emphasis added). But the Court made this statement in the course of *rejecting* the more absolute argument that the presence of the express pre-emption provision entirely foreclosed the possibility of conflict pre-emption. *Id.,* at 288, 115 S.Ct. 1483. The statement, headed with the qualifier "[a]t best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see *id.,* at 289-290, 115 S.Ct. 1483, simply preserves a legal possibility. This ***873** Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption provision imposes no unusual, "special burden" against pre-emption. For similar reasons, we do not see the basis for interpreting the saving clause to impose any such burden.

A "special burden" would also promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply. The dissent does not contend that this "special burden" would apply in a case in which state law penalizes what federal law requires--*i.e.,* a case of impossibility. See *post,* at 1931, n. 6, 1935, n. 16. But if it would not apply in such a case, then how, or when, would it apply? This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"--whether that "obstacle" goes by the name of "conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference," or the like. *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); see *Jones v. Rath Packing Co.,* 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). The Court has not previously driven a legal wedge--only a terminological one-- between

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"conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, *De la Cuesta*, 458 U.S., at 152-153, 102 S.Ct. 3014; see *Locke*, *ante*, at 109, 120 S.Ct. 1135; *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), and it has assumed that Congress would not want either kind of conflict. The Court ***874** has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e.g.*, *AT & T*, 524 U.S., at 228, 118 S.Ct. 1956, *and* in "frustration-of-purpose" cases, see, *e.g.*, *Locke*, *ante*, at 103-112, 120 S.Ct. 1135; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987); see also *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of "conflict" (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain ****1922** some form of an express pre-emption provision, a saving provision, or as here, both. Nothing in the statute suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added "special burden." Indeed, the dissent's willingness to impose a "special burden" here stems ultimately from its view that "frustration-of-purpos[e]" conflict pre-emption is a freewheeling, "inadequately considered" doctrine that might well be "eliminate[d]." *Post*, at 1939-1940, and n. 22. In a word, ordinary pre-emption principles, grounded in longstanding precedent, *Hines*, *supra*, at 67, 61 S.Ct. 399, apply. We would not further complicate the law with complex new doctrine.

IV

[6] The basic question, then, is whether a common-law "no airbag" action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners' and the dissent's view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. The Department of ***875** Transportation's (DOT's) comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance--all of which would promote FMVSS 208's safety objectives. See generally 49 Fed.Reg. 28962 (1984).

A

The history of FMVSS 208 helps explain why and how DOT sought these objectives. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install manual seatbelts in all automobiles. 32 Fed.Reg. 2408, 2415. It became apparent, however, that most occupants simply would not buckle up their belts. See 34 Fed.Reg. 11148 (1969). DOT then began to investigate the feasibility of requiring "passive restraints," such as airbags and automatic seatbelts. *Ibid.* In 1970, it amended FMVSS 208 to include some passive protection requirements, 35 Fed.Reg. 16927, while making clear that airbags were one of several "equally acceptable" devices and that it neither " 'favored' [n]or expected the introduction of airbag systems." *Ibid.* In 1971, it added an express provision permitting compliance through the use of nondetachable passive belts, 36 Fed.Reg. 12858, 12859, and in 1972, it mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975, 37 Fed.Reg. 3911. Although the agency's focus was originally on airbags, 34 Fed.Reg. 11148 (1969) (notice of proposed rulemaking); *State Farm*, 463 U.S., at 35, n. 4, 103 S.Ct. 2856; see also *id.*, at 46, n. 11, 103 S.Ct. 2856 (noting view of commentators that, as of 1970, FMVSS ***876** 208 was " 'a de facto airbag mandate' " because of the state of passive restraint technology), at no point did FMVSS 208 formally require the use of airbags. From the start, as in 1984, it permitted passive restraint options.

DOT gave manufacturers a further choice for new

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vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an "ignition interlock" device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. 37 Fed.Reg. 3911 (1972). The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing ****1923** that such systems must include an interlock system *and* a continuous warning buzzer to encourage reattachment of the belt. 39 Fed.Reg. 14593. But the interlock and buzzer devices were most unpopular with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices. Motor Vehicle and School bus Safety Amendments of 1974, § 109, 88 Stat. 1482 (previously codified at 15 U.S.C. § 1410b(b) (1988 ed.)).

That experience influenced DOT's subsequent passive restraint initiatives. In 1976, DOT Secretary William T. Coleman, Jr., fearing continued public resistance, suspended the passive restraint requirements. He sought to win public acceptance for a variety of passive restraint devices through a demonstration project that would involve about half a million new automobiles. *State Farm, supra,* at 37, 103 S.Ct. 2856. But his successor, Brock Adams, canceled the project, instead amending FMVSS 208 to require passive restraints, principally either airbags or passive seatbelts. 42 Fed.Reg. 34289 (1977).

Andrew Lewis, a new DOT Secretary in a new administration, rescinded the Adams requirements, primarily because DOT learned that the industry planned to satisfy those ***877** requirements almost exclusively through the installation of detachable automatic seatbelts. 46 Fed.Reg. 53419-53420 (1981). This Court held the rescission unlawful. *State Farm, supra,* at 34, 46, 103 S.Ct. 2856. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. 49 Fed.Reg. 28962 (1984).

B

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. *Id.,* at 29003; *State Farm, supra,* at 52, 103 S.Ct. 2856 ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries"). Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. 49 Fed.Reg. 28983 (1984) (estimating that only 12.5% of front seat passengers buckled up manual belts). Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. *Id.,* at 28986 (concluding that, although an airbag plus a lap and shoulder belt was the most "effective" system, airbags alone were *less* effective than buckled up manual lap and shoulder belts).

Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. *Id.,* at 28992-28993. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. *Id.,* at 28992, 29001; see also 65 Fed.Reg. 30680, 30681-30682 (2000) (finding 158 confirmed airbag-induced fatalities as of April 2000, and amending rule ***878** to add new requirements, test procedures, and injury criteria to ensure that "future air bags be designed to create less risk of serious airbag-induced injuries than current air bags, particularly for small women and young children"); U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Accident Sampling System Crashworthiness Data System 1991-1993, p. viii (Aug.1995) (finding that airbags caused approximately 54,000 injuries between 1991 and 1993).

****1924** Sixth, airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). 49 Fed.Reg. 28990 (1984). And the agency worried that the high replacement cost--estimated to be $800--could lead car owners to refuse to replace them after deployment. *Id.,* at 28990, 29000-29001; see also *id.,* at 28990 (estimating total investment costs for mandatory airbag requirement at $1.3 billion compared to $500 million for automatic

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seatbelts). Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices, *id.*, at 28987-28989--a particular concern with respect to airbags, *id.*, at 29001 (noting that "[a]irbags engendered the largest quantity of, and most vociferously worded, comments").

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety--a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. *Id.*, at 28996. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. ***879***Id.*, at 28997. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." *Id.*, at 29001. It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. *Id.*, at 29001-29002. And it would thereby build public confidence, *id.*, at 29001-29002, necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a *gradual* phase-in of passive restraints. *Id.*, at 28999-29000. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. *Id.*, at 28999. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. *Ibid.* And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. *Id.*, at 29000-29001.

Of course, as the dissent points out, *post,* at 1937-1938, FMVSS 208 did not guarantee the mix by setting a ceiling for each different passive restraint device. In fact, it provided a form of extra credit for airbag installation (and other nonbelt passive restraint devices) under which each airbag-installed vehicle counted as 1.5 vehicles for purposes of meeting FMVSS 208's passive restraint requirement. 49 C.F.R. § 571.208, S4.1.3.4(a)(1) (1999); 49 Fed.Reg. 29000 (1984). ***880*** But why should DOT have bothered to impose an airbag ceiling when the practical threat to the mix it desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all? After all, only a few years earlier, Secretary Dole's predecessor had discovered that manufacturers intended to meet ****1925*** the then-current passive restraint requirement almost entirely (more than 99%) through the installation of more affordable automatic belt systems. 46 Fed.Reg. 53421 (1981); *State Farm,* 463 U.S., at 38, 103 S.Ct. 2856. The extra credit, as DOT explained, was designed to "encourage manufacturers to equip *at least some* of their cars with airbags." 49 Fed.Reg. 29001 (1984) (emphasis added) (responding to comment that failure to mandate airbags might mean the "end of ... airbag technology"); see also *id.*, at 29000 (explaining that the extra credit for airbags "should promote the development of what may be better alternatives to automatic belts *than would otherwise be developed* " (emphasis added)). The credit provision *reinforces* the point that FMVSS 208 sought a gradually developing mix of passive restraint devices; it does not show the contrary.

Finally, FMVSS 208's passive restraint requirement was conditional. DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower costs--*if only auto occupants would buckle up.* See *id.*, at 28997-28998. Thus, FMVSS 208 provided for rescission of its passive restraint requirement if, by September 1, 1989, two-thirds of the States had laws in place that, like those of many other nations, required auto occupants to buckle up (and which met other requirements specified in the standard). *Id.*, at 28963, 28993-28994, 28997-28999. The Secretary wrote that "coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement." *Id.*, at 28997. ***881*** In the end, two-thirds of the

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States did not enact mandatory buckle-up laws, and the passive restraint requirement remained in effect.

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 "embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." Brief for United States as *Amicus Curiae* 25; see 49 Fed.Reg. 28997 (1984). Petitioners' tort suit claims that the manufacturers of the 1987 Honda Accord "had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags." App. 3 (Complaint, ¶ 11).

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law--*i.e.,* a rule of state tort law imposing such a duty--by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of- Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives that we have just discussed, it is pre-empted. ***882***Hines,* 312 U.S., at 67, 61 S.Ct. 399; see also *Ouellette,* 479 U.S., at 493, 107 S.Ct. 805; *De la Cuesta,* 458 U.S., at 156, 102 S.Ct. 3014 (finding conflict and pre-emption where state law limited the availability of an option ****1926** that the federal agency considered essential to ensure its ultimate objectives).

Petitioners ask this Court to calculate the precise size of the "obstacle," with the aim of minimizing it, by considering the risk of tort liability and a successful tort action's incentive-related or timing-related compliance effects. See Brief for Petitioners 45-50. The dissent agrees. *Post,* at 1936-1938. But this Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations--paying, say, a fine instead--or how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question. The Court has on occasion suggested that tort law may be somewhat different, and that related considerations--for example, the ability to pay damages instead of modifying one's behavior--may be relevant for pre- emption purposes. See *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988); *Cipollone,* 505 U.S., at 536-539, 112 S.Ct. 2608 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); see also *English,* 496 U.S., at 86, 110 S.Ct. 2270; *Silkwood v. Kerr--McGee Corp.,* 464 U.S. 238, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). In other cases, the Court has found tort law to conflict with federal law without engaging in that kind of an analysis. See, *e.g., Ouellette, supra,* at 494-497, 107 S.Ct. 805; *Kalo Brick,* 450 U.S., at 324-332, 101 S.Ct. 1124. We need not try to resolve these differences here, however, for the incentive or compliance considerations upon which the dissent relies cannot, by themselves, change the legal result. Some of those considerations rest on speculation, see, *e.g., post,* at 1936 (predicting risk of "no airbag" liability and manufacturers' likely response to such liability); some rest in critical part upon the dissenters' own view of FMVSS 208's basic purposes--a view ***883** which we reject, see, *e.g., post,* at 1936- 1938 (suggesting that pre-existing risk of "no airbag" liability would have made FMVSS 208 unnecessary); and others, if we understand them correctly, seem less than persuasive, see, *e.g., post,* at 1936-1937 (suggesting that manufacturers could have complied with a mandatory state airbag duty by installing a *different* kind of passive restraint device). And in so concluding, we do not "put the burden" of proving pre-emption on petitioners. *Post,* at 1939. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.

One final point: We place some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would " 'stan[d] as an obstacle to the accomplishment and execution' " of those objectives. Brief for United States as *Amicus Curiae* 25-26 (quoting *Hines, supra,* at 67, 61 S.Ct.

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399). Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. *Medtronic*, 518 U.S., at 496, 116 S.Ct. 2240; see *id.*, at 506, 116 S.Ct. 2240 (BREYER, J,. concurring in part and concurring in judgment). And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time. Brief for United States as *Amicus Curiae* in *Freightliner Corp. v. Myrick*, O.T.1994, No. 94-286, pp. 28-29; Brief for United States as *Amicus Curiae* in *Wood v. General Motors Corp.*, O.T.1989, No. 89-46, pp. 7, 11-16. In these circumstances, the agency's own views should make a difference. See *City of New York v. FCC*, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); ****1927***Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 721, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *de la Cuesta, supra*, at 158, 102 S.Ct. 3014; *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982); *Kalo Brick, supra*, at 321, 101 S.Ct. 1124.

***884** We have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, 461-462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); cf. *Hillsborough County, supra*, at 721, 105 S.Ct. 2371 (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where agency that promulgated the regulation had not, at the time the regulation was promulgated *or subsequently*, concluded that such a conflict existed). The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

[7][8][9][10] The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre- emption. See *post*, at 1940; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); *Hillsborough, supra*, at 718, 105 S.Ct. 2371. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. *English, supra*, at 78-79, 110 S.Ct. 2270; see *Hillsborough, supra*, at 720-721, 105 S.Ct. 2371; *Jones*, 430 U.S., at 540-543, 97 S.Ct. 1305. While "[p]re-emption fundamentally is a question of congressional intent," *English, supra*, at 78, 110 S.Ct. 2270, this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. See, *e.g.*, *Freightliner*, 514 U.S., at 287, 115 S.Ct. 1483; *English, supra*, at 78-79, 110 S.Ct. 2270; see also *Cipollone, supra*, at 545, 547-548, 112 S.Ct. 2608 (SCALIA, J., concurring in judgment in part and dissenting in part). And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area, *Hillsborough, supra*, at 717, 105 S.Ct. 2371; see *post*, at 1940, n. 23--so-called "field pre-emption"--the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. ***885** Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, *English, supra*, at 90, 110 S.Ct. 2270, for the reasons set out above we find such evidence here. To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent, as we have said, apparently welcomes that result, at least where "frustration-of- purpos[e]" pre-emption by agency regulation is at issue. *Post*, at 1939-1940, and n. 22. We do not.

Nor do we agree with the dissent that the agency's views, as presented here, lack coherence. *Post*, at 1938. The dissent points, *ibid.*, to language in the Government's brief stating that

> "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* ... would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23 (emphasis added).

And the dissent says that these words amount to a concession that there is no conflict in this very case. *Post*, at 1938. But that is not what the words say. Rather, ****1928** as the italicized phrase emphasizes, they simply leave open the question whether FMVSS

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208 would pre-empt a different kind of tort case--one *not* at issue here. It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption--say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners ***886** claimed. They have argued generally that, to be safe, a car must have an airbag. See App. 4.

Regardless, the language of FMVSS 208 and the contemporaneous 1984 DOT explanation is clear enough--even without giving DOT's own view special weight. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice STEVENS, with whom Justice SOUTER, Justice THOMAS, and Justice GINSBURG join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition "that, to be safe, a car must have an airbag." *Ante* this page. Indeed, current federal law imposes that requirement on all automobile manufacturers. See 49 U.S.C. § 30127; 49 C.F.R. § 571.208, S4.1.5.3 (1998). The question raised by petitioners' common-law tort action is whether that proposition was sufficiently obvious when Honda's 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate.

***887** "This is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: It is the product of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined. I believe, however, that it is fair to state that if it had been expressly adopted by the Secretary of Transportation, it would have read as follows:

> "No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;
>
> "Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as ****1929** the Secretary may require the installation of airbags in all new cars; and
>
> "Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another."

Perhaps such a rule would be a wise component of a legislative reform of our tort system. I express no opinion about ***888** that possibility. It is, however, quite clear to me that Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the lifesaving advantages of airbags had become sufficiently obvious that their omission might

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constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre- emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as "ordinary experience-proved principles of conflict pre-emption." *Ante,* at 1922.

I

The question presented is whether either the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.), [FN1] or the version of Standard 208 promulgated by the Secretary of Transportation in 1984, 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (1998), pre-empts common-law tort claims that an automobile manufactured in 1987 was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to, airbags." App. 3. In *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), we reviewed the first chapters of the "complex and convoluted history" of Standard 208. It was the "unacceptably high" rate of deaths and injuries caused by automobile accidents that led to the enactment of the Safety Act in 1966. *Id.*, at 33, 103 S.Ct. 2856. The purpose of the Act, as stated by Congress, ***889** was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." § 1392(a). The Act defines the term "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance." § 1391(2).

FN1. In 1994, the Safety Act was recodified at 49 U.S.C. § 30101 *et seq.* Because the changes made to the Act as part of the recodification process were not intended to be substantive, throughout this opinion I shall refer to the pre-1994 version of the statute, as did the Court of Appeals.

Standard 208 covers "[o]ccupant crash protection." Its purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements ... [and] equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S2 (1998). The first version of that standard, issued in 1967, simply required the installation of manual seatbelts in all automobiles. Two years later the Secretary formally proposed a revision that would require the installation of "passive occupant restraint systems," that is to say, devices that do not depend for their effectiveness on any action by the vehicle ****1930** occupant. The airbag is one such system. [FN2] The Secretary's proposal led to a series of amendments to Standard 208 that imposed various passive restraint requirements, culminating in a 1977 regulation that mandated such restraints in all cars by the model year 1984. The two commercially available restraints that could satisfy this mandate ***890** were airbags and automatic seatbelts; the regulation allowed each vehicle manufacturer to choose which restraint to install. In 1981, however, following a change of administration, the new Secretary first extended the deadline for compliance and then rescinded the passive restraint requirement altogether. In *Motor Vehicle Mfrs. Assn.*, we affirmed a decision by the Court of Appeals holding that this rescission was arbitrary. On remand, Secretary Elizabeth Dole promulgated the version of Standard 208 that is at issue in this case.

FN2. "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by [the National Highway Traffic Safety Administration (NHTSA)] that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed.Reg. 34298." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 35, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The 1984 standard provided for a phase-in of passive restraint requirements beginning with the 1987 model

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year. In that year, vehicle manufacturers were required to equip a minimum of 10% of their new passenger cars with such restraints. While the 1987 Honda Accord driven by Ms. Geier was not so equipped, it is undisputed that Honda complied with the 10% minimum by installing passive restraints in certain other 1987 models. This minimum passive restraint requirement increased to 25% of 1988 models and 40% of 1989 models; the standard also mandated that "after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed.Reg. 28999 (1984); see 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (1998). In response to a 1991 amendment to the Safety Act, the Secretary amended the standard to require that, beginning in the 1998 model year, all new cars have an airbag at both the driver's and right front passenger's positions. [FN3]

FN3. See 49 U.S.C. § 30127; 49 C.F.R. § 571.208, S4.1.5.3 (1998). Congress stated that it did not intend its amendment or the Secretary's consequent alteration of Standard 208 to affect the potential liability of vehicle manufacturers under applicable law related to vehicles with or without airbags. 49 U.S.C. § 30127(f)(2).

Given that Secretary Dole promulgated the 1984 standard in response to our opinion invalidating her predecessor's rescission of the 1977 passive restraint requirement, she provided a full explanation for her decision not to require airbags ***891** in all cars and to phase in the new requirements. The initial 3-year delay was designed to give vehicle manufacturers adequate time for compliance. The decision to give manufacturers a choice between airbags and a different form of passive restraint, such as an automatic seatbelt, was motivated in part by safety concerns and in part by a desire not to retard the development of more effective systems. 49 Fed.Reg. 29000-29001 (1984). An important safety concern was the fear of a "public backlash" to an airbag mandate that consumers might not fully understand. The Secretary believed, however, that the use of airbags would avoid possible public objections to automatic seatbelts and that many of the public concerns regarding airbags were unfounded. *Id.*, at 28991.

Although the standard did not require airbags in all cars, it is clear that the Secretary did intend to encourage wider use of airbags. One of her basic conclusions was that "[a]utomatic occupant protection ****1931** systems that do not totally rely upon belts, such as airbags ..., offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives." *Id.*, at 28963; see also *id.*, at 28966, 28986 (noting conclusion of both Secretary and manufacturers that airbags used in conjunction with manual lap and shoulder belts would be "the most effective system of all" for preventing fatalities and injuries). The Secretary therefore included a phase-in period in order to encourage manufacturers to comply with the standard by installing airbags and other (perhaps more effective) nonbelt technologies that they might develop, rather than by installing less expensive automatic seatbelts. [FN4] As a further incentive ***892** for the use of such technologies, the standard provided that a vehicle equipped with an airbag or other nonbelt system would count as 1.5 vehicles for the purpose of determining compliance with the required 10, 25, or 40% minimum passive restraint requirement during the phase- in period. 49 C.F.R. § 571.208, S4.1.3.4(a)(1) (1998). With one oblique exception, [FN5] there is no mention, either in the text of the final standard or in the accompanying comments, of the possibility that the risk of potential tort liability would provide an incentive for manufacturers to install airbags. Nor is there any other specific evidence of an intent to preclude common-law tort actions.

FN4. "If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply through the use of automatic belts. Thus, by phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors." 49 Fed.Reg. 29000 (1984).

FN5. In response to a comment that the manufacturers were likely to use the cheapest system to comply with the new standard, the Secretary stated that she believed "that competition, potential liability for any deficient systems[,] and pride in one's product would prevent this." *Ibid.*

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II

Before discussing the pre-emption issue, it is appropriate to note that there is a vast difference between a rejection of Honda's threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, [FN6] I assume ***893** that such compliance would be admissible evidence tending to negate charges of negligent and defective design. [FN7] In addition, ****1932** if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. *Silkwood v. Kerr- McGee Corp.*, 485 F.Supp. 566, 583-584 (W.D.Okla.1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "[g]ood faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). [FN8]

FN6. *Wood v. General Motors Corp.*, 865 F.2d 395, 417 (C.A.1 1988) (collecting cases). The result would be different, of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum federal standard--*e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208. Restatement (Third) of Torts: General Principles § 14(b), and Comment *g* (Discussion Draft, Apr. 5, 1999) ("If the actor's adoption [or rejection] of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt [or reject] that precaution"); cf. *ante*, at 1920-1921 (discussing problem of basing state tort liability upon compliance with mandatory federal regulatory requirement as question of pre-emption rather than of liability on the merits); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility ...").

FN7. Restatement (Third) of Torts: Products Liability § 4(b), and Comment *e* (1997); *Contini v. Hyundai Motor Co.*, 840 F.Supp. 22, 23-24 (S.D.N.Y.1993). See also Restatement (Second) of Torts § 288C, and Comment *a* (1964) (negligence); *McNeil Pharmaceutical v. Hawkins*, 686 A.2d 567, 577-579 (D.C.1996) (strict liability).

FN8. The subsequent history of *Silkwood* does not cast doubt on this premise. See *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 921-923 (C.A.10 1981) (reversing on ground that federal law pre-empts award of punitive damages), rev'd and remanded, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), on remand, 769 F.2d 1451, 1457-1458 (C.A.10 1985).

The parties have not called our attention to any appellate court opinions discussing the merits of similar no-airbag claims despite the fact that airbag technology was available for many years before the promulgation of the 1984 standard--a standard that is not applicable to any automobiles manufactured before September 1, 1986. Given that an arguable basis for a pre-emption defense did not exist until that standard was promulgated, it is reasonable to infer that the manufacturers' assessment of their potential liability for compensatory and punitive damages on such claims--even ***894** without any pre- emption defense--did not provide them with a sufficient incentive to engage in widespread installation of airbags.

Turning to the subject of pre-emption, Honda contends that the Safety Act's pre-emption provision, 15 U.S.C. § 1392(d), expressly pre-empts petitioners' common-law no-airbag claims. It also argues that the claims are in any event impliedly pre-empted because the imposition of liability in cases such as this would frustrate the purposes of Standard 208. I discuss these alternative arguments in turn.

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III

When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U.S. Const., Art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. [FN9] Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws--particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers--are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 116-117, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (SOUTER, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred").

FN9. Regrettably, the Court has not always honored the latter proposition as scrupulously as the former. See, *e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

***895** When a federal statute contains an express pre-emption provision, "the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). The Safety Act contains both an express pre-emption provision, 15 U.S.C. § 1392(d), and a saving ****1933** clause that expressly preserves common-law claims, § 1397(k). The relevant part of the former provides:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." [FN10]

FN10. This provision is now codified at 49 U.S.C. § 30103(b)(1). Because both federal and state opinions construing this provision have consistently referred to it as " § 1392(d)," I shall follow that practice. Section 1392(d) contains these additional sentences: "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

The latter states:

"Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." [FN11]

FN11. This provision is now codified at 49 U.S.C. § 30103(e). See nn. 1 and 10, *supra*.

***896** Relying on § 1392(d) and legislative history discussing Congress' desire for uniform national safety standards, [FN12] Honda argues that petitioners' common-law no-airbag claims are expressly pre-empted because success on those claims would necessarily establish a state "safety standard" not identical to Standard 208. It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). The two references to a federal safety standard are necessarily describing an

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objective administrative rule. 15 U.S.C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability--unlike most legislative or administrative rulemaking--necessarily performs an important remedial role in compensating accident victims. Cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

FN12. S.Rep. No. 1301, 89th Cong., 2d Sess., 2 (1966); H.R.Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966).

It is true that in three recent cases we concluded that broadly phrased pre- emptive commands encompassed common-law claims. In *Cipollone v. Liggett Group, Inc.*, while we thought it clear that the pre-emption provision in the 1965 Federal Cigarette Labeling and Advertising Act applied only to "rulemaking bodies," 505 U.S., at 518, 112 S.Ct. 2608, we concluded that the broad command in the subsequent 1969 ***897** amendment that "[n]o requirement or prohibition ... shall be imposed under State law" did include certain common- law claims. *Id.*, at 548-549, 112 S.Ct. 2608 (SCALIA, J., concurring in judgment in part and dissenting in part). [FN13] In ****1934***CSX Transp., Inc. v. Easterwood*, where the pre-emption clause of the Federal Railroad Safety Act of 1970 expressly provided that federal railroad safety regulations would pre-empt any incompatible state " 'law, rule, regulation, order, or standard relating to railroad safety,' " [FN14] we held that a federal regulation governing maximum train speed pre-empted a negligence claim that a speed under the federal maximum was excessive. And in *Medtronic, Inc. v. Lohr*, we recognized that the statutory reference to "any requirement" imposed by a State or its political subdivisions may include common-law duties. 518 U.S., at 502-503, 116 S.Ct. 2240 (plurality opinion); *id.*, at 503-505, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509-512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part).

FN13. The full text of the 1969 provision read: " 'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.' " 505 U.S., at 515, 112 S.Ct. 2608 (quoting Public Health Cigarette Smoking Act of 1969, 84 Stat. 88).

FN14. 507 U.S., at 664, 113 S.Ct. 1732 (quoting § 205, 84 Stat. 972, as amended, 45 U.S.C. § 434 (1988 ed. and Supp. II)).

The statutes construed in those cases differed from the Safety Act in two significant respects. First, the language in each of those pre-emption provisions was significantly broader than the text of § 1392(d). Unlike the broader language of those provisions, the ordinary meaning of the term "safety standard" includes positive enactments, but does not include judicial decisions in common-law tort cases.

Second, the statutes at issue in *Cipollone*, *CSX*, and *Medtronic* did not contain a saving clause expressly preserving common-law remedies. The saving clause in the Safety Act ***898** unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability. In light of this reference to common-law liability in the saving clause, Congress surely would have included a similar reference in § 1392(d) if it had intended to pre-empt such liability. *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S.Ct. 1588, 128 L.Ed.2d 302 (1994) (noting presumption that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

The Court does not disagree with this interpretation of the term "safety standard" in § 1392(d). Because the meaning of that term as used by Congress in this statute is clear, the text of § 1392(d) is itself sufficient to establish that the Safety Act does not expressly pre-empt common- law claims. In order to avoid the conclusion that the saving clause is superfluous, therefore, it must follow that it has a

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different purpose: to limit, or possibly to foreclose entirely, the possible pre-emptive effect of safety standards promulgated by the Secretary. The Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether. [FN15]

FN15. The Court surely cannot believe that Congress included that clause in the statute just to avoid the danger that we would otherwise fail to give the term "safety standard" its ordinary meaning.

Given the cumulative force of the fact that § 1392(d) does not expressly pre-empt common-law claims and the fact that § 1397(k) was obviously intended to limit the pre-emptive effect of the Secretary's safety standards, it is quite wrong for the Court to assume that a possible implicit conflict with the purposes to be achieved by such a standard should have the same pre- emptive effect " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ante,* at 1921. Properly construed, the Safety Act imposes a special burden on a party relying on an arguable, implicit conflict ****1935** with a temporary regulatory policy-- ***899** rather than a conflict with congressional policy or with the text of any regulation--to demonstrate that a common-law claim has been pre-empted.

IV

Even though the Safety Act does not expressly pre-empt common-law claims, Honda contends that Standard 208--of its own force--implicitly pre-empts the claims in this case.

"We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' *id.*, at 79, 110 S.Ct. 2270, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

In addition, we have concluded that regulations "intended to pre-empt state law" that are promulgated by an agency acting nonarbitrarily and within its congressionally delegated authority may also have pre-emptive force. *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-154, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). In this case, Honda relies on the last of the implied pre-emption principles stated in *Freightliner*, arguing that the imposition of common-law liability for failure to install an airbag would frustrate the purposes and objectives of Standard 208.

Both the text of the statute and the text of the standard provide persuasive reasons for rejecting this argument. The saving clause of the Safety Act arguably denies the Secretary the authority to promulgate standards that would ***900** pre-empt common-law remedies. [FN16] Moreover, the text of Standard 208 says nothing about pre-emption, and I am not persuaded that Honda has overcome our traditional presumption that it lacks any implicit pre-emptive effect.

FN16. The Court contends, in essence, that a saving clause cannot foreclose *implied* conflict pre-emption. *Ante,* at 1921-1922. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a *regulation* issued pursuant to that statute of any implicit pre-emptive effect. See *United States v. Locke, ante,* at 104-107, 120 S.Ct. 1135; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action"); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328, 331, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). As stated in the text, I believe the language of this particular

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> saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common- law remedies. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). Under that interpretation, there is by definition no frustration of federal purposes--that is, no "tolerat[ion of] actual conflict," *ante,* at 1922--when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

Honda argues, and the Court now agrees, that the risk of liability presented by common-law claims that vehicles without **1936 airbags are negligently and defectively designed would frustrate the policy decision that the Secretary made in promulgating Standard 208. This decision, in their view, was that safety--including a desire to encourage "public acceptance of the airbag technology and experimentation with better passive restraint systems" [FN17]--would best be promoted *901 through gradual implementation of a passive restraint requirement making airbags only one of a variety of systems that a manufacturer could install in order to comply, rather than through a requirement mandating the use of one particular system in every vehicle. In its brief supporting Honda, the United States agreed with this submission. It argued that if the manufacturers had known in 1984 that they might later be held liable for failure to install airbags, that risk "would likely have led them to install airbags in all cars," thereby frustrating the Secretary's safety goals and interfering with the methods designed to achieve them. Brief for United States as *Amicus Curiae* 25.

FN17. 166 F.3d 1236, 1243 (C.A.D.C.1999).

There are at least three flaws in this argument that provide sufficient grounds for rejecting it. First, the entire argument is based on an unrealistic factual predicate. Whatever the risk of liability on a no-airbag claim may have been prior to the promulgation of the 1984 version of Standard 208, that risk did not lead any manufacturer to install airbags in even a substantial portion of its cars. If there had been a realistic likelihood that the risk of tort liability would have that consequence, there would have been no need for Standard 208. The promulgation of that standard certainly did not *increase* the pre-existing risk of liability. Even if the standard did not create a previously unavailable pre-emption defense, it likely *reduced* the manufacturers' risk of liability by enabling them to point to the regulation and their compliance therewith as evidence tending to negate charges of negligent and defective design. See Part II, *supra.* Given that the pre-1984 risk of liability did not lead to widespread airbag installation, this reduced risk of liability was hardly likely to compel manufacturers to install airbags in all cars--or even to compel them to comply with Standard 208 during the phase-in period by installing airbags exclusively.

Second, even if the manufacturers' assessment of their risk of liability ultimately proved to be wrong, the purposes of Standard 208 would not be frustrated. In light of the inevitable *902 time interval between the eventual filing of a tort action alleging that the failure to install an airbag is a design defect and the possible resolution of such a claim against a manufacturer, as well as the additional interval between such a resolution (if any) and manufacturers' "compliance with the state-law duty in question," *ante,* at 1926, by modifying their designs to avoid such liability in the future, it is obvious that the phase-in period would have ended long before its purposes could have been frustrated by the specter of tort liability. Thus, even without pre-emption, the public would have been given the time that the Secretary deemed necessary to gradually adjust to the increasing use of airbag technology and allay their unfounded concerns about it. Moreover, even if any no-airbag suits were ultimately resolved against manufacturers, the resulting incentive to modify their designs would have been quite different from a decision by the Secretary to mandate the use of airbags in every vehicle. For example, if the extra credit provided for the use of nonbelt passive restraint technologies during the phase-in period had (as the Secretary hoped) ultimately encouraged manufacturers to develop a nonbelt system more effective than the airbag, manufacturers held liable for failing to install passive restraints would have been free to respond by modifying their designs to include**1937 such a system *instead of* an airbag.

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[FN18] It seems clear, therefore, that any ***903** potential tort liability would not frustrate the Secretary's desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags.

FN18. The Court's failure to "understand [this point] correctly," *ante,* at 1926, is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing ... a duty [to install an airbag]." *Ante,* at 1925; see also *ante,* at 1920 (referring to verdict in common-law tort suit as a "jury-imposed safety standard"). Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design--"including, but not limited to, airbags," App. 3--could have reduced the foreseeable risks of harm posed by the product. See Restatement (Third) of Torts: Products Liability § 2(b), and Comment *d* (1997); *id.,* § 1, Comment *a* (noting that § 2(b) is rooted in concepts of both negligence and strict liability). Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.

Third, despite its acknowledgment that the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor," *ante,* at 1919, the Court completely ignores the important fact that by definition all of the standards established under the Safety Act--like the British regulations that governed the number and capacity of lifeboats aboard the *Titanic* [FN19]--impose minimum, rather than fixed or maximum, requirements. 15 U.S.C. § 1391(2); see *Norfolk Southern R. Co. v. Shanklin, ante,* at 359, 120 S.Ct. 1467 (BREYER, J., concurring) ("[F]ederal *minimum* safety standards should not pre-empt a state tort action"); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 721, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10,25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort liability ***904** might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations. For similar reasons, it is evident that variety was not a matter of independent importance to the Secretary. Although the standard allowed manufacturers to comply with the minimum percentage requirements by installing passive restraint systems other than airbags (such as automatic seatbelts), it encouraged them to install airbags and other nonbelt systems that might be developed in the future. The Secretary did not act to ensure the use of a variety of passive restraints by placing ceilings on the number of airbags that could be used in complying ****1938** with the minimum requirements. [FN20] Moreover, even if variety and gradualism had been independently important to the Secretary, there is nothing in the standard, the accompanying commentary, or the history of airbag regulation to support the notion that the Secretary intended to advance those purposes at all costs, without regard to the detrimental consequences that pre- emption of tort liability could have for the achievement of her avowed purpose of reducing vehicular injuries. See *Silkwood v. Kerr-McGee Corp.,* 464 U.S., at 257, 104 S.Ct. 615.

FN19. Statutory Rules and Orders 1018-1021, 1033 (1908). See Nader & Page, Automobile-Design Liability and Compliance with Federal Standards, 64 Geo. Wash. L.Rev. 415, 459 (1996) (noting that the *Titanic* "complied with British

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governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board"); W. Wade, The *Titanic:* End of a Dream 68 (1986).

FN20. Of course, allowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an "obstacle" to the auto manufacturers' freedom to choose among several different passive restraint device options. Cf. *ante,* at 1923-1924, 1925.

My disagreement with Honda and the Government runs deeper than these flaws, however. In its brief, the Government concedes that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of ***905** passive restraint in a certain model of car because of other design features particular to that car ... would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23. [FN21] Petitioners' claims here are quite similar to the claim described by the Government: their complaint discusses other design features particular to the 1987 Accord (such as the driver's seat) that allegedly rendered it unreasonably dangerous to operate without an airbag. App. 4-5. The only distinction is that in this case, the particular 1987 Accord driven by Ms. Geier included no passive restraint of any kind because Honda chose to comply with Standard 208's 10% minimum requirement by installing passive restraints in other 1987 models. I fail to see how this distinction makes a difference to the purposes of Standard 208, however. If anything, the type of claim favored by the Government--*e.g.,* that a particular model of car should have contained an airbag instead of an automatic seatbelt--would seem to trench even more severely upon the purposes that the Government and Honda contend were behind the promulgation of Standard 208: that having a variety of passive restraints, rather than only airbags, was necessary to promote safety. Thus, I conclude that the Government, on the Secretary's behalf, has failed to articulate a coherent view of the policies behind Standard 208 that would be frustrated by petitioners' claims.

FN21. Compare *ante,* at 1925 (disagreeing with Government's view by concluding that tort-law duty "requir[ing] manufacturers of all similar cars to install airbags rather than other passive restraint systems ... would [present] an obstacle to the variety and mix of devices that the federal regulation sought"), with *ante,* at 1926, 1927-1928 (noting that "the agency's own views should make a difference," but contending that the above-quoted Government view is "*not* at issue here").

V

For these reasons, it is evident that Honda has not crossed the high threshold established by our decisions regarding ***906** pre-emption of state laws that allegedly frustrate federal purposes: it has not demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary set forth with clarity in Standard 208. *Gade v. National Solid Wastes Management Assn.,* 505 U.S., at 110, 112 S.Ct. 2374 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 111, 112 S.Ct. 2374 ("A freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-emp[t] state law"). Furthermore, it is important to note that the text of Standard 208 (which the Court does not even bother ****1939** to quote in its opinion), unlike the regulation we reviewed in *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta,* 458 U.S., at 158, 102 S.Ct. 3014, does not contain any expression of an intent to displace state law. Given our repeated emphasis on the importance of the presumption against pre-emption, see, *e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S., at 663-664, 113 S.Ct. 1732; *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), this silence lends additional support to the conclusion that the continuation of whatever common-law liability may exist in a case like this poses no danger of frustrating any of the Secretary's primary purposes in promulgating Standard 208. See *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S., at 721, 105 S.Ct. 2371; *Silkwood v. Kerr-McGee Corp.,* 464 U.S., at 251, 104 S.Ct. 615 ("It is difficult to believe that [the

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Secretary] would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

The Court apparently views the question of pre-emption in this case as a close one. *Ante,* at 1926-1927 (relying on Secretary's interpretation of Standard 208's objectives to bolster its finding of pre-emption). Under "ordinary experience-proved principles of conflict pre-emption," *ante,* at 1922, therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, ***907** preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes. *Ante,* at 1926 (noting that petitioners' arguments "cannot, by themselves, change the legal result"). In view of the important principles upon which the presumption is founded, however, rejecting it in this manner is profoundly unwise.

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied ... [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S., at 230, 67 S.Ct. 1146; see *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); see *United States v. Morrison,* 529 U.S. 598, 660-663, 120 S.Ct. 1740 (BREYER, J., dissenting); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 93- 94, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (STEVENS, J., dissenting); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 292-293, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (THOMAS, J., dissenting); *Gregory v. Ashcroft,* 501 U.S. 452, 460-464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes--*i.e.,* that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution ***908** of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). [FN22]

FN22. Recently, one commentator has argued that our doctrine of frustration-of-purposes (or "obstacle") pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it. Nelson, Preemption, 86 Va. L.Rev. 225, 231-232 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes"). Obviously, if we were to do so, there would be much less need for the presumption against pre-emption (which the commentator also criticizes). As matters now stand, however, the presumption reduces the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes.

****1940** While the presumption is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some

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specificity." [FN23] ***909** *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 717-718, 105 S.Ct. 2371 (noting that too easily implying pre-emption "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence," and stating that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive"); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S., at 154, 102 S.Ct. 3014 (noting that pre-emption inquiry is initiated "[w]hen the administrator promulgates regulations intended to pre- empt state law"). This expectation, which is shared by the Executive Branch, [FN24] serves to ensure ****1941** that States will be able to have a dialog ***910** with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

FN23. The Court brushes aside our specificity requirement on the ground that the cases in which we relied upon it were not cases of implied conflict pre-emption. *Ante,* at 1926-1927. The Court is quite correct that *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), and *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987), are cases in which field pre-emption, rather than conflict pre- emption, was at issue. This distinction, however, does not take the Court as far as it would like. Our cases firmly establish that conflict and field pre-emption are alike in that both are instances of implied pre-emption that by definition do "not [turn] on an express statement of pre- emptive intent." *Ante,* at 1927; see, *e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (quoted *supra,* at 1935); *English v. General Elec. Co.*, 496 U.S. 72, 79-80, and n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (noting that field pre- emption rests on an inference of congressional intent to exclude state regulation and that it "may be understood as a species of conflict pre- emption"); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Given that our specificity requirement was adopted in cases involving implied pre-emption, the Court cannot persuasively claim that the requirement is incompatible with our implied pre-emption jurisprudence in the federal regulatory context.

FN24. See Exec. Order No. 12612, § 4(e), 3 C.F.R. § 252, 255 (1988) ("When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings"); Exec. Order No. 13132, § 4(e), 64 Fed.Reg. 43255, 43257 (1999) (same); cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (discussing 21 C.F.R. § 808.5 (1995), an FDA regulation allowing a State to request an advisory opinion regarding whether a particular state-law requirement is pre-empted, or exempt from pre-emption, under the Medical Device Amendments of 1976).

When the presumption and its underpinnings are properly understood, it is plain that Honda has not overcome the presumption in this case. Neither Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits. Indeed, the only mention of such suits in the commentary tends to suggest that they would not be pre-empted. See n. 5, *supra.* In the Court's view, however, "[t]he failure of the Federal Register to address pre-emption explicitly is ... not determinative," *ante,* at 1927, because the Secretary's consistent litigating position since 1989, the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by no-airbag suits. Pre-empting on these three bases blatantly contradicts the presumption against pre-emption. When the 1984 version of Standard 208 was under consideration, the States obviously were not afforded any notice that purposes might someday be discerned in the history

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of airbag regulation that would support pre-emption. Nor does the Court claim that the notice of proposed rulemaking that led to Standard 208 provided the States with notice either that the final version of the standard might contain an express pre-emption provision or that the commentary accompanying it might contain a statement of purposes with arguable pre-emptive effect. Finally, the States plainly had no opportunity to comment upon either the commentary accompanying the final version of the standard or the Secretary's *ex post* litigating position that the standard had implicit pre- emptive effect.

Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from ***911** regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of- purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or regulation. In my view, however, "preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." 1 L. Tribe, American Constitutional Law § 6-28, p. 1177 (3d ed.2000).

As to the Secretary's litigating position, it is clear that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,] ... do[es] not warrant *Chevron*-style deference." *Christensen v. Harris County, ante,* at 587, 120 S.Ct. 1655. Moreover, our pre-emption precedents and the APA establish that even if the Secretary's litigating position were coherent, the lesser deference paid to it by the Court today would be inappropriate. Given the Secretary's contention that he has the authority to promulgate safety standards that pre-empt state law and the fact that he could promulgate a standard such as the one quoted *supra,* at 1928-1929, with relative ease, we should be quite reluctant to find pre-emption based only on the Secretary's informal effort to recast the 1984 version of Standard 208 into a pre-emptive mold. [FN25] See ****1942 *912***Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 721, 105 S.Ct. 2371; cf. *Medtronic, Inc. v. Lohr*, 518 U.S., at 512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 743-744, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking-- whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent [FN26]--respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation. 5 U.S.C. § 551(5); *Paralyzed Veterans of America v. D.C. Arena L. P.*, 117 F.3d 579, 586 (C.A.D.C.1997); *National Family Planning & Reproductive Health Assn. v. Sullivan*, 979 F.2d 227, 240 (C.A.D.C.1992).

FN25. The cases cited by the Court, *ante,* at 1927, are not to the contrary. In *City of New York v. FCC*, 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988), for example, we were faced with Federal Communications Commission regulations that explicitly "reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television." *Id.*, at 62, 65, 108 S.Ct. 1637. It was only in determining whether the issuance of such regulations was a proper exercise of the authority delegated to the agency by Congress that we afforded a measure of deference to the agency's interpretation of that authority, as *formally* expressed through its explicitly pre-emptive regulations. *Id.*, at 64, 108 S.Ct. 1637; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-705, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (regulation); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S., at 158-159, 102 S.Ct. 3014 (regulation); *Blum v. Bacon*, 457 U.S. 132, 141-142, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982) (Action Transmittal by Social Security Administration); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S., at 327, 101 S.Ct. 1124 (order of Interstate Commerce Commission); *United States v. Shimer*, 367 U.S. 374, 377, 81 S.Ct. 1554, 6 L.Ed.2d 908

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(1961) (regulation). I express no opinion on whether any deference would be appropriate in any of these situations, but merely observe that such situations are not presented here.

FN26. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 721, 105 S.Ct. 2371 (noting that agency "can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements" and to promulgate regulations pre-empting local law that imperils the goals of that program).

* * *

Because neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt ***913** petitioners' cause of action, and because I cannot agree with the Court's unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption, I am convinced that Honda has not overcome the presumption against pre-emption in this case. I therefore respectfully dissent.

120 S.Ct. 1913, 529 U.S. 861, 146 L.Ed.2d 914, 68 USLW 4425, Prod.Liab.Rep. (CCH) P 19,795, 00 Cal. Daily Op. Serv. 3950, 2000 Daily Journal D.A.R. 5277, 2000 CJ C.A.R. 2826, 13 Fla. L. Weekly Fed. S 344

Briefs and Other Related Documents (Back to top)

• 1999 WL 1140848, 68 USLW 3335 (Oral Argument) Oral Argument (Dec. 07, 1999)

• 1999 WL 1076223 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Nov. 30, 1999)

• 1999 WL 1049890 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT (Nov. 19, 1999)

• 1999 WL 1049891 (Appellate Brief) BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Nov. 19, 1999)

• 1999 WL 1049893 (Appellate Brief) BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE (Nov. 19, 1999)

• 1999 WL 1049895 (Appellate Brief) BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049898 (Appellate Brief) BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049900 (Appellate Brief) BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049905 (Appellate Brief) BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049906 (Appellate Brief) BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1050049 (Appellate Brief) BRIEF FOR RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1045115 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE (Nov. 08, 1999)

• 1999 WL 966486 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966514 (Appellate Brief) BRIEF AMICUS CURIAE OF ROBERT B LEFLAR, ROBERT S. ADLER, MICHAEL GREEN, AND

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JOSEPH A. PAGE IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966529 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Oct. 22, 1999)

• 1999 WL 966532 (Appellate Brief) BRIEF FOR PETITIONERS (Oct. 22, 1999)

• 1999 WL 973859 (Appellate Brief) BRIEF AMICI CURIAE OF THE STATES OF MISSOURI, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, IOWA, KANSAS, MONTANA, NEW HAMPSHIRE, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT AND WASHINGTON IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 988261 (Appellate Brief) BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Oct. 20, 1999)

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Brett Kavanaugh – Product Liability

Allegation: In *Green v. General Motors Corp.*, Mr. Kavanaugh once again represented big business attempting to overturn a jury verdict in favor of a 24-year-old who became a quadriplegic due to the defective design of the car manufactured by defendant. 310 N.J. Super. 507 (1998).

Facts:

- **Mr. Kavanaugh relied on Third Circuit precedent that supported his client's position on appeal, that the judge had made an improper jury instruction.**
  - ✓ The defendant argued that the jury should have been able to consider the plaintiff's own negligence in speeding, which was conceded by the defendant.
  - ✓ The defense urged the Superior Court of New Jersey to accept a Third Circuit holding that juries had to be allowed to consider factors such as speed and the plaintiff's driving. *Huddell v. Levin*, 537 F.2d 726, 741 (3rd Cir. 1976).
  - ✓ Ultimately, the Superior Court of New Jersey "respectfully disagreed" with the Third Circuit's speed analysis. *Green v. General Motors Corp.*, 310 N.J. Super. 507, 523 (1998).
- **The court ruled in favor of Mr. Kavanaugh's clients, General Motors, on a number of issues that were argued on appeal.**
  - ✓ The appellate court agreed with Mr. Kavanaugh's client's position that the trial court had wrongly awarded prejudgment interest on <u>future</u> medical expenses and lost earnings. This amount had exceeded $8.5 million. *Id.* at 533.
- **As a member of the appellate team, Mr. Kavanaugh had a duty to zealously advance his client's positions. He did so by making reasonable arguments that relied on established precedent.**
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Superior Court of New Jersey,
Appellate Division.

Michael GREEN, Plaintiff-Respondent-Cross-Appellant,
v.
GENERAL MOTORS CORPORATION, Defendant-Appellant-Cross-Respondent,
and
Delores Parmentier, Breza Bus Service, Inc., and Goodyear Tire & Rubber Company, Defendants.

Argued Jan. 27, 1998.
Decided March 18, 1998.

Motorist, who was rendered a quadriplegic as a result of an automobile accident, brought design defect products liability action against automobile manufacturer. The Superior Court, Law Division, Essex County, entered judgment for motorist, with damage award totaling more than $25 million. Manufacturer appealed. The Superior Court, Appellate Division, Dreier, P.J.A.D., held that: (1) accident severity and speed were not factors to consider in determining whether automobile's roof design was defective; (2) motorist presented reasonable alternative roof design, as required to recover in action premised on defective design; (3) trial court's improper placement of burden of proving allocation of injuries between accident and defective design on motorist was harmless error; (4) trial court's improper instruction on manufacturer's duty to inspect and test automobile roof was harmless error; (5) motorist was not entitled to award of prejudgment interest on future damages; (6) prejudgment interest would not be tolled during two-year period in which action was not brought to trial; (7) damages for future medical expenses should have been reduced to present value using some reasonable discount rate; and (8) manufacturer was not entitled to credit for settlement between motorist and other driver involved in accident.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Products Liability 36
313Ak36 Most Cited Cases

Accident severity and speed of vehicle at time of impact were not factors to consider in determining whether automobile's roof design was defective.

[2] Products Liability 11
313Ak11 Most Cited Cases

Design defect does not come into being at time of accident; rather, it occurs when defective product is placed into stream of commerce.

[3] Products Liability 36
313Ak36 Most Cited Cases

In determining whether automobile was defective, jury had to determine the risks and alternatives that should have been known to reasonable manufacturer, and then assess whether manufacturer discharged its duty to provide reasonably fit, suitable, and safe vehicle, employing a risk-utility analysis.

[4] Products Liability 11
313Ak11 Most Cited Cases

In defective design case, issue upon which most claims will turn is proof by plaintiff of reasonable alternative design, the omission of which renders product not reasonably safe.

[5] Products Liability 36
313Ak36 Most Cited Cases

Motorist, who was rendered a quadriplegic as a result of automobile accident, presented reasonable alternative roof design for automobile, as required to recover in action premised on defective design.

[6] Damages 15
115k15 Most Cited Cases

Since automobile driver's injuries were caused totally by defective product, and not by collision with van, injuries could not be apportioned between automobile manufacturer and automobile driver and/or van driver.

[7] Products Liability 40

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313Ak40 Most Cited Cases

Automobile driver's own negligence with respect to his claim of a defective product was limited to whether he unreasonably proceeded in the face of a known danger; furthermore, this "known danger" was not the obviously known consequences of driver's speed, but rather was that posed by automobile's faulty roof design.

[8] Appeal and Error 1064.1(9)
30k1064.1(9) Most Cited Cases

Although trial court, in design defect products liability action, improperly placed on automobile driver the burden of proving allocation of injuries between accident, for which driver and/or driver of van with which he collided were responsible, and design defect, for which automobile manufacturer was responsible, error favored manufacturer and, therefore, was harmless.

[9] Appeal and Error 1064.1(8)
30k1064.1(8) Most Cited Cases

Trial court's improper instruction, in defective design products liability action, on automobile manufacturer's duty to inspect and test automobile roof, to which automobile manufacturer did not object, was harmless error, since it was not clearly capable of producing unjust result.

[10] Products Liability 13
313Ak13 Most Cited Cases

Proof of failure to test or of inadequate testing may be evidential as explanation of why design was defective, but it is not in itself proof of separate basis for liability.

[11] Appeal and Error 181
30k181 Most Cited Cases

Reviewing court will reverse on appeal for errors that lacked an objection only if errors cut mortally into substantive rights of defendant.

[12] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Driver, who was rendered a quadriplegic as a result of design defect in automobile, was not entitled to award of prejudgment interest on future medical expenses and future lost earnings, where prejudgment interest on portions of losses that driver had not yet suffered exceeded $8.5 million. R. 4:42- 11(b).

[13] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Denial or suspension of prejudgment interest in products liability action is left to sound discretion of trial judge, based on considerations of equity, fairness, and justice, viewed in factual context of case at hand. R. 4:42- 11(b).

[14] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Prejudgment interest would not be tolled during two-year period in which design defect action was not brought to trial because injured driver was obtaining new liability expert after his initial expert suffered incapacitating strokes, since manufacturer had use of sums due for that period and could invest them.

[15] Appeal and Error 1178(6)
30k1178(6) Most Cited Cases

[15] Damages 226
115k226 Most Cited Cases

In design defect action, damages for future medical expenses should have been reduced to present value using some reasonable discount rate, and jury's use of total offset method warranted remand and remittitur.

[16] Trial 114
388k114 Most Cited Cases

While expert witness is prohibited from presenting bottom line evidence of future wage losses in design defect products liability action, attorney may include bottom line income loss calculation in summation.

[17] Damages 63
115k63 Most Cited Cases

Since jury in defective design products liability action made no determination of liability of driver of van which collided with plaintiff's automobile, and found only that as between plaintiff and automobile manufacturer, manufacturer was 100% responsible for plaintiff's injuries, manufacturer was not entitled to credit for settlement between van driver and plaintiff.

****206 *511** Brett M. Kavanaugh (Kirkland & Ellis) of the District of Columbia Bar, Washington, DC,

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admitted pro hac vice, for defendant-appellant- cross-respondent (Tansey, Fanning, Haggerty, Kelly, Convery & Tracy attorneys; Thomas F. Tansey, Woodbridge, and James N. Tracy, on the brief).

****207** Maurice J. Donovan, West Orange, for plaintiff-respondent-cross- appellant (Benjamin M. Del Vento, Newark, attorney; Benjamin M. Del Vento, of counsel, Mr. Donovan, on the brief).

Before Judges DREIER, PAUL G. LEVY and WECKER.

The opinion of the court was delivered by

DREIER, P.J.A.D.

Defendant, General Motors Corporation (GM), appeals from a final judgment based upon a jury award in favor of plaintiff, who was driving a GM vehicle when involved in an accident that rendered him a quadriplegic. The jury awarded $13,000,000 for future medical expenses, $149,315 for loss of past income, $305,860.35 for loss of future income, and $4,000,000 for pain and suffering. Plaintiff's past medical expenses of $312,000 have been stipulated. The total damage award was therefore $17,767,175.35, which with prejudgment interest and costs, and a credit for a settlement with other defendants, totaled $25,110,484.90. GM also appeals from the denial of its motions for a judgment n.o.v., a new trial, or a remittitur. Plaintiff cross-appeals from a portion of the judgment granting defendant a $799,000 credit for amounts received from other defendants who settled after an initial trial had ended in a hung jury. The court deducted this amount from the final judgment after computation of the prejudgment interest noted earlier. Considering that the jury returned a verdict for plaintiff, we will examine the facts in a light favorable to plaintiff, except where any alternative facts may bear upon one of the many issues raised by GM.

On the day of the accident, June 9, 1986, plaintiff, then twenty-four years old and five feet, nine inches tall, was employed as a "car jockey" by Sullivan Chevrolet, an automobile dealership in Roselle Park. He was driving one of his employer's automobiles, ***512** a brand new 1986 Chevrolet Camaro IROC (International Race of Champions) Z28 sports coupe, a two-door vehicle designed and manufactured by defendant.

The Camaro was equipped with a "T-roof," a "luxury option" [FN1] provided by GM. In 1986, the Camaro was constructed with both an "A-pillar" and a "B-pillar." The A-pillar consisted actually of two pillars and a header which held the front windshield and supported the door hinges. The B-pillar similarly supported the rear window. In the T-roof Camaro there was a steel "center T-bar" welded into the center of the front windshield header and the rear window header. The roof design is called a "T-roof" or "T-top" because the T-bar is the only connection between the A and B pillars. Removable glass panels were supported by the front and rear headers and the T-bar, and provided a convertible-like feeling and driving experience when they were removed. When installed, they provided greater protection from the weather and more security than a canvas-top convertible.

> FN1. A "luxury option" is distinguished from a "performance option" which enhances the ability of the vehicle to proceed from one point to another beyond that of the base car. Therefore, a "T-roof" as opposed to a standard roof was offered solely for its appearance or comfort.

As plaintiff drove the Camaro north on Chandler Avenue with both glass panels inserted and the side windows rolled up, he was accompanied by a friend, Marc Alexander, seated in the front passenger seat. Both plaintiff and Alexander were wearing their seat belts. The legal speed on Chandler Avenue was twenty- five miles per hour; however, plaintiff was apparently greatly exceeding the speed limit. As he came over a slight rise on Chandler Avenue, plaintiff saw a school van proceeding south on Chandler Avenue. According to the driver of the van, her speed was approximately twenty-five miles per hour when she first saw plaintiff's car. The only indication of how much this speed may have actually decreased by the time of the collision, is the van driver's estimate that her speed at contact was five miles per hour.

***513** When plaintiff first observed the school van, it was only one or two car lengths away and was "right in the middle of the road" and "on the center line." We assume, however, that since the driver of the van was more elevated than plaintiff, she may have seen ****208** the Camaro slightly before plaintiff could see her. To avoid a head-on collision, plaintiff applied

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the Camaro's brakes and attempted to steer to the right, however, the left rear side of the Camaro, just behind the driver's-side door, struck the left front corner of the van at a thirty to forty-five degree angle.

The question of the speeds of the van and Camaro were disputed, and the record shows various estimates. Both plaintiff and the passenger estimated the Camaro's speed as between forty and fifty miles per hour. Plaintiff's expert, Donald Phillips, testified that there was insufficient physical evidence to perform a reliable reconstruction of speeds at impact. The van driver estimated plaintiff's speed at seventy-five miles per hour (and testified that plaintiff was on the wrong side of the road and did not decrease his speed). An employee of the Department of Public Works, who was travelling south on Chandler Avenue, 200 feet behind the school van in a dump truck, estimated plaintiff to be proceeding between sixty and seventy miles an hour. Defendant's expert estimated the Camaro's speed at between sixty-seven to seventy-six miles per hour. Therefore, if we accept the van driver's estimate that her vehicle was proceeding at five miles per hour at the time of the impact, and plaintiff's minimum estimate of his speed at forty miles per hour, the lowest closing speed between the two vehicles would have been forty-five miles per hour. If we accept the van driver's estimate of her speed and the maximum speed she and the independent witnesses placed upon the Camaro, the closing speed could have been as high as eighty-one miles per hour.

Plaintiff's medical expert explained that plaintiff had suffered a compression fracture of his spinal cord. Such an injury does not cause instantaneous paralysis, and therefore it "would take a longer time to show all the symptoms of spinal cord injury as ***514** opposed to a sudden disruption of the cord completely through." There was other eyewitness testimony that plaintiff could move his arms and legs immediately after the accident. But, unfortunately, this spinal cord injury quickly and permanently rendered plaintiff a quadriplegic.

Plaintiff's engineering expert's theory of the cause of plaintiff's injury focused on the collapse of the T-bar and "B" frame. When the Camaro hit the school bus to the rear of the driver's door and behind the center of gravity of the car, it spun, causing plaintiff's seat belt to force him back into his seat so that his head was just under the rear portion of the T-bar and B frame which deformed downward onto the back of plaintiff's head. The collapse of the T- bar compressed his spine and caused the compression fracture to his C5, C6, and C7 vertebrae. It was undisputed and is apparent from the photographs that the rear roof of the T-top caved downward in the accident.

Neither plaintiff nor Alexander had any post-accident memory of the accident beyond the instant of impact. Immediately after the accident, however, plaintiff was found outside of the Camaro lying facedown on the ground. [FN2] A neighbor who heard the crash ran to the site, and as she arrived she saw the driver's side door of the Camaro swing out, following which plaintiff "stepped out of the car." She testified that a "dazed" plaintiff took a "couple of steps," and "fell straight on his face." Defendant, through extensive expert testimony, contended that plaintiff was thrown from the car and suffered his injuries when he landed on his head. Plaintiff's expert testified that the lack of injuries that would have been commensurate with plaintiff so landing made such a scenario a virtual impossibility. This conclusion, coupled with the independent ***515** witness who saw plaintiff open the door and walk away from the vehicle, certainly provides a sufficient basis for the jury's implicit factual finding that plaintiff was not ejected from the car.

> FN2. Within seconds of the collision, and apparently after plaintiff left the car, it caught fire while Alexander was still sitting inside. Alexander was pulled out by a witness who observed burns on the back of Alexander's head and ears. Alexander testified that he incurred third- degree burns on his arm, neck and face, but medical personnel observed no burns on plaintiff's body, corroborating plaintiff's testimony that he suffered no burns in the accident.

The verdict was taken by special interrogatories. The jury found specifically that the "collapse of the rear roof of the T-Top Camaro****209** caused it to strike the plaintiff on his head." It also found that the "roof collapse" was caused by a "design defect of the T-Roof Camaro." Finally, it determined that the roof collapse was a proximate cause of plaintiff's injuries, and that 100f his injuries were "solely attributable to the design defect of the T-Roof Camaro." Presumably because of the earlier settlement, the jury was given no interrogatories relating to the responsibility of the driver of the van or her employer, and we have not been informed by the record on appeal whether GM had ever made a

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cross-claim for contribution against these former defendants, and if so, whether this claim was withdrawn when these defendants were released by plaintiff.

The additional facts concerning the trial, including those relating to the testing of the Camaro, the judge's charge and testimony relating to damages will be discussed when these issues are explored.

Defendant has raised five points on this appeal, some with subparts. We have departed somewhat from defendant's organization of the arguments and will address each point accordingly.

I. The Judge's Instruction on Speed

[1] GM first contends that the trial judge mistakenly instructed the jury that it could not consider evidence of accident severity and speed in determining whether the Camaro's T-roof design was defective. Before we proceed to the jury instructions, we must examine the nature of plaintiff's claim. Plaintiff has not contended here that GM or the van driver were responsible for the accident. Plaintiff's cause of action against GM was based upon a crashworthiness theory. He claims that whoever might be responsible for the accident, GM was obliged to design a vehicle that ***516** would maintain the integrity of the passenger compartment sufficiently to prevent additional injury to the occupant. If plaintiff had not suffered the injury from the T-bar and B frame deflection, he would have had no claim against GM for the accident that resulted in large part from his faulty driving. Also, if the van driver were to some extent responsible for the accident, GM could have had that responsibility assessed by a timely request to the court to have the jury fix the van driver's percentage responsibility.

[2] Given this narrow framework, we will focus on plaintiff's claim against GM. A design defect does not come into being at the time of an accident. Rather, it occurs when a defective product is placed into the stream of commerce. *See* Zaza v. Marquess & Nell, Inc., 144 *N.J.* 34, 48-49, 675 *A.*2d 620 (1996), and the cases cited therein. One of the differences between the causes of action for strict liability, negligence, or even some warranty claims is the way each focuses upon this time frame. If we were to look for negligence, we would focus upon the conduct of the manufacturer during the period of design, manufacture and distribution of the Camaro, including its testing and construction. If we were to look at a warranty claim, we would examine the performance of the car and determine whether it was "fit for the ordinary purposes for which" the car was used. *N.J.S.A.* 12A:2-314. A claim for strict liability, however, focuses on the car as it enters the stream of commerce to see whether it was defective. *Zaza, supra,* 144 *N.J.* at 49, 675 *A.*2d 620.

These neat temporal lines have been blurred over the years as we have come to realize that a claim for strict liability is akin to a negligence claim in that the central focus is upon the reasonableness of the manufacturer putting the defective product onto the market. *Id.* at 50, 675 *A.*2d 620. This is different from examining the manufacturer's conduct for negligence before the product was marketed. We do not look to see whether a particular designer acted unreasonably or whether a test engineer failed to perform a particular test, but rather whether a reasonable manufacturer, ***517** knowing the harmful propensities of the product, would have placed it onto the market in its condition. *Ibid.*

Under the New Jersey Products Liability Act, *N.J.S.A.* 2A:58C-1 *et seq.* (PLA or the Act), the causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action, the essence of which is strict liability. ****210***Jurado v. Western Gear Works,* 131 *N.J.* 375, 384-85, 619 *A.*2d 1312 (1993); *Tirrell v. Navistar Int'l, Inc.,* 248 *N.J.Super.* 390, 398-99 n. 5, 591 *A.*2d 643 (App.Div.), *certif. denied,* 126 *N.J.* 390, 599 *A.*2d 166 (1991). The Act, however, was non-exclusive, and the Legislature intended that the existing common law would continue to be applied, except where specifically changed by the Act. Senate Judiciary Committee Statement to Senate Bill No. 2805 (1987), *reprinted following* *N.J.S.A.* 2A:58C-1. The Act incorporated the standard from *Suter v. San Angelo Foundry & Mach. Co.,* 81 *N.J.* 150, 169, 406 *A.*2d 140 (1979), which required: "If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes ... the seller shall be responsible for the ensuing damages." The PLA used a shorthand reference to this standard in *N.J.S.A.* 2A:58C-2, but as is clear from the Senate Judiciary Committee Statement, no change in the law was intended.

[3][4] Thus, in determining whether the Camaro was defective, a jury must determine the risks and alternatives that should have been known to a reasonable manufacturer, and then assess whether the manufacturer discharged its duty to provide a "reasonably fit, suitable and safe" vehicle. [FN3] To

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do this, the jury employs a risk-utility analysis. *Jurado v. Western Gear Works, supra,* 131 *N.J.* at 385, 619 *A.*2d 1312. Although there are seven listed factors in the classical statement of the risk-utility analysis, see ***518** *Cepeda v. Cumberland Eng'g Co.,* 76 *N.J.* 152, 174, 386 *A.*2d 816 (1978) and its progeny, the prevalent view is that, unless one or more of the other factors might be relevant in a particular case, the issue upon which most claims will turn is the proof by plaintiff of a "reasonable alternative design ... the omission ... [of which] renders the product not reasonably safe." *Restatement (Third) of Torts: Products Liability* § 2(b) (Proposed Final Draft, April 1, 1997). [FN4] *See Congiusti v. Ingersoll-Rand Co., Inc.,* 306 *N.J.Super.* 126, 138-39, 703 *A.*2d 340 (App.Div.1997); *Grzanka v. Pfeifer,* 301 *N.J.Super.* 563, 579, 694 *A.*2d 295 (App.Div.), *certif. denied,* 152 *N.J.* 189, 704 *A.*2d 19 (1997); *Smith v. Keller Ladder Co.,* 275 *N.J.Super.* 280, 283-84, 645 *A.*2d 1269 (App.Div.1994).

FN3. *Suter v. San Angelo Foundry & Mach. Co., supra,* also teaches us that "[f]itness and suitability are terms synonymous with safety." 81 *N.J.* at 169, 406 *A.*2d 140. Thus the sole standard in the usual case is reasonable safety.

FN4. The full text of § 2(b) of the *Restatement (Third) of Torts: Products Liability, supra,* is that a product
is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.
In instances where other risk-utility factors need be considered, they are not excluded by this formulation. *See id.* at cmts. b and e.

Plaintiff's premise in this case is that although he was negligent in the operation of the vehicle, his injuries did not flow from this negligence, but rather from the faulty design of the Camaro which should have protected plaintiff under the circumstances of this accident. Defendant counters with a claim that the speed of the vehicle in this case, which may have been over double the legal limit, was a factor that the jury should have considered in determining whether the Camaro was defectively designed. The trial judge rejected defendant's view after a long and contentious argument. The judge charged the jury that the speed of the vehicle, the use of a seat belt, the use of the vehicle, crossing lanes of traffic and the like could be considered by the jury only on the issue of proximate cause, that is, the allocation of the cause of plaintiff's injuries or of damages between those responsible for the accident and the alleged crashworthiness deficit. Speed could not ***519** be considered on the issue of whether the Camaro was defectively designed.

The applicable portions of the charge on this subject read as follows:

> In this case the plaintiff alleges and has the burden of proving that the 1986 T-top Camaro was defectively designed because it was not crashworthy and that this defect was a proximate cause of plaintiff's injuries. The defendant, by way of response, ****211** denies that the vehicle was defectively designed and contends that Michael Green's injuries were caused by his own conduct.
> In this regard, please keep in mind that the conduct of the plaintiff concerning speed, seat belt use, use of the vehicle, crossing the lanes of traffic, etc., can only be considered by you on the issue of proximate cause. It cannot be considered by you as to whether the Camaro was defective.
> ....
> ... [E]ven if you determine that the Camaro roof system was defective, you must go on to consider whether the defect was a proximate cause of plaintiff's injuries. Plaintiff must prove by a preponderance of the evidence that any defect in the Camaro roof system, whatever you may find it to be, was a proximate cause of his injuries.
> By proximate cause I mean that the defect in the Camaro was a substantial factor that singly or in combination with another cause brought about plaintiff's injuries.... You may consider whether the speed of the Camaro at the time that it collided with the bus and the resulting severity of the accident was the proximate cause or the sole proximate cause of plaintiff's injuries.
> ....
> In relation to speed, ... you may take into account that except where otherwise posted it shall be lawful for the driver of a vehicle to drive at a speed not exceeding 25 miles per hour in any business or residential zone. Please remember that speed is only relevant on the subject of proximate cause and not on the question of whether the product was

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defective.

Defendant reiterated its objection at the new trial motion, but the judge again noted that speed was not a factor in this case.

> With respect to the speed of the vehicle, I don't think I ever suggested certainly that the jury could not consider the severity of the impact on the issue of crashworthiness or the design defect, but certainly the issue of speed, how fast the vehicle was going, was not pertinent to the design of this particular car. It was not relevant. Certainly [it was] relevant on the issue of proximate cause, that was my determination then, it is still my determination today.
>
> The speed of this vehicle was not relevant as to how the vehicle was designed, when it was designed and all of the factors that were taken into account by the design people, the design team, the design managers, and the design engineers. They had a number of things to consider, but what Mr. Green did on the date of ***520** this accident is not pertinent, not relevant to whether that design was defective or not.

We agree with the trial judge. When GM placed this vehicle on the market, it certainly knew that it would be driven at lawful speeds up to fifty-five miles per hour and in some states sixty-five miles per hour. It also knew that the vehicle might collide with another vehicle similarly operated. The experts in this case testified to the crash-testing of vehicles with a purpose of maximizing the safety of the occupants. The experts further testified that the only relevant speed factor in an accident between vehicles of the same size and weight [FN5] is the closing speed between the two vehicles, there being no difference between a vehicle hitting a fixed object at eighty miles an hour and two vehicles travelling forty miles per hour in opposite directions hitting each other. The closing speed between plaintiff's vehicle and the school van of between forty-five and eighty-one miles per hour is well within the range reasonably to be expected in the design of the Camaro.

> FN5. There would be a difference in impact depending on the mass of the vehicle that was travelling at the particular speed, since the force exerted is dependent on both the mass and speed of the vehicle. For example, if a car is hit by a freight train going ten miles per hour or an insect flying or being blown at the same speed against the car, the damage to the car is devastating in the first case and non-existent in the second. This aspect of the cause of the damage to the Camaro was not explored at trial.

Plaintiff's expert testified that closing speeds of up to 110 miles per hour must be anticipated and designed for by automobile ****212** manufacturers, and the speed in this case was well within the realm of anticipated accident speeds that a responsible manufacturer would and does consider in designing an automobile that is reasonably crashworthy. While GM's expert did not discuss particular speeds, he testified that all accident circumstances should be considered in evaluating crashworthiness. He acknowledged that two vehicles travelling within the legal limits could have a 110 mile per hour closing speed. GM's estimate of the closing speed in this case was at least thirty miles per hour under the 110 mile per hour speed. We see, therefore, that if GM was required to ***521** design a reasonably safe vehicle for its intended and reasonably foreseeable use, it should, if possible, have designed a vehicle that could reasonably withstand a crash at considerably higher speeds than in this case.

Also, the speed limit and manner of driving were irrelevant to the plaintiff's crashworthiness issue. As stated in *Green v. Sterling Extruder Corp.*, 95 *N.J.* 263, 471 *A.*2d 15 (1984), once the defendant has "a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct." *Id.* at 272, 471 *A.*2d 15 (quoting Patricia Marschall, "*An Obvious Wrong Does Not Make a Right: Manufacturer's Liability for Patently Dangerous Products,*" 48 *N.Y.U. L.Rev.* 1065, 1088 (1973)). *See also Ramos v. Silent Hoist & Crane Co.*, 256 *N.J.Super.* 467, 481, 607 *A.*2d 667 (App.Div.1992) (noting that to appraise contributory negligence against a plaintiff would "excuse the very conduct that gives rise to strict liability on the part of the manufacturer" as well as to the manufacturer's negligence). Thus, the Camaro had to be designed, if feasible, to protect the integrity of the passenger compartment in an accident at a closing speed that could be reasonably anticipated by the manufacturer. If it was not, then the Camaro was defective, regardless of plaintiff's driving speed within such protectable limits. The speed at which plaintiff was driving might theoretically have been greater than that at which plaintiff's reasonable alternative designs would have afforded protection, but such was not the testimony. If the speed was beyond the design

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limits, speed would have been a proper factor to determine proximate cause and a later apportionment of liability. Since the closing speed in this case was recognized to be well within the acknowledged design parameters, and the passenger compartment remained intact, with the exception of the deforming T- bar roof, the trial judge correctly ruled that speed was not a factor in determining whether the vehicle was defective.

As noted in the portions of the charge we quoted earlier, the trial judge did not rule out speed as a factor in the case. ***522** Plaintiff's speed was a definite factor in bringing about the accident, and the jury was told specifically and carefully that it could consider plaintiff's speed. However, speed properly was a factor solely in determining proximate cause, and this was carefully explained to the jury. [FN6] Insofar as plaintiff's injuries were caused solely by the product defect, speed was not relevant.

> FN6. As is explained later in more detail, the limitation of the type of plaintiff's conduct that can be considered to offset responsibility for a design defect precluded the jury from considering any conduct by plaintiff other than that he unreasonably proceeded in the face of the known danger of the defective design. *See Cartel Capital Corp. v. Fireco of New Jersey*, 81 *N.J.* 548, 562-63, 410 *A.*2d 674 (1980); *Suter v. San Angelo Foundry & Machine Co., supra*, 81 *N.J.* at 158, 406 *A.*2d 140.

Defendant urges that the argument against consideration of speed with respect to the defect was overwhelmingly rejected in *Huddell v. Levin*, 537 *F.*2d 726 (3d Cir.1976). The speed issue in *Huddell* was somewhat different from the one before us, but we will analyze it, analogizing the defective seat belt and headrest in *Huddell* with the alleged defective roof design in the case before us. The plaintiff in *Huddell* argued that if a seat belt and headrest design was faulty "it remains faulty whether an accident occurs at 5 m.p.h. or 100 m.p.h." *Id.* at 740. The Third Circuit rejected this argument, stating that the severity of the impact went to the heart of the question of a defect "in terms of the ordinary purposes for which the product, the head restraint, was designed." *Ibid.* The *Huddell* court reasoned that if the seat belt or head restraint failed to protect the wearer in a five mile per hour crash, there would be ****213** an inference of a defect, but that if the seat belt failed in a 100 mile per hour crash, the same argument might lose its validity. "At least in the context of safety design, we see no meaningful way to evaluate the defectiveness *vel non* of a product except in the context of a particular risk." *Id.* at 741.

The problem with the *Huddell* analysis is that it failed to assess the defect and any reasonable alternatives asserted by the plaintiff against the reasonably anticipated use of the product. Although ***523** the manufacturer is not an insurer of the safety of the occupant of a vehicle, the fifty to sixty mile per hour rear-end hit of the 1970 Chevrolet Nova in *Huddell* certainly was a foreseeable accident, and the reasonable alternative design suggested by the plaintiff of a larger and more deformable head restraint correctly persuaded the *Huddell* court that there was sufficient evidence to submit the issue of defect to the jury. *Id.* at 736. We must respectfully disagree, however, with the speed analysis in *Huddell*. The ten versus the hundred mile per hour rear-end collision comparison was appropriate, because a hundred mile per hour hit would be outside of the design parameters. But the anticipatable fifty to sixty mile per hour rear-end hit, with a reasonable alternative design presented, causes us to question whether speed should have been a factor in determining whether there was a defect in the design of the *Huddell* seat belt/headrest assembly. [FN7] Therefore, we depart from *Huddell* and agree with the trial judge's decision in this case to limit the consideration of speed to the issue of proximate cause of plaintiff's injuries.

> FN7. We are not, however, privy to all of the proofs in *Huddell* with respect to the technology available for the construction of the 1970 Chevrolet Nova. If the injury and death of the plaintiff in *Huddell* in a fifty to sixty mile per hour rear-end hit could not reasonably have been avoided by the use of the technology of the time, then the factor of speed would very much be a factor in determining the reasonableness of the design. Available technology, however, is not an issue in the case before us.

II. Reasonable Alternative Design

[5] Plaintiff accepted his duty under the risk-utility formulation (or the alternative *Restatement* formulation) to present a reasonable alternative design to the jury. Plaintiff came forward with two

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such designs, both of which he contended would have prevented the B-pillar and roof deformity. The first alternative challenged the fundamental safety of the T-bar configuration itself and merely claimed that the basic Camaro design with a standard full sheet- metal roof provided sufficient stability to maintain the integrity of the passenger compartment, even in an oblique side ***524** impact such as in the case before us. GM's own tests confirmed this claim. With this design, plaintiff argued that if there were no other design that would have maintained the roof's stability, then the risk of an injury such as this far outweighed any social utility of the T-bar and glass roof. This alternative of not marketing the specific product at all is explored in comment e of the *Restatement (Third) of Torts: Products Liability* § 2(b), *supra.*

Plaintiff's second alternative design posited two stabilizing bars, one connecting the left corners of the A (front) and B (rear) pillars, and the second connecting the right corners of these pillars. The sheet metal roof still would be replaced by two glass panels up to the T-bar, but the roof pillars and T-bar would have been stabilized by the additional side bars.

Defendant's opposition to this configuration was interesting. It asserted that the use of these two additional supports was theoretical at best in that they had never been tested, and that there was no showing that they would have protected the passenger compartment against the roof deformities from the side impact. Note that the redrafted comment f to the *Restatement (Third) of Torts: Products Liability* § 2, after noting that the requirement of an expert depends upon the feasibility and understandability of the alternative design, states:

> Subsection (b) does not, however, require the plaintiff to produce a prototype in order to make out a prima facie case. Thus, qualified expert testimony on the issue suffices, even though an expert has produced no prototype, if it reasonably supports the conclusion that a reasonable alternative design ****214** could have been practically adopted at the time of sale.

Comment f also supports plaintiff's claim that the jury could consider his expert's suggestion that the original roof design without the T-bar construction was an alternative which would have protected plaintiff. The comment notes:

> Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.

Obviously, the jury accepted plaintiff's alternative design evidence and disagreed with defendant.

***525** Moreover, following the verdict in this case and the attendant press coverage, plaintiff's attorneys were contacted by attorneys representing a plaintiff in a similar accident in Tennessee where defendant had apparently been more forthcoming in its discovery. Although plaintiff in this case had requested all testing of alternative designs, defendant did not supply plaintiff with the testing of a design remarkably similar to the one suggested by plaintiff's expert. [FN8]

> FN8. Because defendant was still arguing on this appeal that the alternative of inserting side rails should have been rejected because it had not been tested, plaintiff successfully moved before us to expand the record to include the extensive data the attorneys had received from the Tennessee plaintiff. Defendant first claimed that all of this material had been produced for plaintiff, but then, after searching its own records, withdrew the explanation.

Defendant also claimed that plaintiff's design was different because plaintiff's expert had suggested the two side rails in addition to the T-bar. Defendant's own design had the two side rails suggested by plaintiff's expert, but instead of the welded T-bar in plaintiff's design, defendant's design had the glass panels merely being separated by a simulated T-bar that apparently was not structurally connected to the front and rear pillars. We find this distinction unavailing, since if the sidebars alone protected the passenger compartment, plaintiff's expert's suggestion of the sidebars and a connected T- bar would have provided more protection, not less. The revelation of defendant's own alternative design akin to the one suggested by plaintiff, well supported by defendant's own testing, should put to rest the issue of a reasonable alternative design in this case.

III. Burden of Proving Allocation of Injury

Defendant raises another issue arising from *Huddell v. Levin, supra.* GM contends that plaintiff failed to discharge his burden of allocating the injuries between the accident, for which plaintiff and/or the van driver were responsible, and the design defect for which GM was responsible. Defendant contends

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that although the ***526** judge placed the burden upon plaintiff in accordance with *Huddell v. Levin,* the apportionment proofs were non-existent.

[6][7] We disagree for two reasons. First, between plaintiff and defendant, the jury found that plaintiff's injuries were caused totally by the defective product. Therefore, there was nothing to apportion. This finding has an ample basis in fact. But for the crushing injury to plaintiff's spine, plaintiff was virtually uninjured; he literally walked away from the accident, not even suffering the burns that affected Alexander who had to be helped from the car. Furthermore, plaintiff's own negligence with respect to his claim of a defective product is limited to whether he unreasonably proceeded in the face of a known danger. *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 158-60, 406 *A.*2d 140. Such "known danger" was not the obviously known consequences of plaintiff's speed, but rather must be that posed by the faulty roof design. *See Cartel Capital Corp. v. Fireco of New Jersey, supra,* 81 *N.J.* at 562-63, 410 *A.*2d 674. (There, plaintiff's employees would have had to have been aware of the defective fire extinguisher, not merely the obvious danger of placing grease-soaked paper plates in front of an open-hearth fire.)

[8] The second basis for rejecting defendant's claim warrants detailed discussion since it has been left open by ****215***Crispin v. Volkswagenwerk AG,* 248 *N.J.Super.* 540, 569 n. 1, 591 *A.*2d 966 (App.Div.), *certif. denied,* 126 *N.J.* 385, 599 *A.*2d 162 (1991). The uncertainty concerning where New Jersey places the burden of proof for allocating causation of injuries in a crashworthiness case has attracted national attention. The Reporters' Note for the *Restatement (Third) of Torts: Products Liability* discusses two approaches to the burden of proof question. The annotation to comment d of § 16 states the majority view as the "*Fox-Mitchell* [FN9] approach," which places the burden of allocating the harm caused by the accident upon the defendant. The opposing minority view ***527** is the *Huddell* approach under which "[i]f the plaintiff is unable to quantify the increased harm, even if the plaintiff can establish that some increased harm was caused by the defendant, the plaintiff is unable to recover." *Restatement (Third) of Torts: Products Liability* § 16, Reporters' Note, cmt. d (Proposed Final Draft, April 1, 1997) [hereinafter Reporters' Note].

FN9. *Mitchell v. Volkswagenwerk AG,* 669 *F.*2d 1199 (8th Cir.1982); *Fox v. Ford Motor Co.,* 575 *F.*2d 774 (10th Cir.1978).

In a thirteen-page discussion, the Reporters list twenty-three states, including New Jersey, as either adopting the *Fox-Mitchell* approach or likely to do so. Only six states appear to follow the *Huddell* approach. [FN10] The Reporters' Note at comment d of § 16 cites the footnote in *Crispin, supra,* noting the open issue in New Jersey, in which Judge Baime states:

> A rule placing upon the defendant the burden of proof with respect to the apportionment of damages may be more in line with our Supreme Court's recent decision in *Scafidi v. Seiler,* 119 *N.J.* 93, 111-113, 574 *A.*2d 398 (1990). *See also Fosgate v. Corona,* 66 *N.J.* 268, 272-273, 330 *A.*2d 355 (1974). However, this issue is not before us and we need not resolve it.
>
> [248 *N.J.Super.* at 569 n. 1, 591 *A.*2d 966].

Lastly, the Reporters' Note points out that since *Crispin* the issue has been treated in only two trial court opinions, *McLaughlin v. Nissan Motor Corp., U.S.A.,* 267 *N.J.Super.* 130, 135, 630 *A.*2d 857 (Law Div.1993), and *Thornton v. General Motors Corp.,* 280 *N.J.Super.* 295, 299-303, 655 *A.*2d 107 (Law Div.1994). *McLaughlin* follows the *Huddell* approach; *Thornton* rejects it.

FN10. The Reporters' Note at comment d further states that the *Fox-Mitchell* approach, which is the source of § 16(c) of the new *Restatement,* "reflects the more recent developments." They also explain that much of the authority stems from federal courts, assuming how the courts of the state in which they sit would hold. Of decisions actually rendered by state appellate courts, thirteen favor the *Restatement* rule and only three states (all intermediate appellate court decisions) favor the *Huddell* position.

The Supreme Court in *Waterson v. General Motors Corp.,* 111 *N.J.* 238, 544 *A.*2d 357 (1988), treats a similar but not identical issue of the allocation of injuries between the manufacturer of a defective automobile and a motorist who failed to wear a seat belt. While the basis of liability in *Waterson* may be different from the ***528** case before us, both involve a second injury. In the seat belt case, the Court placed the burden upon "defendant [to] ... demonstrate that nonuse of a seat belt increased the extent or severity

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of plaintiff's injury." *Id.* at 269, 544 *A.*2d 357. See also *Schwarze v. Mulrooney,* 291 *N.J.Super.* 530, 540-41, 677 *A.*2d 1144 (App.Div.1996), where in a second injury case involving a shifting load, Judge Baime determined that the defendant had the burden to present evidence enabling the jury to apportion damages. *Cf. Thorn v. Travel Care, Inc.,* 296 *N.J.Super.* 341, 349, 686 *A.*2d 1234 (App.Div.1997) (another seat belt case placing the burden on defendant). Although the Supreme Court has not yet spoken definitively on this subject, we agree with Judge Baime and the *Restatement* Reporters that the direction indicated by the Supreme Court in such cases as *Scafidi, supra,* and *Fosgate, supra,* is with the majority of state courts that have considered the allocation issue.

It thus appears to us that we should apply subsections 16(b) and (c) of the *Restatement (Third) of Torts: Products Liability.* These sections read:

> (b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited ****216** to the increased harm attributable solely to the product defect.
>
> (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes. [FN11]

> FN11. Note that the *Restatement (Third) of Torts: Products Liability* § 16(c) "does not formally shift any burden of proof to the defendant. Its effect is that, if the plaintiff has established that the product defect increased the harm over and above that which the plaintiff would have suffered had the product been nondefective, and if at the close of the case proof does not support a determination of the harm that would have resulted in the absence of the product defect then the defendant is liable for all the harm suffered by the plaintiff." Reporters' Note, § 16(c), cmt. d.

We therefore reject defendant's claim that plaintiff did not carry his burden of proof, since the court's decision to follow *Huddell v. Levin* and place the burden on plaintiff was in error. However, as this error favored defendant, it was clearly harmless. Placing the ***529** burden on defendant, where it properly belongs, reveals that defendant did not meet its burden, and therefore no allocation evidence was required of plaintiff.

IV. Charge on a Duty to Inspect

[9] Defendant next raises an objection to a portion of the judge's charge relating to defendant's duty to inspect and test the T-roof designed car. Inexplicably, after the judge charged the risk-utility elements for a design defect; GM's obligation to produce a product fit, suitable and safe; and plaintiff's obligation to prove an alternative safer design, the judge added an additional charge. He stated:

> In determining whether the Camaro was defective, you may take into account that a manufacturer is also under a duty to make reasonable inspection and tests of its products for the purpose of locating obvious or hidden but discoverable defects in the product.

The charge continued for nearly two pages in the transcript, discussing GM's duty to exercise reasonable care in the testing of the Camaro and posing the question of what a reasonable manufacturer would or would not have done under the circumstances.

Notwithstanding the court having given this charge, which obviously did not relate to a design defect, but rather to negligence, [FN12] none of the special jury interrogatories dealt with this issue. Furthermore, the record is replete during both the plaintiff's and defendant's cases with reference to GM's extensive testing of the Camaro both with and without the T-bar roof. We are at a loss therefore to understand why the trial judge gave this portion of his charge.

> FN12. The charge itself is taken from a former model charge to be given in a manufacturing defect case where a plaintiff's claim is based upon a negligence theory of failure to inspect.

[10] It is clear that a breach of any duty to test, insofar as it may exist, is relevant to a negligence cause of action, or in a rare case to a manufacturing defect, but not a design defect claim. As defendant correctly notes, a product that is not defective and has ***530** not been tested at all remains free of a defect. Similarly, a defective product that has been extensively tested is still defective. Proof of a failure to test or of inadequate testing may be evidential as an explanation of why a design was defective, but it is not in itself proof of a separate basis for liability.

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[FN13]

FN13. Testing might also have some relevance in the area of a manufacturing defect on the issue of what was a reasonably safe product, or the unavoidably unsafe product defense, *N.J.S.A.* 2A:58C-3a(3). Similarly, in a warning defect case, testing could be relevant if a plaintiff wished to explain that adequate testing would have caused the manufacturer to warn of a particular problem which was discoverable, or if a defendant wished to claim that extensive testing did not reveal a problem and therefore the manufacturer could not reasonably have known of the problem, and there was thus no necessity to warn. (While here plaintiff did claim that defendant performed inadequate side impact testing, the defect in design was not dependent on this testing). It is also possible that if the defendant were relying upon a state-of-the-art defense under *N.J.S.A.* 2A:58C-3a(1), testing might in some way indicate that there was no practical and technically feasible alternative design.

The charge was relevant only to appraise an aspect of the manufacturer's conduct ****217** which was not properly in issue. The Supreme Court has made it clear that the manufacturer's negligence is not an issue in a strict liability case. In *Waterson v. General Motors Corp., supra,* the Court stated:

> The essence of an action in strict liability is that the injured party is relieved of the burden of proving the manufacturer's negligence. The injured party need prove, for the party's prima facie case, only that the injury- causing product was unsafe or unfit for its intended or foreseeable use at the time it left the manufacturer's control and that the injuries sustained arose from the unsafe or unfit condition of the product.
>
> [111 *N.J.* at 267-68, 544 *A.*2d 357].

The Senate Judiciary Committee Statement, *supra,* accompanying the PLA made it clear that the initial sections define the new product liability action as falling within the categories of manufacturing defects, warning defects, and design defects, and "[e]xcept as modified by the provisions of sections 3 and 4, the elements of these causes of action are to be determined according to the existing common law of the State." Negligence had long been subsumed within strict liability prior to the PLA. *See* ***531***Realmuto v. Straub Motors, Inc.*, 65 *N.J.* 336, 322 *A.*2d 440 (1974); *Collins v. Uniroyal, Inc.*, 64 *N.J.* 260, 315 *A.*2d 16 (1974); *Heavner v. Uniroyal, Inc.*, 63 *N.J.* 130, 305 *A.*2d 412 (1973). Thus, if negligence principles were not to have been applied prior to the Act, as stated in *Waterson,* the same rule would apply to a design defect claim under the Act.

We have analyzed this aspect of the charge in detail to see whether it might reasonably have influenced the jury against defendant. The judge informed counsel that he was including this charge as a consideration for the reasonableness of defendant's conduct in designing the car as it did. GM did not specifically object to the charge, although at one point defendant requested the court only to give the model charge as testing was "captured by the risk-utility factors." We read this objection to have told the court that testing was a fair consideration, but that a separate charge was unnecessary. The objection certainly would not put the judge on notice of defendant's opposition to any charge at all related to the subject of testing. Plaintiff's summation referred to a lack of testing of the T-bar roof, not as a separate basis of liability, but only as an attack upon defendant's having permitted the defective vehicle to be placed on the market and defendant having an inadequate basis to certify that the T-roof Camaro complied with federal motor vehicle safety standards.

[11] We have read this section of the charge in the context of the charge conference, the charge as given, the objections and the interrogatories given to the jury which, as we noted, contain no reference to the testing, but looked only to the issues of defect and proximate cause. Pursuant to *R.* 1:7-2, it was defendant's obligation to make a specific objection to this aspect of the charge before the jury retired, and "no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict." *Ibid.* We are, of course, cognizant of our power to notice plain error, but in the context of the jury's findings, the addition of this charge concerning the duty to test has not been shown "to ***532** have been clearly capable of producing an unjust result." *R.* 2:10-2. The charge failed to affect "a substantial right of plaintiff." *Atlas v. Silvan,* 128 *N.J.Super.* 247, 252, 319 *A.*2d 758 (App.Div.1974). We will reverse on appeal for errors that lacked an objection only if the errors " 'cut mortally into the substantive rights of the defendant.' " *State v. Shomo,* 129 *N.J.* 248, 260, 609 *A.*2d 394 (1992) (quoting *State v.*

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Harper, 128 *N.J.Super.* 270, 277, 319 *A.*2d 771 (App.Div.), *certif. denied,* 65 *N.J.* 574, 325 *A.*2d 708 (1974)). We therefore determine this error to be harmless. *R.* 2:10-2.

V. Damages

We now proceed to assess the damage award. Defendant objects to several aspects of this award: first, the award of interest on future damages; second, the award of prejudgment interest for two years during which plaintiff allegedly delayed the trial; and third, the apparent failure of the jury to discount plaintiff's award for future medical expenses to their present value. On cross-****218** appeal, plaintiff objects to the court having granted the $789,000 offset for the former co-defendants' settlement.

a. Interest on Future Damages

[12] With regard to the $13,000,000 award for future care and medical expenses and the $305,860.35 award for future lost income, GM objects to the award of prejudgment interest. In truth, the award of prejudgment interest for amounts that will not be incurred by plaintiff until after judgment is "questionable." *Ruff v. Weintraub,* 105 *N.J.* 233, 245, 519 *A.*2d 1384 (1987). The Court explained away the logical inconsistency. It first recognized the validity of the argument that the damages would not accrue until after judgment, but then stated:

> However, the public interest in encouraging settlements is an adequate independent basis for the application of the prejudgment interest rule in this case. Thus, this is not an "exceptional" case, as that term has been interpreted [under *R.* 4:42-11(b)].
>
> ***533** Since rule 4:42-11(b) allows for the suspension of prejudgment interest only in "exceptional cases," the trial court's assessment of prejudgment interest on the entire award was proper in this case.
>
> [*Id.* at 245, 519 *A.*2d 1384].

Where the awards are modest, we can understand the Supreme Court's policy to encourage settlement. Perhaps an unstated additional reason is to defray plaintiff's attorney's fees attributable to sums that plaintiff will be forced to pay third parties or which would reduce a compensatory stream of lost future income. [FN14] In the case before us, however, of the $17,767,175.35 judgment returned by the jury, $13,305,860.35 represented future medical expenses and future lost earnings. Based upon the proof submitted to the court concerning the interest for the seven-year period commencing six months after the date of the filing of the complaint through the date of judgment, *R.* 4:42-11(b), the prejudgment interest on the portions of the losses that plaintiff *had not yet suffered* exceeded $8,500,000.

FN14. This court has previously also justified the assessment of prejudgment interest for future loss on the theory that the "interest factor simply covers the value of the award for the period during which the defendants had the use of the moneys to which plaintiffs are found to be entitled." *Statham v. Bush,* 253 *N.J.Super.* 607, 617, 602 *A.*2d 779 (App.Div.1992) (quoting *Busik v. Levine,* 63 *N.J.* 351, 360, 307 *A.*2d 571 (1973)). Such reasoning does not apply, at least under the facts of this case. A plaintiff loses nothing when post-judgment losses are paid without interest. This aspect of the justification for such interest was apparently abandoned in *Ruff. See Statham, supra,* 253 *N.J.Super.* at 618, 602 *A.*2d 779 (discussing *Ruff, supra,* 105 *N.J.* at 245, 519 *A.*2d 1384).

This is an exceptional case. It took seven years to reach trial, but the interest on all sums that accrued during this seven-year period is not questioned by defendant. This was a hotly contested case on the issue of liability, and whatever we may think of defendant's position on the merits of the case, an assessment of prejudgment interest of this magnitude amounts to a penalty bordering on confiscation. [FN15] This is especially so when we look at ***534** the fact that the award spans periods of time when the interest rates were seven and one-half, eight or even eight and one-half percent, although the actual post-judgment rates, which will properly affect post-judgment payments due to plaintiff, will be far less.

FN15. *See* Pressler, *Current N.J. Court Rules,* comment 8 on *R.* 4:42-11 (1997) (stating that suspension of prejudgment interest should be cautiously exercised with consideration of the underlying purpose of *R.* 4:42-11, "namely that prejudgment interest is not a penalty but is rather a payment for the use of money"). We take this statement as applying principally to pre-judgment damages because a defendant has not withheld reimbursing a plaintiff for any

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sums that the plaintiff has not yet advanced.

[13] The Supreme Court in *Ruff* recognized this prejudgment interest as a fiction, but determined that a *reasonable* award furthers the interests of speedy trials and calendar control and provides a payment to needy plaintiffs. *See* 105 *N.J.* at 245, 519 *A.*2d 1384. We note that defendant properly did not include within its objections the prejudgment interest on the $4,000,000 payment for plaintiff's future pain and suffering. *See Friedman v. C & S Car Serv.*, 108 *N.J.* 72, 78, 527 *A.*2d 871 (1987). But it appears ****219** reasonable to us that the payment of the prejudgment interest on this $4,000,000 for the seven-year prejudgment period is sufficient to further the goals expressed by the Supreme Court in *Ruff.* The denial or suspension of prejudgment interest is left to the sound discretion of the trial judge, based on considerations of equity, fairness and justice, viewed in the factual context of the case at hand. *Dall'Ava v. H.W. Porter Co.*, 199 *N.J.Super.* 127, 129-31, 488 *A.*2d 1036 (App.Div.1985). In addition, we may exercise our original jurisdiction. *R.* 2:10-5. In this "exceptional case," we therefore vacate the prejudgment interest on the awards for future medical expenses and lost income. [FN16]

FN16. We cannot help but note that in the Punitive Damage Act, *N.J.S.A.* 2A:15-5.14b, the Legislature has placed a $350,000 cap on the award of punitive damages. Since, as we have noted earlier, interest on future medical expenses and earnings has been upheld solely on the basis of an inducement to settle, and constitutes a *quasi*-punishment for not settling, it stands on a similar footing to a punitive damage award. While we realize that this interest is not actually encompassed in the Punitive Damage Act, the prejudgment interest on the post-judgment expenses in the case before us would be over twenty times the maximum limit on punitive damages, an issue stricken from this case. It seems anomalous that if defendant had wantonly designed the car to inflict this injury, the damages, if the Punitive Damage Act applied, would be limited to $350,000. But for trial delays, not all attributable to defendant, it would be punished for over $8,500,000. This argument, of course, could not have been considered by the Supreme Court in *Ruff,* as the case was decided some eight years prior to the enactment of the statute.

535 *b. Tolling of Interest

[14] Defendant also asserts that all prejudgment interest should have been totally tolled for a two-year period, February 1994 through February 1996, where the delay was caused solely by reason of plaintiff's failure to bring the case to trial. Actually, most of this delay was caused by plaintiff being required to obtain a new liability expert after his initial expert suffered incapacitating strokes. The judge found no misconduct or lack of cooperation and a reasonable basis for the various adjournments required by plaintiff. He therefore determined that there was no reason to foreclose interest for this period.

As to sums due for this period, defendant had use of the funds and could invest them; plaintiff lost this income. The prejudgment interest rule provides a sensible adjustment. The judge made a reasoned decision not to suspend prejudgment interest for this two-year period, and we find no fault with the judge's decision.

c. Proof of Future Medical Expenses--Failure to Discount

[15] Defendant next attacks plaintiff's proof of future medical expenses. Plaintiff's medical expert, Dr. Martin, testified concerning both the amount of plaintiff's annual medical costs, and also about how these costs would be projected into the future. He based these latter projections upon his consultation with plaintiff's economist, Dr. Richard Ruth, to compute the difference in the costs of medical treatment from 1989 when the witness examined plaintiff to the 1996 trial. He based his conversion factor on the increase in the medical services component of the consumer price ***536** index. Applying that percentage charge to plaintiff's medical expenses increased the approximate figure of $220,000 per year from 1989 to $369,250 in 1996. [FN17] (In fact, the base figure of $220,000 was initially increased to $250,000 to account for various elements of medical treatment for which the witness had been given no particular figures). [FN18] He recognized that plaintiff's life expectancy because of his injuries would be less than the normal life expectancy for his age, and reasoned that plaintiff had a ****220** projected life expectancy of approximately thirty-five years.

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FN17. Defendant also questioned Dr. Martin's ability to testify as an economist. He stated, however, that he based his cost projections on his conversation with Dr. Ruth, an economist who testified later in the case and provided a sufficient foundation for Dr. Martin's testimony. The judge, therefore, properly ruled that Dr. Martin's testimony on the consumer price index would be received subject to Dr. Ruth's anticipated expert opinion concerning the consumer price index.

FN18. Defendant did not object to the various categories of future expenses that would be necessary in plaintiff's care and treatment. Special cars, chairs, house renovations, as well as medication and therapy all were included without objection.

Dr. Martin was asked to describe "the formula one would use in order to arrive at what his future cost would be." Over defendant's objection, he answered as follows:

> You take the figure of $369,250 and you multiply that by the 35 years of expected life--of life expectancy and you get the final figure.

At the next trial session, plaintiff's attorney returned Dr. Martin to this topic:

> Q: Doctor, could you just tell us one more time how we take that figure $369,250 and predict how much money is necessary to maintain [plaintiff] medically and with the equipment and with the care that you deem is proper for someone with his condition?
>
> A: Well, we multiply that figure by the projected ... life expectancy at this time of about 35 years.

The jury awarded plaintiff $13,000,000 for his future medical expenses. We note that 35 years multiplied by $369,250 equals $12,923,750.

***537** *Tenore v. Nu Car Carriers, Inc.*, 67 *N.J.* 466, 341 *A.*2d 613 (1975), holds that expert economic evidence "purporting to show plaintiff's aggregate damages," there a wage loss claim, was improper, primarily because the projection before the jury of a "gross figure" or "total resulting damage figure" submitted by an expert "tends to exert an undue psychological impact leading to the danger of its uncritical acceptance by the jury in the place of its own function in evaluating the proofs." *Id.* at 482-83, 341 *A.*2d 613. The plaintiff's experts may, however, "provide the jury with their analyses of trends of future wage increases and discount interest rates generally," and the jurors can "use those trends and rates in arriving at their own independent single-figure appraisal of plaintiff's pecuniary loss." *Id.* at 483-84, 341 *A.*2d 613.

In *Genovese v. New Jersey Transit Rail Operations, Inc.*, 234 *N.J.Super.* 375, 560 *A.*2d 1272 (App.Div.), *certif. denied*, 118 *N.J.* 195, 570 *A.*2d 960 (1989), the trial judge himself elicited testimony from the plaintiff's expert economist "announcing 'bottom line' wage loss figures." *Id.* at 378, 560 *A.*2d 1272. On the next day of trial, the judge concluded that he had erred because such expert testimony "clearly violated the prohibition of such testimony announced in *Tenore*," and he twice instructed the jury to "disregard the bottom line figures." *Ibid.* The jury found the defendant liable, and assessed damages of $413,000. *Id.* at 377, 560 *A.*2d 1272. Noting that the jury's damage verdict of $413,000 was "suspiciously near one of the witness's bottom line figures of $425,000," this court reversed the damage verdict and remanded for retrial on that issue. *Id.* at 379, 383, 560 *A.*2d 1272. Referring to the *Tenore* rule, in *Genovese* we concluded that the trial judge's curative instructions were insufficient to overcome the "strong psychological impact on the jury of the court-invited testimony of gross numbers." *Id.* at 379, 560 *A.*2d 1272.

In *Dunn v. Praiss*, 256 *N.J.Super.* 180, 606 *A.*2d 862 (App.Div.), *certif. denied*, 130 *N.J.* 20, 611 *A.*2d 657 (1992), the plaintiff's economic expert wrote his damage assumptions, calculations and conclusions on four charts which, over the defendants' objection, were permitted into evidence, and accompanied the jury into the ***538** jury room as an exhibit (a separate error, not repeated here).. *Id.* at 196-99, 606 *A.*2d 862. On the last chart was a summary that, among other things, said "28 x $36,350." *Id.* at 197, 606 *A.*2d 862. On the issue of economic loss, the jury awarded $1,017,800 to the plaintiff. *Id.* at 198, 606 *A.*2d 862. (The 28 years, multiplied by $36,350, equals $1,017,800). As in *Genovese*, in *Dunn* we reversed the damage verdict and remanded for a retrial on that issue. *Id.* at 202, 606 *A.*2d 862.

[16] We recognize that while *Tenore* "bars 'bottom line' evidence of future wage losses," *Tenore* "does not, however, bar an attorney's argument in summation which includes the bottom line income loss calculation which the expert witness is forbidden

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to make." *Lovenguth v. D'Angelo*, 258 *N.J.Super.* 6, 9-10, 609 *A.*2d 47 (App.Div.1992), *appeal dismissed*, 133 *N.J.* 417, 627 *A.*2d 1128 (1993). There, however, we were careful to state "that we deal here only with a future income loss summation argument that ****221** completes the arithmetic prohibited to the expert witness." *Id.* at 10, 609 *A.*2d 47. We see no reason not to apply the *Tenore* principles, as interpreted by the cases, to testimony concerning the cost of future medical and care expenses.

In its post-trial motion, defendant argued that "what Dr. Martin did violates the *Dunn* case." The judge disagreed, pointing out that the plaintiff's expert is "allowed to give the jury a yearly figure and to give the jury either a life expectancy figure or a work life expectancy figure," and concluding that he perceived no prejudice in this case, "as long as the expert does not give a bottom line figure." According to the judge, Dr. Martin did not do so:

> Yes, Dr. Martin, it might have been better had he not said do the math. But the point is that it's there in black and white and there was nothing improper about giving the jury those two figures. I can't--it's very difficult to conclude now that the jury placed too much emphasis on a bottom line figure. Indeed, he--they weren't given the bottom line figure. The true evil, I think, is for the doctor to have multiplied it all out and arrive at a figure of $12,923,000. The jury's seeing that then perhaps might have been swayed too much by the expert's math.

Plaintiff argues that Dr. Martin's testimony did not contravene *Tenore*, because he merely presented a "formula for calculating ***539** future medical costs," but he "did not make the ultimate calculation of the future medical costs," in that he did not do the multiplication and present the jury with the resulting "bottom line number." While defendant acknowledges that "Martin did not actually put pen to paper to write out the number for the jury," defendant, relying on *Dunn*, argues that Dr. Martin's formula was the "equivalent of a 'projection of a gross figure before the jury submitted by an expert,' which *Tenore* holds is improper."

Dr. Martin did not calculate each year's loss, with inflation factors, and discounting, but only calculated the then-current cost of plaintiff's care and life expectancy. Had he stopped there, and left the use of these figures to the economist, there may not have been error. His problem, as will be explained, was his telling the jury to multiply the 1996 figure by plaintiff's life expectancy, in effect testifying to a total-offset recovery theory, discussed *infra*. Hence we find that plaintiff's proof of future medical expenses was admitted in error. This error was compounded by the omission of instructions on applying present value discounting.

Dr. Martin's testimony was not the sole basis for the calculation of future medical expenses and wage loss damages. Plaintiff's economist, Dr. Ruth, testified in detail concerning two ways to compute future damages: the total offset method and the standard method. The total offset method posits that the rate of inflation will cancel the fair return from the amount awarded when it is prudently invested, and therefore a jury may merely multiply the annual amount necessary to make the plaintiff whole by the relevant number of years. Where the issue is one of lost wages, the net wages after taxes would merely be multiplied by the number of remaining years of the plaintiff's working life; and the future medical expense or future pain and suffering would similarly be multiplied by the plaintiff's life expectancy. This was obviously the method testified to by Dr. Martin and was the first of the two methods proposed by Dr. Ruth.

The second method requires the discounting of the stream of income to its present value, using an appropriate discount rate. ***540** In the case before us, taxes would not be a consideration since the amount of the lost wages would be discounted on an after-tax basis. *Caldwell v. Haynes*, 136 *N.J.* 422, 436-40, 643 *A.*2d 564 (1994). The medical expenses would be largely deductible on plaintiff's tax return, [FN19] unless there is a radical amendment of the Internal Revenue Code.

> FN19. The fund would, if accurately awarded and used, generate income to which an appropriate amount of the principal would be added, so that the fund would be exhausted in the last year of plaintiff's life. The income, therefore would be less than the expenses, which would be deductible when they exceed a certain percentage of plaintiff's income.

****222** As this court noted in *Friedman v. C & S Car Serv.*, 211 *N.J.Super.* 657, 670-73, 512 *A.*2d 560 (App.Div.1986), *rev'd*, 108 *N.J.* 72, 527 *A.*2d 871 (1987), the total offset method does not reflect reality. [FN20] The critical determination is the selection of a reasonable discount rate for the

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standard method. As was noted in our opinion in *Friedman,* from the period of 1926 through 1985 the rate of return for common stocks, corporate bonds, and government bonds exceeded the rate of inflation by varying amounts. *Id.* at 671, 512 *A.*2d 560. What was true in the double-digit inflation of past years, is even more true at the current time when inflation apparently is in check and has for the past few years been held to approximate three percent or even less. Investments in quality common stocks have for the past few years exceeded twenty percent, and, while we assume that these rates cannot be duplicated year after year, a balanced portfolio of stocks, corporate and government bonds and certificates of deposit ***541** certainly would yield far in excess of the projected inflation rates, especially for a portfolio of the size of plaintiff's net award. Even if inflation rates should rise, prudent investment returns should keep well ahead of inflation.

FN20. The Supreme Court's reversal was on the basis that a pain, suffering and disability judgment should not be discounted, as plaintiff's was not in this case. The Supreme Court distinguished the pain and suffering damages from the economic damages in *Tenore, supra,* where discounting was ordered. The Court required that such economic damages be discounted to present value because such calculation was "neither artificial nor unrealistic." 108 *N.J.* at 78, 527 *A.*2d 871. Despite the Supreme Court's reversal, our opinion in *Friedman* provides a good discussion of the necessity to discount awards for future economic expenses.

These considerations were totally absent from Dr. Martin's testimony, and Dr. Ruth's charts described in the record (and shown to us at oral argument) listed only two columns, one for the total offset computation, and one for a one percent discount rate. Dr. Ruth did testify, however, that if the jury chose to use a different rate it could do so, but this testimony was not aided by any percentage figures by which the jury could adjust its total award. Dr. Ruth was not cross-examined.

Similarly, the trial judge in his charge did not aid the jury beyond the standard charge that it should take into consideration the factor of inflation and the discounting of its damages award for post-judgment medical expenses and future pecuniary losses to present value. The court did not fill in the gap left by the expert witnesses as to what percentages the jury could apply and how to apply them, even though these percentages are supplied as a table attached to our court rules. *See* Pressler, *Current N.J. Court Rules,* Appendix I. The appropriate line representing plaintiff's future life expectancy, as testified to by Dr. Martin without opposition, showing percentage rates in a reasonable range might have given the jury greater options. The brief comment that the jury could use a different rate, if it wished, was insufficient. [FN21]

FN21. While the judge also noted that the jury should take taxes into consideration, there was no indication that the future medical expenses would constitute a tax deduction which would largely offset the taxes on the income portion of the income and principal which was to be applied to defray the expenses.

We note that defendant offered no evidence on this subject nor even cross-examined Dr. Ruth to bring out the additional figures that could have made the process more understandable to the jury. Here, the array of witnesses called by defendant indicated that this case was prepared with immense resources and with a complete understanding of the issues to be determined. The trial ***542** judge is not expected to try the case for either a plaintiff or defendant. But the judge still has an obligation to make the jury function understandable. Dr. Ruth's testimony explained the application of a one percent discount, and he told the jury that it could also use a two percent, three percent, or four percent discount rate. Dr. Ruth, however, neglected to mention how the jury would perform this function.

While in no way excusing defendant's failure to present evidence on this point, it is apparent to us that the jury's verdict should have been reduced to present value using some reasonable discount rate. We therefore****223** remand the matter to the Law Division on this point for a supplemental hearing. The judge may effect a remittitur after the parties present any necessary proofs concerning a fair market return on a balanced portfolio of prudent investments and a reasonable estimate of medical expense inflationary costs. We recognize this is far from an exact science, but a total disregard of these factors, which in effect applies the total offset method, flies in the face of present reality and demands our

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intervention to achieve substantial justice between these parties. [FN22] We trust that on remand the court can order payment of all sums not in dispute, if that has not been accomplished by this date.

FN22. We understand that our taking this action will affect the amount of the adjustment for prejudgment interest we have already discussed. We also suggest, but cannot order, that the parties consider structured payments that would provide for the actual medical bills, thus compensating for estimates or predictions of plaintiff's longevity, the costs of future services, medical advances, and the like. The authority to direct rather than merely suggest such a solution, with its attendant lower costs, can only come from a legislative or Supreme Court direction.

VI. Application of Settlement Proceeds

Plaintiff has cross-appealed from the judge's decision to deduct $799,000 from the award. The deduction represents the settlement of plaintiff's claim against the van driver and her employer. Plaintiff claims that the jury's determination that 100% of plaintiff's injuries were caused by the defective design of the Camaro ***543** forecloses any liability that the settling defendants could have had in this case. Defendant argues that the settling former co-defendants' liability was not adjudicated in this case, and that they may have been liable for some percentage. GM reasons further that the former co-defendants' liability would have encompassed not only injuries related solely to the accident, but also injuries relating to plaintiff's second injuries assessed under his crashworthiness claim.

Again, we must view the twin issues of causation of the accident and causation of the injury. Given plaintiff's claim that the van was straddling the center line forcing plaintiff to swerve around it (and putting to one side the independent witness' description of plaintiff having been on the van's side of the road with the van totally within its own lane), it is conceivable that a jury could have allocated some small percentage of negligence assessed against the settling former defendants. We proceed with this assumption to determine whether the jury's determination exonerated the settling defendants.

Huddell v. Levin, supra, provides an answer, namely, that the settling defendants in our case would have been in the position of the defendant Levin in that case. The court stated that "Levin may be held liable for *all* injuries, but General Motors may only be held liable for 'enhanced injuries'." 537 *F.*2d at 738 (emphasis in original). Such injuries would be "for the entire consequences of ... [the] accident which the automobile manufacturer played no part in precipitating." *Id.* at 739. A similar statement can be found in *Waterson v. General Motors Corp., supra,* 111 *N.J.* at 271, 544 *A.*2d 357, "A party responsible for the accident is always also responsible for the injuries incurred as a result of the accident." The 100 [[[[judication by the jury in plaintiff's claim against GM tells us nothing concerning the respective liabilities of the van driver to plaintiff or the van driver to defendant for contribution. Theoretically, the van driver might have been liable for a percentage of all damages occasioned by the accident, unless a court held that the design defect was an independent intervening cause, relieving the van driver of her liability.

***544** As we noted earlier, plaintiff's comparative negligence could have been assessed against the van driver's, but plaintiff's comparative fault as against GM would be limited to plaintiff unreasonably proceeding in the face of a known danger. *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 158-60, 406 *A.*2d 140; *Cartel Capital Corp. v. Fireco of New Jersey, supra,* 81 *N.J.* at 562-63, 410 *A.*2d 674. [FN23] GM, however, may have ****224** been able to hold the van driver for contribution for some percentage of the total fault responsible for plaintiff's injury. Plaintiff settled with the van driver and her employer after the earlier trial ended in a mistrial because of a hung jury, and GM apparently was satisfied not to have made a cross-claim for contribution or to have applied to the court to assess any percentage responsibility to the settling parties.

FN23. The *Restatement (Third) of Torts: Products Liability* notes that New Jersey is in a small minority of states applying this quasi- assumption of risk rule that grew out of comment n to § 402A of the *Restatement (Second) of Torts*. This rule had been an answer to the old total bar of a plaintiff's contributory negligence. At some point the Court may wish to reassess this rule so firmly stated in *Suter, Cartel Capital* and their progeny. If this were done, the assessment in Part I of this opinion might yield a different result. The Reporters for

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> the *Restatement (Third) of Torts: Products Liability* note that the courts of the country are "sharply split" on the issue of whether a plaintiff's negligent conduct leading to an accident should be the subject of comparative fault. They conclude that a "majority of the courts allow the introduction of plaintiff's conduct as comparative fault in a crashworthiness context." Reporters' Note, § 16, cmt. f. Our rules of limited comparative fault place us with the minority on this issue.

If the settling former co-defendants had been found to have no liability, the principles announced in *Rogers v. Spady*, 147 *N.J.Super.* 274, 278, 371 *A.*2d 285 (App.Div.1977), and confirmed in *Young v. Latta*, 123 *N.J.* 584, 591, 589 *A.*2d 1020 (1991), would permit plaintiff without question to keep the $799,000 as a windfall, [FN24] in addition to the award in this case. *See also* ***545***Johnson v. American Homestead Mortg. Corp.*, 306 *N.J.Super.* 429, 436- 37, 703 *A.*2d 984 (App.Div.1997). But, the windfall exists only where a jury determines that the settling party was 0% negligent. If a percentage of liability had been assessed against these former co-defendants, that percentage of the verdict would have been deemed satisfied. *Young v. Latta, supra*, 123 *N.J.* at 591, 589 *A.*2d 1020; *Rogers v. Spady, supra*, 147 *N.J.Super.* at 277, 371 *A.*2d 285. Lastly, a settlement may be, as here, accomplished with one who is neither exonerated nor assigned a percentage because the non-settling defendant never requested such a finding. Plaintiff claims that in such a case the non-settling defendant, GM, loses its right to claim a credit.

> FN24. In truth, such a settlement is only a windfall by hindsight. Plaintiffs and defendants settle for a variety of reasons, and are guided by enlightened self-interest as it is perceived at the time.

In *Young v. Latta, supra*, the Court assessed the consequences of the usual cross-claim for contribution and a delayed assertion of the claim without a formal cross-claim.

> Although early and diligent pursuit of a non-settling tortfeasor's claim for credit seems to have obvious advantages, there may be tactical reasons, not readily apparent to us, why the non-settler would delay asserting that claim. We emphasize that in this context trial courts should not countenance delay-- that is, the court should not permit the non-settler to wait until the last minute before alerting the court and the plaintiff's lawyer that the settler's conduct will be at issue. Because tactics cannot be allowed to foil discovery, in the context of a claim for credit the court should enforce strictly the Rules setting forth the time prior to trial within which answer to interrogatories may be amended to set forth a settler's fault. *See Rule* 4:17-7.
>
> [123 *N.J.* at 597-98, 589 *A.*2d 1020].

Here, however, the assertion was not just delayed, it was nonexistent. GM never claimed that the jury should assess the van driver's responsibility for plaintiff's injuries; no credit was even suggested until GM requested the $799,000 offset. In such a case, we refer to *Mort v. Besser Co.*, 287 *N.J.Super.* 423, 671 *A.*2d 189 (App.Div.1996), *certif. denied*, 147 *N.J.* 577, 688 *A.*2d 1053 (1997). There, in a slightly different setting (where the settling defendant had no separate liability as a matter of law, *id.* at 433, 671 *A.*2d 189), Judge Keefe commented on the obligations of the non-settling defendant to protect the record.

> Clearly, a non-settling defendant has the right to have a settling defendant's liability apportioned by the jury. ***546***Kiss v. Jacob*, 138 *N.J.* 278, 283-84, 650 *A.*2d 336 1994); *Cartel Capital Corp. v. Fireco of N.J.*, 81 *N.J.* 548, 566-67, 410 *A.*2d 674 (1980); *Rogers v. Spady*, 147 *N.J.Super.* 274, 278, 371 *A.*2d 285 (App.Div.1977). However, that liability must be proven. ****225** The fact of settlement does not prove the settlor's liability. "[I]f no issue of fact is properly presented as to the liability of the settling defendant, the fact finder cannot be asked, under *N.J.S.A.* 2A:15-5.2 or otherwise, to assess any proportionate liability against the settler." *Young v. Latta*, 233 *N.J.Super.* 520, 526, 559 *A.*2d 465 (App.Div.1989), *aff'd*, 123 *N.J.* 584, 589 *A.*2d 1020 (1991).
>
> [*Id.* at 431-32, 671 *A.*2d 189].

This duty on the part of the non-settling defendant to provide percentage of fault applicable to the settling party is also reflected in the proposed *Restatement (Third) of Torts: Apportionment of Liability*, § 27B (Council Draft No. 2, Nov. 13, 1997), which states:

> The plaintiff's recoverable damages are reduced by the comparative share of damages attributable to a settling tortfeasor who otherwise would have been liable to nonsettling defendants for contribution.

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> The settling tortfeasor's comparative share of damages is the percentage of comparative responsibility assigned to the settling tortfeasor multiplied by the total damages of the plaintiff.

Comment f to this section requires the non-settling defendant to prove "that the settling tortfeasor's tortious conduct was a legal cause of plaintiff's injury ..., that the settlement was for the injuries for which the plaintiff is suing, and that defendant would otherwise have a valid contribution claim against the settling tortfeasor." *Id.* at cmt. f. [FN25] Thus, we have before us what appears to be the first case of a procedural bar to the assessment of the settling defendant's liability for the accident. We see no reason to treat the bar any differently from any other assertion of a defendant's factual or legal inability to assert the contribution claim.

> FN25. The Reporters' Note at comment f of § 27B to *Restatement (Third) of Torts: Apportionment of Liability* cites as authority *Spaur v. Owens-Corning Fiberglas Corp.*, 510 *N.W.*2d 854, 863-64 (Iowa 1994). *Cf. Ball v. Johns-Manville Corp.*, 425 *Pa.Super.* 369, 625 *A.*2d 650, 661 (1993). In *Spaur*, there was no legal or factual basis for the non- settling defendant's claim. In *Ball*, the issue turned on factual bases for the claim against the settling defendants.

[17] The jury in our case made no determination of the van defendant's liability. It found only that as between plaintiff and ***547** defendant, defendant was 100% responsible for plaintiff's injuries. This finding would have been the same whether on one hand the school van had completely blocked the road and plaintiff had been operating his vehicle within the legal limit, or on the other, if the van were standing still in its own lane with its flashers activated. Defendant, by failing to have the jury assess the van driver's percentage of fault, gave up its potential claim to contribution. Under the entire controversy doctrine it is now too late to assert the claim. Defendant is not entitled to any credit for the settlement even if it amounts to a windfall to plaintiff.

VII. Application of Pro Tanto Credits

Defendant also claims that if a *pro tanto* credit were to be found proper, the credit should be against the verdict before prejudgment interest is assessed rather than after. Defendant properly notes that applying the credit to the judgment after the prejudgment interest is assessed in effect gives plaintiff the benefit of prejudgment interest on the credit, an amount that itself is subject to no such interest. We have vacated the credit, and therefore the issue is moot.

VIII. Conclusion

We affirm the liability judgment in favor of plaintiff. We vacate the prejudgment interest awarded on post-judgment medical expenses and earnings. We remand that portion of the jury's verdict that awards post-judgment medical expenses and earnings. We direct the judge to enter a remittitur after further argument, with or without proofs, reflecting the present value of these awards as more extensively described in this opinion. We reverse the judge's determination to give defendant a *pro tanto* reduction of the judgment based on plaintiff's settlement with the former defendants, the van driver and bus company. This amount shall be restored to the judgment. Except as stated, we affirm the damage award.

709 A.2d 205, 310 N.J.Super. 507, Prod.Liab.Rep. (CCH) P 15,201

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VII. Judicial Nominations

Brett Kavanaugh – Judicial Nominees

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

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	Nomination of Brett M. Kavanaugh [page 1] - To: Arlen Specter - From: John McAuliffe	1	05/31/2005	P6/b6;
002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;

COLLECTION TITLE:
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RESTRICTION CODES

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

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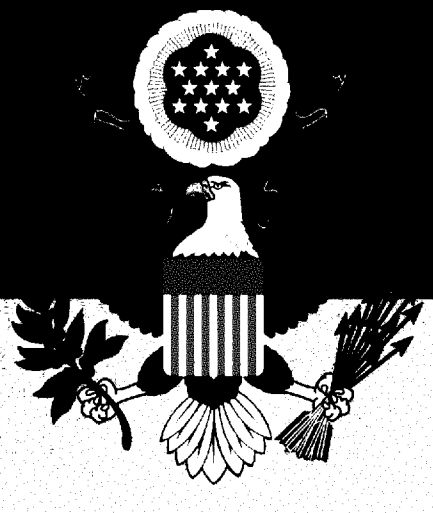
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute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

Records Not Subject to FOIA

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

BRETT M. KAVANAUGH



BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

WALTER K. STAPLETON
CIRCUIT JUDGE

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,

Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, PA 19106-1782
Phone: (215)-597-9642
Fax: (215)-597-7217

May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

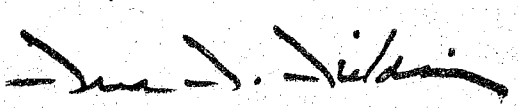
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,

Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

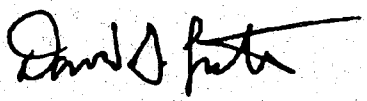
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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WRITER'S DIRECT NUMBER
202-736-8971

WRITER'S E-MAIL ADDRESS
bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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240-777-9105 Courthouse

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May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
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The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

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May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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May 26, 2005

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

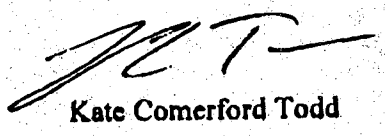
First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Rob.

RHM:sy

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002	Letter	Nomination of William Gerry Myers, III - To: Orrin Hatch - From: William Barr	1	07/14/2003	P6/b6;

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MYERS

JUDGE WILLIAM G. MYERS, III
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Biographical Information

- Served as Solicitor of the Interior, the chief legal officer and third-ranking official at the Department of the Interior.
- Served in the Department of Energy as the Deputy General Counsel for Programs, Assistant to the Attorney General of the United States, and as Legislative Counsel for Senator Alan Simpson of Wyoming.
- Served as Vice-Chairman of the Public Lands and Land Use Committee of the American Bar Association.
- Chaired the Idaho State Board of Land Commissioner's Federal Lands Task Force Working Group and the Boise Metro Chamber of Commerce's State Affairs and Natural Resources Subcommittee.
- Supported by the Governors of Alaska, Hawaii, Idaho, Montana, and Nevada, five states in the Ninth Circuit.

Allegations

- Accused of not adequately protecting the environment as Solicitor of the Interior
- Accused of clearing the way for a previously rejected gold mine in Imperial County, California that would pollute the environment and destroy the Quechan Tribe's sacred sites.
- Accused of not adequately defending the interests of Native Americans
- Violated federal ethics laws as well as an ethics agreement he signed before taking office, in which he promised not to deal with his former clients or employers
- Accused of giving preferential treatment to Harvey Robbins, a rancher, who frequently disregarded public land grazing laws.

Responses

- Judge Myers protected the environment by taking action to stop trespassers from illegally using a bulldozer to damage resources in Alaska, by supporting a settlement agreement whereby private owners of mining right relinquished their rights to min, and helped prevent the continued destruction of an important natural stream in California.
- Judge Myers did nothing to foreclose the Secretary from taking action against the mining proposals on the grounds that they would unduly impair the public lands; and merely found that the reasoning provided by the Department of the Interior for denying the proposal was inconsistent with federal law.
- Judge Myers supported legislation to vindicate the rights of the Pueblo of Sandia; he sided with a coalition of Indian tribes claiming the right to custody of the skeletal remains of an approximately 9,000-year-old man; and has been a strong defender of tribal interests under the Indian Gaming Act.
- A thorough investigation by the Department of Interior's Inspector General, found that Judge Myers complied with applicable federal ethics laws and his ethics agreement.

- Judge Myers was cleared of any wrongdoing during the investigation; it was found that she was not involved in the negotiations over the Robbins agreements, did not know the details of the allegations against Robbins, and did not sign the settlement agreement.

William G. Myers, III

Nominee to the Ninth Circuit

Provided by the White House
Office of Legislative Affairs

TABLE OF CONTENTS: WILLIAM G. MYERS III

Summary and Biographical Points for William G. Myers III 1

Statements by Select Supporters of William G. Myers III 4

Responses to False Allegations Against William G. Myers III 7

Select Letters of Support for William G. Myers III 17

Letter from the Honorable Alan K. Simpson, Former United States Senator from Wyoming 17
Joint Letter from the Honorable Mike Simpson and C.L. "Butch" Otter, United States Representatives from Idaho 18
Letter from the Honorable Henry J. Hyde, United States Representative from Illinois 19
Joint Letter from the Honorable Governors of Alaska, Hawaii, Idaho, Montana, and Nevada 20
Joint Letter from the Honorable Attorneys General of Alaska, Colorado, Delaware, Guam, Hawaii, Idaho, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and Wyoming 22
Letter from the Honorable Lawrence G. Wasden, Attorney General of Idaho 27
Letter from the Honorable Bill Anoatubby, Governor of The Chickasaw Nation 28
Letter from the Honorable John Berrey, Chairman of The Quapaw Tribe of Oklahoma 29
Letter from the Honorable Herman A. Williams, Jr., Chairman of the Board of Directors for the Tulalip Tribes 30
Letter from the Honorable Dick Thornburgh, Former Governor of Pennsylvania and Former Attorney General of the United States 31
Letter from the Honorable William P. Barr, Former Attorney General of the United States 32
Letter from the Honorable Marilyn S. Kite, Justice, Supreme Court of Wyoming 33
Letter from the Honorable Cecil D. Andrus, Former Governor of Idaho and Former Secretary of the Interior 34
Letter from the Honorable Michael J. Sullivan, Former Governor of Wyoming 35
Letter from the Honorable Charles Cuddy, Idaho State Representative 36
Letter from Michael Dennis, Director, Conservation, Real Estate and Private Lands, The Nature Conservancy 38
Letter from Robert A. Maynard, Esq., Partner, Perkins Coie 39

WILLIAM G. MYERS III
Nominee to the U.S. Court of Appeals for the Ninth Circuit

- Former Solicitor of the Interior William G. Myers III of Idaho is a highly respected attorney who has extensive experience in the fields of natural resources, public lands, and environmental law. His nomination enjoys widespread support from across the ideological and political spectrum.
    - Mr. Myers has been nominated to the Ninth Circuit, which covers the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Mariana Islands.
- Mr. Myers has had a distinguished career as a public servant and practicing attorney.
    - From July 2001 to October 2003, Mr. Myers served as Solicitor of the Interior, the chief legal officer and third-ranking official at the Department of the Interior. In that capacity, he supervised over 300 attorneys in 19 offices located across the country, managed a $47 million annual budget, and provided advice and counsel to the Secretary of the Interior as well as departmental offices and bureaus. He was confirmed by the United States Senate to serve as Solicitor of the Interior by unanimous consent.
    - Before coming to the Department of the Interior, Mr. Myers practiced at one of the most respected law firms in the Rocky Mountain region, where he participated in an extensive array of federal litigation involving public lands and natural resources issues.
    - From 1992 to 1993, Mr. Myers served in the Department of Energy as the Deputy General Counsel for Programs, where he was the Department's principal legal adviser on matters pertaining to international energy, government contracting, civilian nuclear programs, power marketing, and intervention in state regulatory proceedings.
    - Mr. Myers served as an Assistant to the Attorney General of the United States from 1989 to 1992. In this capacity, he prepared the Attorney General for his responsibilities as chairman of the President's Domestic Policy Council.
    - Before entering the Justice Department, Mr. Myers served for over four years as Legislative Counsel for Senator Alan Simpson of Wyoming, where he was Senator Simpson's principal adviser on public land issues.

- Mr. Myers is a nationally recognized expert in natural resources and public lands law.
    - Mr. Myers served as Vice-Chairman of the Public Lands and Land Use Committee of the American Bar Association Section on Environment, Energy, and Resources.
    - In his home state, Mr. Myers has chaired the Idaho State Board of Land Commissioner's Federal Lands Task Force Working Group and the Boise Metro Chamber of Commerce's State Affairs and Natural Resources Subcommittee.
- Mr. Myers is an avid outdoorsman and a committed conservationist.
    - For the last fifteen years, Mr. Myers has served as a volunteer for the National Park Service. Over that span, he has logged at least 180 days of volunteer service in numerous national parks, performing trail work, campsite cleaning, visitor assistance, and park patrols. Mr. Myers volunteered 7 days in the Bridger-Teton National Forest, where he worked on trail rehabilitation, tore down and packed out an illegal hunting camp, and conducted backcountry patrol.
    - Mr. Myers began camping and fishing as a child and became an Eagle Scout at age 15.
- Mr. Myers has widespread support from across the ideological and political spectrum.
    - Former Democratic Idaho Governor Cecil Andrus, who also served as Secretary of the Interior in the Carter Administration, supports Mr. Myers; he says that Mr. Myers possesses "the necessary personal integrity, judicial temperament, and legal experience" as well as "the ability to act fairly on matters of law that will come before him on the court."
    - Former Democratic Wyoming Governor Mike Sullivan, who also served as United States Ambassador to Ireland in the Clinton Administration, endorses Mr. Myers. He calls Mr. Myers "a thoughtful, well-grounded attorney who has reflected by his career achievements a commitment to excellence" and says that Mr. Myers "would provide serious, responsible, and intellectual consideration to each matter before him as an appellate judge and would not be prone to extreme or ideological positions unattached to legal precedents or the merits of a given matter."
    - Mr. Myers is backed by every member of Idaho's congressional delegation. In particular, Congressman Mike Simpson and Congressman C.L. "Butch" Otter write: "Without a doubt, Bill would make an outstanding Judge on the Ninth Circuit."
    - In 2004, Mr. Myers was endorsed by fifteen state Attorneys General, including current United States Senator Ken Salazar of Colorado as well as the Democratic Attorneys General of Oklahoma and Wyoming. These chief law enforcement officers stated that Mr. Myers "would bring to the Ninth Circuit strong intellectual skills, combined with a strong sense of civility, decency, and respect for all."

- Two former Attorneys General of the United States support Mr. Myers. Former Attorney General William P. Barr states that Mr. Myers "represents the epitome of judicial temperament" and "would make a great judge," while former Attorney General Dick Thornburgh calls Mr. Myers "exceptionally well qualified to serve as a member of the Federal Judiciary."

- In 2004, the Governors of Alaska, Hawaii, Idaho, Montana, and Nevada, five states in the Ninth Circuit, strongly backed Mr. Myers, writing that he had the "temperament and the judicial instincts to serve well on the Ninth Circuit."

- Mr. Myers is supported by numerous Native American leaders, including the Chairman of the Board of Directors of the Tulalip Tribes, the Governor of the Chickasaw Nation, and the Chairman of the Quapaw Tribe. In its endorsement of Mr. Myers, the Board of Directors of the Tulalip Tribes specifically noted that Mr. Myers "has a balanced record" and was "experienced and knowledgeable in Federal Indian law."

STATEMENTS BY SELECT SUPPORTERS OF WILLIAM G. MYERS III
Nominee to U.S. Court of Appeals for the Ninth Circuit

The Honorable Alan K. Simpson, Former United States Senator from Wyoming

"I have observed Bill closely for nearly 20 years. I can wholeheartedly vouch for his legal competence and his integrity. He has not yet had an opportunity to serve as a member of the judiciary. However, based on my observations of him as an attorney, counselor, and close friend I firmly believe that he would demonstrate superb judicial temperament in the role of a federal judge."

The Honorable Mike Simpson and C.L. "Butch" Otter, United States Representatives from Idaho

"Bill possesses a strong moral character and can be trusted with decisions of both individual and national importance. His extensive legal background gives him the qualifications he needs for this position. Bill has consistently brought a balanced approach to solving the many and varied issues we have discussed with him over the years."

The Honorable Henry J. Hyde, United States Representative from Illinois

"I fully support his nomination, as do many other people whose opinions I hold in high regard. These would include Mr. Myers' home state Senators, former Attorney Generals, and especially Alan Simpson, who is his former supervisor and my good friend. Many other people who I know have known Mr. Myers for many years and share my belief that that he will be an excellent appellate judge"

The Honorable Governors of Alaska, Hawaii, Idaho, Montana, and Nevada (in 2004)

"As representatives of states within the largest Circuit Court of Appeals in the nation, we are well aware of the need for quality judges who will provide a balanced perspective to the Ninth Circuit's extraordinary caseload. Mr. Myers will bring his background and experience in western issues to his fellow colleagues on the bench. These matters are significant to western Governors, and we believe Mr. Myers has the temperament and the judicial instincts to serve well on the Ninth Circuit."

The Honorable Attorneys General of Alaska, Colorado, Delaware, Guam, Hawaii, Idaho, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and Wyoming (in 2004)

"In our view, his thorough understanding of relevant legal precedents, decisions, and key policy interests and his outstanding legal reasoning as Solicitor demonstrate his keen intellect, sound judgment and the skills suitable for the bench. It is also our experience that Mr. Myers has acted with the highest standard of integrity, competence, and good judgment. His ability to objectively evaluate cases with calm deliberation and thoughtful analysis is precisely what we, as government officials, lawyers and citizens, expect from our appellate judges."

The Honorable Lawrence G. Wasden, Attorney General for the State of Idaho

"Mr. Myers has gained my respect because he has always been willing to listen to the State of Idaho's concerns and provide a timely and reasoned response. His professional competence as a lawyer, his integrity, as demonstrated through his advocacy for his client and his respect for the law, and his temperament in dealing with issues that stir deep feelings throughout Idaho and the West, are traits that Mr. Myers will bring to the Ninth Circuit."

The Honorable Bill Anoatubby, Governor of The Chickasaw Nation

"Based upon Mr. Myers' work as solicitor in the U.S. Department of the Interior, we know him to be fair and impartial. He listened to our concerns and acted upon them. He is extremely well-qualified to fill the post in the 9th Circuit, and has demonstrated his ability to listen and to reason. We believe Mr. Myers will be an asset to the Court."

The Honorable Dick Thornburgh, Former Governor of Pennsylvania and Attorney General of the United States

"I believe Bill is exceptionally well qualified to serve as a member of the Federal Judiciary. During the time I worked with Bill, he demonstrated not only an outstanding legal intellect, but also good judgment and exemplary integrity. I have no doubt that these skills, along with his sound temperament and work ethic, would serve him well on the bench, should he be confirmed."

The Honorable William P. Barr, Former Attorney General of the United States

"Apart from his outstanding legal ability and intellect, Bill represents the epitome of judicial temperament. He is fair-minded, careful, and balanced. He has good judgment and the highest integrity. He would make a great judge."

The Honorable Marilyn S. Kite, Supreme Court of Wyoming

"Bill is extremely knowledgeable on the legal issues related to natural resources and public lands. His practical experience in that area provides him with a sound pragmatic base from which to analyze those issues. He often found workable solutions to clients' problems without the need for litigation. I have no doubt about his legal ability and integrity. His successful record before federal and state courts as well as regulatory agencies confirms those attributes."

The Honorable Cecil D. Andrus, Former Governor of Idaho and Secretary of the Interior

"It is my judgment that Mr. Myers possesses the necessary personal integrity, judicial temperament, and legal experience appropriate to a nominee to the federal bench, and particularly the federal Court of Appeals. Further, it is my judgment that, while Mr. Myers has been an effective advocate in the past for specific policy positions with which I may have personally disagreed, he also possesses the ability to act fairly on matters of law that will come before him on the court."

The Honorable Michael J. Sullivan, Former Democratic Governor of Wyoming

"Mr. Myers has a wealth of legal experience in the private practice, in Washington, and in the areas of public lands and the environment. These are areas of extreme importance to the country and those of us in the West, and it is my view that Bill's experience would serve the Court and the Circuit well . . . . He is, in my view, an individual who would provide serious, responsible, and intellectual consideration to each matter before him as an appellate judge and would not be prone to extreme or ideological positions unattached to legal precedent or the merits of a given matter."

The Honorable Charles D. Cuddy, Democratic State Representative from Idaho

"Since becoming an Idaho State Legislator 13 years ago, I have had the opportunity to work with Mr. Myers on federal land management issues. This committee attempted and succeeded at facilitating management policies and procedures, providing efficiency, product production, and healthy forests in an environmentally sound manner . . . . As chairperson of this committee, Mr. Myers held the discussions on a very professional level with high quality and standard, while maintaining congressional order and produced workable conclusions. Mr. Myers' capability to conduct these meetings in a positive and forward-moving manner without indicating bias convinced me that he is a very disciplined person and would work to gain conclusion based on factual evidence."

WILLIAM G. MYERS III
Responses to False Allegations

ISSUE:

Some groups claim Mr. Myers did not adequately protect the environment as Solicitor of the Interior.

RESPONSES:

As Solicitor of the Interior, Mr. Myers vigorously fought to safeguard the environment and conserve natural resources.

- Mr. Myers sought to protect this country's lands, national parks and monuments.
    - Mr. Myers took action to stop trespassers from illegally using a bulldozer to damage resources in Alaska's Wrangell-St. Elias National Park/Preserve and recover damages for injuries from past activities.
    - Mr. Myers supported a settlement agreement whereby private owners of mining rights in Alaska's Denali National Park and Preserve relinquished their right to mine in exchange for compensation by the government. By reaching an agreement rather than litigating the miners' claims, the government avoided having to reexamine the validity of the mining rights, which would have required sampling and ground disturbance within the park, thus damaging park resources.
    - Mr. Myers helped expand and secure the status of Governors Island National Monument (in New York Harbor) through use of Presidential proclamation authority under the Antiquities Act. *See* Presidential Proclamation 7647 of February 7, 2003.
    - Mr. Myers authorized the regional solicitor of Nevada to take numerous cases, such as *Colvin v. Snow*, to the U.S. Attorney to require ranchers to pay applicable grazing fees.
    - Mr. Myers helped prevent the continued destruction of an important natural stream in California's White Mountains. As Solicitor, Mr. Myers supported the government's successful pursuit of a preliminary injunction against a farmer who was entering onto public lands and replacing a segment of Marble Creek, one of the last natural streams flowing out of National Forest System lands in California's White Mountains, with a pipeline. Without the preliminary injunction, the government would not have been able to restore the Creek before winter, thus endangering fish, wildlife, and vegetation.

- Mr. Myers recognized the importance of protecting indigenous animals, as well as the environment.

    - Mr. Myers supported an agreement removing two dams from the Penobscot River, in what conservationists called "the biggest restoration project north of the Everglades." Misty Edgecomb, *A River Reborn*, BANGOR DAILY NEWS, Oct. 7, 2003. The agreement, devised by a coalition including the Penobscot Nation, environmental groups, and state and federal officials, will allow the Atlantic salmon and ten other species of native sea-run fish in the Penobscot River to reach their spawning habitat, thus dramatically raising the population of these fish in the Penobscot River.

    - Mr. Myers participated in deliberations that resulted in the Fish and Wildlife Service rejecting a Wyoming wolf management plan because the plan designated wolves as predators, allowing the wolves to be killed virtually at will and hunted as trophy game in parts of the state.

    - Mr. Myers supported protecting information detailing the nesting sites of endangered birds to avoid exposing the birds to harassment from birdwatchers and physical harm from landowners.

- Mr. Myers fought to protect our nation's waters and ensure the nation was adequately compensated for the private use of any natural resources.

    - Mr. Myers defended a reasonable interpretation of the Outer Continental Shelf Deep Water Royalty Relief Act to ensure that oil and gas companies did not enjoy an unjustified windfall through royalty-free activity for at least two decades.

    - Mr. Myers supported record royalty recoupment and penalties against the Shell Oil Company for its illegal flaring and venting of natural gas in the Gulf of Mexico. The company reached a $49 million settlement with the Department of the Interior's Minerals Management Service in 2003.

ISSUE:

As Solicitor of the Interior, Mr. Myers repudiated a predecessor's legal opinion, thus clearing the way for a previously rejected gold mine in Imperial County, California that would pollute the environment and destroy the Quechan Tribe's sacred sites.

RESPONSES:

- Mr. Myers did not approve Glamis Gold, Ltd.'s proposal to build a gold mine in Imperial County, California. Rather, he only found that the reasoning previously provided by the Department of the Interior for denying Glamis's proposal was inconsistent with federal law.

    - Upon arriving at the Department of the Interior, Mr. Myers was confronted by a host of pending lawsuits against the Department resulting from a 1999 opinion issued by his predecessor interpreting the Federal Land Policy and Management Act and the changes instituted to hard-rock mining regulations.

    - After reviewing his predecessor's opinion, Mr. Myers found that it would be difficult to defend in court because it was inconsistent with the plain language of the Federal Land Policy and Management Act.

- Mr. Myers's opinion did nothing to foreclose the Secretary from promulgating regulations defining the term "undue impairment" and thus allowing the Department to deny mining proposals on the grounds that they would unduly impair the scenic, scientific, and environmental values of public lands.

    - His predecessor concluded that the Secretary of the Interior possessed the authority to deny Glamis's proposal pursuant to section 601(f) of the Federal Land Policy and Management Act if it would result in "undue impairment" of cultural, historical, and archaeological resources.

    - Section 601(f) of the Federal Land Policy and Management Act preserves the applicability of federal mining laws within the California Desert Conservation Act with the following exception: "all mining claims located on public lands within the California Desert Conservation Area shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section." The provision further directs that "[s]uch regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation area against undue impairment."

    - In the years following the enactment of the FLPMA, however, the Department of the Interior did not exercise its statutory discretion to prescribe regulations pursuant to section 601(f) defining the meaning of the phrase "undue impairment."

- As a result, Mr. Myers appropriately concluded that the Department could not reject Glamis's proposal pursuant to section 601(f). Because the Department had failed to adopt the necessary regulations defining the meaning of "undue impairment," it would have been difficult to defend in court a decision rejecting Glamis's proposal on the grounds that it would cause unduly impair of the scenic, scientific, and environmental values of public lands.

- Senior officials from the Department of the Interior consulted with representatives of the Quechan Tribe concerning the Glamis Imperial gold mine.

  - Deputy Secretary J. Steven Griles, Assistant Secretary for Indian Affairs Neal McCaleb, and Deputy Assistant Secretary for Indian Affairs Wayne Smith met with the President of the Quechan Tribe and other Tribal members in Arizona to discuss the Glamis gold mine.

  - Deputy Assistant Secretary for Indian Affairs Wayne Smith visited with Tribal officials in California to discuss the proposed gold mine.

- Mr. Myers fully considered the views of the Quechan Tribe before issuing his opinion concerning the Glamis Imperial gold mine.

  - Mr. Myers learned about the Quechan Tribe's concerns from an August 31, 2001 letter authored by the Tribe's attorney as well as from discussions with the attorneys in his office handling the matter.

  - While Mr. Myers accepted the invitation of Glamis representatives to meet in Washington, DC to discuss the mine, these representatives were disappointed in the meeting because Mr. Myers refused to engage them in a discussion of their ideas or views since he had already considered all of the relevant arguments and had begun drafting his opinion.

  - Had the Quechan Tribal leaders asked Mr. Myers for a meeting in Washington, DC to discuss the mine, he would have gladly accepted. The Tribal leaders, however, invited Mr. Myers to meet them in California, and Mr. Myers received this letter shortly before the terrorist attacks of September 11, 2001, and did not schedule the trip.

  - The issue under consideration by Mr. Myers was a pure question of statutory interpretation that did not involve any material factual disputes. In those cases, however, where the facts were important, such as the creation of a trust area for the Pueblo of Sandia Tribe, Mr. Myers traveled and consulted with tribes before reaching a conclusion.

- After Mr. Myers issued his opinion, he met with the Quechan Tribal leaders in Washington, DC to discuss the mine proposal and the possibility of a federal buy-out of the Glamis mine.

- The Department of the Interior's Inspector General found that Mr. Myers conducted himself appropriately and ethically in connection with the Glamis decision. He concluded that the conduct of Department of Interior officials involved in the Glamis matter "was appropriate, that their decisions were supported by objective documentation, and that no undue influence or conflict of interest affected the decision-making process related to the Imperial Project."

ISSUE:

Some groups claim Mr. Myers did not adequately defend the interests of Native Americans as Solicitor of the Interior.

RESPONSES:

Mr. Myers worked vigorously as Solicitor of the Interior to protect the interests of Native Americans.

- Mr. Myers supported legislation to vindicate the rights of the Pueblo of Sandia, a federally recognized Indian Tribe in central New Mexico, by creating the T'uf Shur Bien Preservation Trust Area within New Mexico's Cibola National Forest.
    - This legislation recognized and protected for the first time the Pueblo of Sandia's rights and interests in approximately 10,000 acres of land mistakenly omitted from the Pueblo's land grant due to an incorrect survey.
    - This legislation was backed by a broad bipartisan coalition as well as the Pueblo of Sandia.
- Mr. Myers sided with a coalition of Indian tribes claiming the right to custody of the skeletal remains of an approximately 9,000-year-old man (the "Kennewick Man") under the Native American Graves Protection and Repatriation Act. A group of forensic scientists and anthropologists had sought to study and conduct invasive tests on the remains.
- Mr. Myers has been a strong defender of tribal interests under the Indian Gaming Regulatory Act.
    - Mr. Myers worked to defend the constitutionality of a provision of the California Constitution giving Indian tribes the exclusive right to conduct casino gaming in California as well as 62 Tribal-State gaming compacts negotiated by California Indian Tribes and the State of California. The Ninth Circuit recently sided with Mr. Myers by upholding the constitutionality of the provision and the contested gaming compacts. *See Artichoke Joe's California Grand Casino, v. Norton*, 353 F.3d 712 (2003).
    - Mr. Myers fought to uphold the Secretary of the Interior's decision to take into trust for the United Auburn Indian Community a parcel of land located in Placer County, California, thus enabling the Auburn Tribe to develop a casino on that property. The D.C. Circuit recently upheld the legality of the Secretary's decision taking the land into trust. *See City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003).

- Mr. Myers helped negotiate an agreement removing two dams from the Penobscot River and paving the way for the Penobscot Indian Nation to exercise its tribal fishing rights.
    - This agreement was supported by the State of Maine, conservation groups, the Penobscot Indian Nation, and the power company that owned the dams.
    - It will allow for the Atlantic salmon and ten other species of native sea-run fish in the Penobscot River to reach their spawning habitat, thus dramatically raising the population of these fish in the Penebscot River.
    - Barry Dana, Chief of the Penobscot Indian Nation, praised the agreement, stating "Maine's Penobscot River watershed has been the homeland for the Penobscot Indian Nation for more than 10,000 years. This agreement will restore our ability to obtain our sustenance, culture, and identity from the river that bears our name."
- Mr. Myers worked to implement President Bush's Indian Education Initiative.
    - The Indian Education Initiative includes greater financial support to Bureau of Indian Affairs schools, including over $200 million annually for school construction.
    - The Indian Education Initiative placed renewed emphasis on improving reading, math, and science education, as well as the teaching of tribal languages and cultures, and expanding the use of educational technology.

ISSUE:

While serving as Solicitor of the Interior, Mr. Myers violated federal ethics laws as well as an ethics agreement he signed before taking office, in which he promised not to deal with his former clients or employers.

RESPONSES:

Following a thorough investigation of these allegations by the Department of the Interior's Office of Inspector General, the Office of Government Ethics found that Mr. Myers complied with applicable federal ethics laws and his ethics agreement.

- On August 5, 2003, Public Employees for Environmental Responsibility and Friends of the Earth suggested that Mr. Myers may have violated federal ethics law as well as the ethics agreement that he signed before taking office by participating in 27 meetings. They alleged that these meetings included former clients of Mr. Myers' law firm, attorneys at his former firm, or involved potential changes to federal grazing regulations. The two environmental groups asked the Office of Government Ethics to launch an investigation into their allegations.

- After learning of these allegations, Mr. Myers asked the Secretary of the Interior to assign appropriate personnel to investigate these charges.

- The Department of the Interior's Office of Inspector General then conducted a thorough investigation of these charges. In this investigation, personnel from the Office of the Inspector General interviewed over 40 individuals and reviewed hundreds of documents, including documents stored on Mr. Myers' Department of the Interior computer.

- The results of the Inspector General's investigation were referred to the Office of Government Ethics.

- The Office of Government Ethics concluded that Mr. Myers did not violate federal ethics laws or his ethics agreement with regard to any of the meetings raised in the complaints filed by environmental groups, and "Mr. Myers actively sought to comply with both his ethics agreement specifically and the rules and laws governing the conduct of federal Executive branch employees generally."

ISSUE:

While Mr. Myers was Solicitor of the Interior, his office negotiated, over the U.S. Attorney's objections, a sweetheart deal that rewarded, rather than punished, Harvey Robbins, a rancher who frequently disregarded public land grazing laws. The Inspector General of the Department of the Interior has since harshly criticized this settlement agreement for giving Robbins preferential treatment and compromising the interests of the Department of the Interior.

RESPONSES:

In his recent investigation, the Inspector General cleared Mr. Myers of any allegations of wrongdoing in connection with the Robbins settlement agreement.

- The Inspector General "ascribed no fault whatsoever to Mr. Myers" for any errors made by the Department in concluding a settlement agreement with Robbins.

- Indeed, the Inspector General made clear his belief that Mr. Myers was "victimized when he was given a distorted explanation by one of his senior Associate Solicitors" of how the settlement agreement had been reached.

Mr. Myers was not involved in the negotiations over the Robbins settlement agreement. He did not know the details of the allegations against Robbins. Additionally, he did not sign the settlement agreement.

- According to the Inspector General's report, BLM Director Kathleen Clarke instructed that a settlement agreement between BLM and Robbins be pursued.

- According to that same report, this agreement was then negotiated by Robert Comer, an Associate Solicitor in Mr. Myers's office.

- The Inspector General's report contains no evidence whatsoever that Mr. Myers had any involvement in the negotiation of the settlement agreement or had any awareness of the details of that agreement before it was signed.

Once Mr. Myers became aware of potential problems with the Robbins settlement, he swiftly took appropriate action to ensure that the matter would be thoroughly investigated.

- It was not until 6 months after the final settlement agreement was signed that Mr. Myers became aware of complaints from environmental groups regarding the settlement agreement, and specific complaints regarding the fact that the rancher had not been required, as a condition of the settlement, to drop RICO charges he had pending against BLM employees.

- When he became aware of the complaints, the Inspector General's report verifies that Mr. Myers looked into the matter, and inquired why the RICO charges were not dropped as a condition of the agreement. In response to his inquiry, Mr. Myers was

informed by Mr. Comer that the U.S. Attorney's Office handling the matter on behalf of the employees did not want those charges dropped because it believed that its position was correct and the case would be won outright. The Inspector General concluded that Mr. Myers had been misled by Mr. Comer

- Mr. Myers, along with the Assistant Secretary for Lands and Mineral Management, also appointed senior officials within the Department, who had not been involved in the settlement negotiations, to investigate the matter.

N K. SIMPSON

United States Senator (Ret.)
WYOMING

July 8, 2003

Chairman Orrin Hatch
U.S. Senate Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Orrin:

Hello old friend! I am so very pleased that one fine attorney who worked for me in the Senate has been nominated to serve on the U.S. Court of Appeals for the 9th Circuit. I am referring to Bill Myers who was my Legislative Counsel from 1985 to 1989.

You may remember him...for Bill was my key staff attorney on Senate Judiciary Committee issues pertaining to the Constitution, courts, antitrust, and criminal law matters. His portfolio also included advising me on important public land issues.

From 1989 to 1993, Bill worked at the Department of Justice and also at the Department of Energy. From 1993 until 2001 he was a private sector attorney. Since 2001, he has been the Solicitor at the Department of Interior, and I understand he has done a most outstanding job there.

I have observed Bill closely for nearly 20 years. I can wholeheartedly vouch for his legal competence and his integrity. He has not yet had an opportunity to serve as a member of the judiciary. However, based on my observations of him as an attorney, counselor, and close friend I firmly believe that he would demonstrate superb judicial temperament in the role of a federal judge.

I deeply believe that he would be a "mainstream," and a very balanced Justice and that he would be a great asset to the 9th Circuit Court of Appeals.

Please feel free to contact me if I can furnish any further information regarding this fine person.

Respectfully and sincerely...
and with warm personal regards,

Alan K. Simpson

Cc: Office of Legal Policy
Department of Justice

Not Printed at Government expense

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CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

January 6, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
Senate Dirksen- 224
Washington, D.C. 20510

Dear Chairman Hatch:

We are writing today, as Idaho's Representatives to the U.S. House of Representatives, in support of the nomination of William "Bill" Myers to a position on the United States Court of Appeals for the Ninth Circuit. As we both personally know Bill, we know he would make a fine member of the Ninth Circuit.

Having followed Bill's career for several years, we know he would make decisions in a thoughtful and expeditious manner. Bill possesses a strong moral character and can be trusted with decisions of both individual and national importance. His extensive legal background gives him the qualifications he needs for this position. Bill has consistently brought a balanced approach to solving the many and varied issues we have discussed with him over the years. We are confident that his opinions will be well within the mainstream of judicial thought.

Without a doubt, Bill would make an outstanding Judge on the Ninth Circuit. Please feel free to contact either of us if you have any questions regarding Bill's capabilities.

Sincerely,

Mike Simpson
Member of Congress

C.L. "Butch" Otter
Member of Congress

Cc: The Honorable Patrick J. Leahy

HENRY J. HYDE, ILLINOIS
Chairman

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Congress of the United States

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SHELLEY BERKLEY, NEVADA
GRACE F. NAPOLITANO, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
DIANE E. WATSON, CALIFORNIA
ADAM SMITH, WASHINGTON
BETTY MCCOLLUM, MINNESOTA
CHRIS BELL, TEXAS

ROBERT R. KING
Democratic Staff Director

PETER M. YEO
Democratic Deputy Staff Director

DAVID S. ABRAMOWITZ
Democratic Chief Counsel

September 15, 2003

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

Dear Mr. Chairman:

As you know, William Myers has been nominated by President Bush to be a judge on the Ninth Circuit Court of Appeals. I fully support his nomination, as do many other people whose opinions I hold in high regard. These would include Mr. Myers' home state Senators, former Attorneys General, and especially Alan Simpson, who is his former supervisor and my good friend. Many other people who I know have known Mr. Myers for many years and share my belief that he will be an excellent appellate judge.

I appreciate the many demands on your Committee's calendar as this year comes to a close. But, given the extraordinary importance of a full-staffed and competent judiciary, I hope that you will be able to schedule a hearing on the nomination of Mr. Myers at an early date so that he might receive Senate consideration and a vote before this First Session of the 108th Congress concludes.

With best wishes, I remain

Sincerely,

HENRY J. HYDE
Chairman

OFFICES OF THE GOVERNORS

March 8, 2004

VIA FACSIMILE and U.S. MAIL

The Honorable Orrin Hatch
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington D.C. 20510

Re: Nomination of William G. Myers III to the United States Court of Appeals for the Ninth Circuit

Dear Senator Hatch:

We, the undersigned Governors, are writing to express support for the nomination of William G. Myers III to the United States Court of Appeals for the Ninth Circuit.

As representatives of States within the largest Circuit Court of Appeals in the nation, we are well aware of the need for quality judges who will provide a balanced perspective to the Ninth Circuit's extraordinary caseload.

Mr. Myers will bring his background and experience in western issues to his fellow colleagues on the bench. These matters are significant to western Governors, and we

believe Mr. Myers has the temperament and the judicial instincts to serve well on the Ninth Circuit.

We ask that the Committee closely examine the record of Mr. Myers. We know he is well qualified to serve on the United States Court of Appeals for the Ninth Circuit and we ask that the Committee act favorably on his nomination.

DIRK KEMPTHORNE
Governor

JUDY MARTZ
Governor

KENNY GUINN
Governor

LINDA LINGLE
Governor

FRANK MURKOWSKI
Governor

A Communication from the
Attorneys General of
Alaska • Colorado • Delaware • Guam • Hawaii
Idaho • Nevada • North Dakota • Ohio • Oklahoma
Pennsylvania • South Dakota • Utah • Virginia • Wyoming

BY TELEFAX: 202-228-1698

January 30, 2004

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

Dear Chairman Hatch:

We, the undersigned state Attorneys General and chief legal officers of our states, strongly support the confirmation by the United States Senate of the President's nomination of William G. Myers III to the United States Court of Appeals for the Ninth Circuit.

Mr. Myers most recently has served with distinction as Solicitor for the United States Department of Interior, handling with great care and attention legal matters that necessarily involve and impact the States of the Union. These matters concern numerous federal interests such as endangered species, Indian affairs, federal lands, water allocation and distribution, timber, fish and wildlife, and minerals. These interests often exist in a delicate balance with state and local interests that we are charged with protecting. As Attorneys General, we observed that Mr. Myers, while dutifully representing his client, the federal government, always maintained an objectivity and practical understanding of the conflicting demands relating to those interests. In our view, his thorough understanding of relevant legal precedents, decisions and key policy interests and his outstanding legal reasoning as Solicitor demonstrate his keen intellect, sound judgment and the skills suitable for the bench.

It is also our experience that Mr. Myers has acted with the highest standards of integrity, competence and good judgment. His ability to objectively evaluate cases with calm deliberation and thoughtful analysis is precisely what we, as government officials, lawyers and citizens, expect from our appellate judges. As Attorneys General, we appear before the Circuit Courts of Appeal with considerable frequency. Clearly, we value judges who display a temperament that is even-handed, respectful and thoughtful - the temperament displayed by Mr. Myers. Mr. Myers would bring to the Ninth Circuit strong intellectual skills, combined with a strong sense of civility, decency and respect for all.

We therefore urge the United States Senate to favorably consider and confirm Mr. Myers as a judge on the United States Court of Appeal for the Ninth Circuit. Please do not hesitate to contact us for further views or information, or contact Tom Gede, Executive Director, Conference of Western Attorneys General (CWAG) at 916-323-1939.

Sincerely,

GREGG RENKES
Attorney General of Alaska

KEN SALAZAR
Attorney General of Colorado

M. JANE BRADY
Attorney General of Delaware

LAWRENCE WASDEN
Attorney General of Idaho

BRIAN SANDOVAL
Attorney General of Nevada

W.A. DREW EDMONDSON
Attorney General of Oklahoma

LARRY LONG
Attorney General of South Dakota

MARK SHURTLEFF
Attorney General of Utah

PATRICK CRANK
Attorney General of Wyoming

GERALD J. PAPPERT
Attorney General of Pennsylvania

WAYNE STENEHJEM
Attorney General of North Dakota

JIM PETRO
Attorney General of Ohio

Jerry W. Kilgore

JERRY KILGORE
Attorney General of Virginia

cc: The Honorable Patrick Leahy, Ranking Minority Member,
Committee on the Judiciary

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

July 9, 2003

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

Dear Chairman Hatch:

I write to you in support of the United States Senates' favorable consideration and confirmation of the President's nomination of William G. Myers III to the United States Court of Appeals for the Ninth Circuit.

As you know, Mr. Myers has served as the Solicitor for the United States Department of the Interior (DOI). In my capacity as Attorney General of the State of Idaho, I have represented the State of Idaho's interests in matters before the DOI. The State of Idaho is frequently involved in legal matters with the DOI due to the large swaths of land managed by the DOI and other federal agencies. I have worked with Mr. Myers in his capacity as Solicitor of the DOI on many of these matters. My unqualified endorsement of Mr. Myers is based upon these personal experiences.

One only needs to read the newspaper to see how polemic natural resource and environmental issues have become. The DOI is often at the center of these multi-issue and multi-party controversies. In Idaho, we have had to deal with the DOI on the Endangered Species Act, federal reserved water rights and Indian law issues. In each of these contexts, I have observed Mr. Myers' ability to set aside the rhetoric and to objectively evaluate the respective interests of the parties. He has been a strong advocate for the interests of his clients, just as a lawyer must be, and he has also been able to find ways to achieve his clients' interests by providing a reasoned means of resolving the conflict.

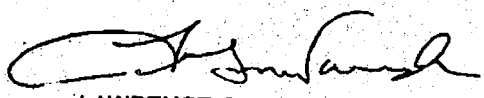
A mark of an outstanding attorney is one who has gained the respect of his peers by what he does, not what he says. Mr. Myers has gained my respect because he has always been willing to listen to the State of Idaho's concerns and provide

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2530
Located at 700 W. Jefferson Street, Suite 210

a timely and reasoned response. His professional competence as a lawyer, his integrity, as demonstrated through his advocacy for his client and his respect for the law, and his temperament in dealing with issues that stir deep feelings throughout Idaho and the West, are traits that Mr. Myers will bring to the Ninth Circuit. These attributes are essential in candidates seeking to serve as a judge on the federal bench.

I urge the United States Senate to favorably consider and confirm Mr. Myers' nomination to serve as a judge on the United States Court of Appeals for the Ninth Circuit.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

LGW:cs:tpo:jc

Cc: The Honorable Patrick J. Leahy
Office of Legal Policy

OFFICE OF THE GOVERNOR
The Chickasaw Nation
Post Office Box 1548 • Ada, Oklahoma 74821
(580) 436-2603 • Fax (580) 436-4287
http://www.chickasaw.net/~cnation

BILL ANOATUBBY
GOVERNOR

January 30, 2004

Honorable Orrin G. Hatch, Chairman
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510-6275

Via Facsimile: 202-224-9102

Dear Mr. Chairman:

Please allow me this opportunity to highly recommend your consideration of Mr. Bill Myers, whom we understand is being considered for appointment to the U.S. 9th Circuit Court of Appeals.

Based upon Mr. Myers' work as solicitor in the U.S. Department of the Interior, we know him to be fair and impartial. He listened to our concerns and acted upon them. He is extremely well-qualified to fill the post in the 9th Circuit, and has demonstrated his ability to listen and to reason. We believe Mr. Myers will be an asset to the Court.

Your consideration of Mr. Bill Myers will be appreciated.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

cc: Senator Patrick J. Leahy

QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1853
FAX (918) 542-4694

Via Facsimile 202/228-1698

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of William Gerry Myers III

Dear Chairman Hatch and Ranking Member Leahy:

I am writing this letter to express my support for William Myers nomination as United States Circuit Judge for the Ninth Circuit.

Mr. Myers has a long history as a public servant; he was a former aide to Senator Alan Simpson, and practiced law in Boise, Idaho for twenty years before joining the Interior Department in 2001 as Solicitor.

His writings, public statements and legal work also reveal his sharp legal mind. Mr Myers appears to be a qualified choice for this court. I support this nomination.

Sincerely,

John L. Berrey
Chairman, Quapaw Tribe

Board of Directors:
Herman Williams Jr., Leb Sil Tsed - Chairman
Stanley G. Jones Sr., Schn Hallem - Vice Chairman
Marie M. Zackuse - Secretary
Mel Sheldon - Treasurer
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Les Parks - Board Member
Linda L. Jones - General Manager

THE TULALIP TRIBES

6700 TOTEM BEACH ROAD
TULALIP, WA 98271-9694
(360) 651-4000
FAX (360) 651-4032

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliot

March 9, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Vic Facsimile: 202-224-9102

Dear Honorable Chairman Hatch:
Dear Honorable Ranking Member Leahy:

The Tulalip Tribes is writing to support the nomination of William G. Myers, III to the 9th Circuit Court of Appeals.

Mr. William G. Myers, III served as a solicitor in the U.S. Department of the Interior. We find that he has a balanced record to defend the interest of Native Americans. The 9th Circuit Court of Appeals is in need of an appointment by an individual experienced and knowledgeable in Federal Indian Law.

The appointment of Mr. William G. Myers, III would receive the support of The Tulalip Tribes.

Respectfully submitted,

Herman A. Williams, Jr.
Chairman
Board of Directors

HAW/pcp

DICK THORNBURGH

(b)(6)

June 16, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of William Gerry Myers, III

Dear Orrin:

It is my understanding that Bill Myers, currently serving as Solicitor of the United States Department of Interior, has been nominated by President Bush to serve on the United States Court of Appeals for the Ninth Circuit.

I have known Bill for a number of years, dating back to 1989 when Bill served on my staff while I was Attorney General. I believe Bill is exceptionally well qualified to serve as a member of the Federal Judiciary. During the time I worked with Bill, he demonstrated not only an outstanding legal intellect, but also good judgment and exemplary integrity. I have no doubt that these skills, along with his sound temperament and work ethic, would serve him well on the bench, should he be confirmed.

If you would like to discuss this further, please do not hesitate to contact me.

Sincerely,

Dick Thornburgh,

cc: The Honorable Patrick J. Leahy

WILLIAM P. BARR

July 14, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of William Gerry Myers, III

Dear Orrin:

It is my understanding that Bill Myers, currently serving as Solicitor of the United States Department of Interior, has been nominated by President Bush to serve on the United States Court of Appeals for the Ninth Circuit.

I have known Bill since 1989 when Bill served on Attorney General Dick Thornburgh's staff. I believe Bill is exceptionally well qualified to serve as a member of the Federal Judiciary. Apart from his outstanding legal ability and intellect, Bill represents the epitome of judicial temperament. He is fair-minded, careful and balanced. He has good judgment and the highest integrity. He would make a great judge.

If you would like to discuss this further, please do not hesitate to contact me.

Sincerely yours,

William P. Barr

cc: The Honorable Patrick J. Leahy

(b)(6)

Supreme Court of Wyoming
Cheyenne, Wyoming 82002

MARILYN S. KITE, JUSTICE

TELEPHONE: (307) 777-7422

July 15, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: William G. Myers III

Dear Mr. Chairman:

I understand that William G. Myers III is under consideration for an appointment to serve on the United States Court of Appeals for the 9th Circuit. I have known Bill for over a decade and am pleased to recommend him for your favorable consideration.

I was a partner with Holland & Hart when Bill joined the firm in 1997 and had many opportunities to work with him until May of 2000 when I left the firm to begin my service on the Wyoming Supreme Court. Bill is extremely knowledgeable on the legal issues related to natural resources and public lands. His practical experience in that area provides him with a sound pragmatic base from which to analyze those issues. He often found workable solutions to clients' problems without the need for litigation. I have no doubt about his legal ability and integrity. His successful record before federal and state courts as well as regulatory agencies confirms those attributes.

As far as judicial temperament is concerned, Bill's easygoing, pleasant personality will lend itself well to the proper exercise of judicial duties, if he is confirmed. He has demonstrated his ability to work constructively with people who hold widely divergent views on the issues. As a result, I expect he would demonstrate an appropriate judicial temperament.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Marilyn S. Kite

Marilyn S. Kite
Justice

MSK:gp
cc: The Honorable Patrick J. Leahy

CECIL D. ANDRUS

August 19, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy:

I write in support of the President's nomination of William Myers of Boise, Idaho to a position on the United States Court of Appeals for the Ninth Circuit.

It is my judgment that Mr. Myers possesses the necessary personal integrity, judicial temperament, and legal experience appropriate to a nominee to the federal bench, and particularly the federal Court of Appeals. Further, it is my judgment that, while Mr. Myers has been an effective advocate in the past for specific public policy positions with which I may have personally disagreed, he also possesses the ability to act fairly on matters of law that will come before him on the court.

My old friend, and occasional political adversary, and your old colleague, Senator Al Simpson of Wyoming, speaks very highly of Bill Myers and has known him for years. I know Senator Simpson to be a good judge of character and his endorsement carries great weight with me, as well.

I hope you will look with favor on Bill Meyer's nomination to the Ninth Circuit Court of Appeals.

With best regards,

Sincerely,

Cecil D. Andrus

cc: Department of Justice – Office of Legal Policy

Governor Michael J. Sullivan
Attorney at Law
msullivan@rothgerber.com

123 West First Street, Suite 200
Casper, Wyoming 82601-2480
Telephone 307.233.0222
Fax 307.232.0077
www.rothgerber.com

Denver • Colorado Springs • Cheyenne • Casper

January 10, 2004

The Honorable Senator Orrin G. Hatch
Chairman, Senate Judiciary Committee
104 Hart Office Building
Washington, DC 20510

Re: William G. Meyers

Dear Senator Hatch:

I am writing to support the nomination of William G. Meyers for appointment to the Ninth Circuit Court of Appeals. I have known Mr. Meyers since he first practiced law with the firm of Davis & Cannon in Sheridan, Wyoming, and worked with him during his service with Al Simpson as Legislative Counsel, which overlapped with my first term as Governor of Wyoming.

Mr. Meyers has a wealth of legal experience in the private practice, in Washington, and in the areas of public lands and the environment. These are areas of extreme importance to the country and those of us in the West, and it is my view that Bill's experience would serve the Court and the Circuit well. While I don't profess intimate knowledge with the nature of all the issues before the Ninth Circuit, I am confident those areas in which Bill has developed an expertise would figure prominently. I believe him to be a thoughtful, well-grounded attorney who has reflected by his career achievements a commitment to excellence. He is, in my view, an individual who would provide serious, responsible and intellectual consideration to each matter before him as an appellate judge and would not be prone to extreme or ideological positions unattached to legal precedent or the merits of a given matter.

I urge your favorable consideration of the nomination.

With best regards, I am

Very truly yours,

Rothgerber Johnson & Lyons LLP

Michael J. Sullivan

MJS:mi
H:\Ma\mf\corresp 04\Senator Hatch-W.O Meyers.doc

CHARLES D. CUDDY
DISTRICT 8
CLEARWATER, IDAHO, LEWIS
& VALLEY COUNTIES

HOME ADDRESS
P.O. BOX 64
ORofino, IDAHO 83544
HOME (208) 476-3799

COMMITTEES
REVENUE & TAXATION
RESOURCES & CONSERVATION
TRANSPORTATION & DEFENSE
LEGISLATIVE COUNCIL

House of Representatives
State of Idaho

January 23, 2004

Honorable Orrin G Hatch
Chairman, U.S. Senate Judiciary Committee
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
(F) 202-228-1698

RE: Mr. William Myers, Senate Confirmation to the U.S. 9th Circuit Court of Appeals

Dear Honorable Orrin G Hatch

I believe Mr. William Myers would full fill the office and duties of a U.S. Court of Appeals Judge located in the 9th Circuit Court, with the upmost honesty and integrity.

Since becoming an Idaho State Legislator 13 years ago, I have had the opportunity to work with Mr. Myers on federal land management issues. This committee attempted and succeeded at facilitating management policies and procedures, providing efficiency, product production, and healthy forests in an environmentally sound manner.

This project involved discussions regarding endangered species, old growth timber, water quality, local economics and implementing land management processes and procedures. Mr. Myers was the chairperson of this committee which consisted of environmental advocates, recreationist, industry and labor, as well as national, state and local Representative.

As expected, this committee had to deal with controversial issues that required thoughtful deliberation in order to compile acceptable resolutions. As chairperson of this committee, Mr. Myers held the discussions on a very professional level with high quality and standard, while maintaining congressional order and produced workable conclusions.

Mr. Myers' capability to conduct these meetings in a positive and forward-moving manner without indicating bias convinced me that he is a very disciplined person and would work to gain conclusions based on factual evidence.

It is my pleasure to endorse the confirmation and appointment of Mr. William Myers to the U.S. 9th Circuit Court of Appeals. I also believe that it is very important to Idaho's citizens and the West as a whole to maintain integrity within the 9th Circuit.

Sincerely,

Honorable Charles Cuddy, Idaho State Representative

CC: Honorable Pat Leahy, Ranking Member-U.S. Senate,
U.S. Senate Judiciary Committee (F) 202-224-9516

BC: Legal Policy (F) 202-353-6192
B.C. Bob Maynard (F) 208-343-3434

The Nature Conservancy

Worldwide Office
4245 N. Fairfax Drive, Suite 100
Arlington, VA 22203-1606

tel [703] 841.5300
fax [703] 841.1283

January 15, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Honorable Hatch:

It has been brought to my attention that my friend and professional colleague Bill Myers has been nominated to the United States Court of Appeals for the Ninth Circuit. I strongly support this nomination.

I have known Bill for several years during his service to both the public and private sectors. My closest working experience with Bill involved a conservation project in the Southwest known as the Malpai Borderlands Group (MBG) where Bill participated as an advisor. His involvement in this project was significant for two reasons. First it was an opportunity for the MBG to get the benefit of Bill's expertise. More importantly, Bill's balanced approach to the protection of our nation's natural resources further enhanced MBG's ability to work collaboratively with a diverse representation of public and private agencies and individuals.

You have much background material which demonstrates Bill's intelligence, legal acumen and responsible work ethic. However it is Bill's willingness and ability to understand and accept the importance of a fair, evenhanded and inclusive approach to problem solving that will guarantee great performance as a member of the Court of Appeals.

Thank you for this opportunity to support my friend and colleague.

Sincerely

Michael Dennis
Director, Conservation Real Estate and Private Lands

Perkins Coie

Robert A. Maynard
PHONE: 208.433.7508
FAX: 208.343.3232
EMAIL: RMaynard@perkinscoie.com

251 East Front Street, Suite 400
Boise, ID 83702-7310
PHONE: 208.343.3434
FAX: 208.343.3232
www.perkinscoie.com

February 2, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
Unites States Senate
224 Dirksen Senate Office Bldg.
Washington, DD 20510

Re: Mr. William G. Myers, Senate Confirmation to the U.S. Court of Appeals for the Ninth Circuit

Dear Mr. Chairman:

I wholeheartedly support and urge the United States Senate to confirm the nomination of Mr. William G. Myers to a seat on the United States Court of Appeals for the Ninth Circuit.

I have practiced before the Ninth Circuit and in numerous other federal courts for many years, on behalf of federal agency and other public as well as private sector clients. I have worked with Mr. Myers during his private law practice years in Boise and also during his public service as Solicitor for the Department of the Interior. I know that Mr. Myers has the intellect, experience, integrity, work ethic, and dedication to justice and citizenship that will make him an outstanding, impartial federal appellate judge. I enthusiastically endorse Mr. Myers for appointment to the Ninth Circuit seat for which he has been nominated.

Sincerely,

Robert A. Maynard

Robert A. Maynard, Partner

RAM:ram
cc: Honorable Patrick J. Leahy, Ranking Member (by fax & U.S. Mail)

[09901-0001/BL040330.001]

PICKERING

JUDGE CHARLES W. PICKERING
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Biographical Information

- Unanimously confirmed to be a federal district judge in 1990.
- Rated well-qualified by the American Bar Association.
- Investigated and prosecuted the KKK in the 1960's.
- Hired the first African-American staffer for the Mississippi Republican Party in 1976.
- Chaired the Jones County Committee on Racial Progress.
- Member of the Board of Directors of the Mississippi Institute for Racial Reconciliation
- Strongly supported by African-Americans and Democrats, including Democrat Governor Musgrove, Attorney General Moore, and former Clinton Administration Assistant Attorney General Frank Hunger, as well as Sixth Circuit Judge Damon Keith and U.S. District Judge Henry Wingate.

Allegations

- Accused of going the "whole nine yards" in *United States v. Swan* to ensure that a defendant who burned a cross in an interracial couple's yard received a more lenient sentence than that recommended by the prosecutors in the case.
- Accused of advocating expanding the law to provide for ciminal penalties for interracial marriages, and of "advising" the Mississippi Legislature how to amend their laws to continue to penalize interracial marriages.
- Accused of being hostile to the fundamental protections offered by the Voting Rights Act and the Constitution.
- Accused of being a staunch opponent of *Roe v. Wade* and a woman's right to choose.

Responses

- Judge Pickering's actions in the *Swan* case were consistent with his general practice of striving to maintain proportionality in sentencing defendants involved in the same criminal activity. In the end, Judge Pickering sentenced Swan, the adult defendant who went to trial, to 27 months in prison, even though the other two defendants who pled guilty received no prison time at all, and the facts of the trial suggested that one of the other defendants (the juvenile) was the ringleader of the crime.
- As a district court judge, Judge Pickering has demonstrated no bias towards interracial couples. Indeed, in one case (*Adams v. Walmart*), Judge Pickering set aside a jury verdict – one of only two verdicts he has ever set aside – because he believed that the interracial marriage and race had biased the jury. Boyce Holleman, the couple's attorney in the case, has written a letter of support for Judge Pickering.
- Judge Pickering has never been reversed in a voting rights case.
- Judge Pickering has testified that he is committed t following the Supreme Court precedent, including *Roe v. Wade* and *Planned Parenthood v. Casey*.

Nominees who have been deemed "controversial" by interest groups include the following:

- **Judge Charles Pickering**, nominee to the 5th Circuit (Mississippi), was unanimously confirmed to be a federal district judge in 1990. He was rated well-qualified by the ABA. He has a long record of advancing race relations in Mississippi: investigating and prosecuting the KKK in the 1960's, sending his daughters to newly integrated public schools, hiring the first African-American staffer for the state party in 1976, chairing a Jones County committee on racial progress, and serving on the board of the Mississippi Institute for Racial Reconciliation. He is strongly supported by local African-Americans and Democrats, including Democrat Governor Musgrove, Attorney General Moore, and former Clinton Administration Assistant Attorney General Frank Hunger, as well as Sixth Circuit Judge Damon Keith and U.S. District Judge Henry Wingate.

- **Justice Priscilla Owen**, nominee to the 5th Circuit (Texas), has served on the Texas Supreme Court since 1994. In her successful reelection bid in 2000, every major newspaper in Texas endorsed her. She is supported by a bipartisan group of 15 past Presidents of the state bar, 3 former Democrat Justices of the Texas Supreme Court, and the former head of Legal Aid of Central Texas. She received a *unanimous* well-qualified ABA rating.

- **Judge Carolyn Kuhl**, nominee to the 9th Circuit (California), currently serves as a state trial judge on the Superior Court in California. She clerked for then-Judge Anthony Kennedy on the 9th Circuit, worked as a special adviser to Attorney General Smith and served as Deputy Solicitor General of the United States. She then became a partner at a leading Los Angeles law firm. She is supported by prominent Democrats such as Vilma Martinez, former President of the Mexican American Legal Defense and Educational Fund, and Ron Olson, as well as a bipartisan group of nearly 100 judges on the Los Angeles Superior Court. She received a well-qualified ABA rating.

- **Bill Pryor**, nominee to the 11th Circuit (Alabama), currently serves as Alabama Attorney General. He has earned great respect for his integrity and fairness as Alabama Attorney General. He is supported by prominent Democrats and African-American in Alabama, including former Democrat Governor Siegelman and Dr. Joe Reed, chair of the state's African-American caucus. He began his career as a law clerk for civil rights legend, Judge John Minor Wisdom. He received a qualified ABA rating. Some interest groups are opposing him because he is pro-life.

- **Judge Terrence Boyle**, nominee to the 4th Circuit (North Carolina), was unanimously confirmed to be a federal district judge in 1984 and has served with distinction since, now as Chief Judge. Judge Boyle has been appointed twice by Chief Justice Rehnquist to serve on Judicial Conference committees and has sat by designation on the Fourth Circuit. The former chairman of the state Democratic Party supports Judge Boyle's nomination, stating that he gives everyone "a fair trial."

- **Judge David McKeague**, nominee to the 6th Circuit (Michigan), was unanimously confirmed by the Senate to be a federal district judge in 1992. He served in private

practice for 25 years before that and is widely respected for his intellect and integrity. He received a well-qualified ABA rating.

- **Judge Susan Neilson**, nominee to the 6th Circuit (Michigan), has been a judge on the Michigan 3rd Judicial Circuit Court since 1991. She has more than 10 years of experience in private practice and was co-editor and author of Michigan Civil Procedure, a two-volume treatise on all areas of Michigan civil practice that received an award from the State Bar of Michigan. Judge Neilson is also active in numerous community service organizations. She received a *unanimous* well-qualified ABA rating.

- **Judge Henry Saad**, nominee to the 6th Circuit (Michigan), has served since 1994 on the Michigan Court of Appeals. In his re-election, he received broad bipartisan support, including endorsements from the Michigan Chamber of Commerce and the UAW. Since 1996, Judge Saad has taught legal ethics at Wayne State University Law School. He received the Arab-American and Chaldean Council Civic and Humanitarian Award for Outstanding Dedication to Serving the Community with Compassion and Understanding in 1995. He received a qualified ABA rating.

- **Claude A. Allen**, nominee to the 4th Circuit (Virginia), was confirmed by the Senate in 2001 as Deputy Secretary for the Department of Health and Human Services and is currently serving in that position. Before joining HHS, Allen served as Secretary of Health and Human Resources for the Commonwealth of Virginia and led Governor Gilmore's initiative to pass a Patients Bill of Rights in 1999. Allen has also served with distinction as Virginia's Deputy Attorney General for the Civil Litigation Division and as Counsel to the Attorney General. Before joining the Virginia state government, Allen practiced law at Baker & Botts in Washington, D.C., where he specialized in government contracts, litigation, and legislative affairs. He has received a qualified ABA rating.

- **Miguel Estrada** (nomination to the D.C. Circuit was withdrawn at Estrada's request). Estrada has argued 15 cases before the U.S. Supreme Court and has worked as a federal prosecutor, Assistant U.S. Solicitor General, and Supreme Court law clerk for Justice Kennedy. Estrada came to America as a teenager who spoke virtually no English, and had he been confirmed would have been the first Hispanic to serve on the D.C. Circuit. He represented a capital defendant pro bono before the Supreme Court. He was supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and received a *unanimous* well-qualified ABA rating.

TABLE OF CONTENTS: JUDGE CHARLES W. PICKERING

Summary and Biographical Points for Judge Pickering 1

Statements by Select Supporters of Judge Pickering 3

Responses to Allegations against Judge Pickering 8

Select Editorials, News Articles and Letters of Support for Judge Pickering 14

James Charles Evers op-ed, Wall Street Journal (2/7/2002) 14
New York Times article (2/17/2002) 15
Roll Call article (2/21/2002) 19
National Review article (1/9/2003) 22
National Review article (1/13/03) 25
Washington Times article (2/3/2003) 28
Knight-Ridder article (2/23/2003) 31
Legal Times article (3/5/2003) 37
Atlanta Journal-Constitution articles (3/9/2003) 42

Letter of Governor Ronnie Musgrove and other Democratic Mississippi elected officials 57
Letter of William F. Winter, former Governor of Mississippi 60
Letter of Judge Damon J. Keith, U.S. Court of Appeals for the Sixth Circuit 62
Letter of Judge Henry T. Wingate, U.S. District Judge, Southern District of Mississippi 64
Letter of Judge Johnny L. Williams, Tenth Chancery Court District of Mississippi 66
Letter of Ruben V. Anderson, former Supreme Court Justice in Mississippi 67
Letter of I.A. Rosenbaum, civil rights activist 68
Letter of Jorge C. Rangel, prior member of ABA Standing Committee 69
Letter of David Z. Chesnoff, criminal defense attorney 71
Letter of Johnny Magee, Laurel, Mississippi City Councilman 73
Letter of Rev. George L. Barnes, Pastor, New Homer Missionary Baptist Church 75
Letter of Deborah Jones Gambrell, attorney-at-law 76
Letter of Early M. Gray, Taylorsville, Mississippi 78
Letter of Melanie Rube, Deputy U.S. Marshal 79
Letter of Rev. Nathan Jordan, Pastor, St. John United Methodist Church 80
Letter of Johnny L. DuPree, Mayor, City of Hattiesburg 82
Letter of Henry E. Naylor, City of Hattiesburg Councilman 83
Letters of Rev. Kenneth E. Fairley, President, Forrest County Branch of the NAACP 84
Letter of Shane F. Langston, President, Mississippi Trial Lawyers Association 86
Letter of Charles Bolton, Deputy Sherrif, Forrest County, Mississippi 88
Letters of James King, first African-American hired by the Mississippi Republican Party 90
Letter of Representative Phillip West, Natchez, Mississippi, Chairman of the Mississippi Legislative Black Caucus 93

Charles W. Pickering
Nominee to U.S. Court of Appeals for the Fifth Circuit (Mississippi)
(Nominated May 25, 2001)

- Judge Charles Pickering has served on the federal district court since the United States Senate unanimously confirmed him to that position on October 2, 1990. Prior to his appointment, he practiced law for almost thirty years, gaining extensive trial experience.

- The American Bar Association's Standing Committee on the Judiciary has rated Pickering "Well Qualified" to serve on the Fifth Circuit, and the seat to which he has been nominated has been designated as a "Judicial Emergency" by the Administrative Office of the United States Courts.

- Judge Pickering graduated at the top of his law school class at the University of Mississippi in 1961. While in law school, he was on the Law Journal and served as Chairman of the Moot Court Board.

- After graduating from law school, Judge Pickering became a partner in a Mississippi law firm. In 1962, he was appointed to serve as Prosecuting Attorney for the City of Laurel, and in 1964, he was elected and served four years as Prosecuting Attorney for Jones County. In 1969, Judge Pickering became a Municipal Court Judge for the City of Laurel.

- In 1972, Judge Pickering was elected to the Mississippi State Senate and served two terms, from 1972 to 1980. He was the Republican nominee for Attorney General in 1979, and he served as Chairman of the Mississippi Republican Party from 1976 to 1978.

- Throughout his career, Judge Pickering has shown a commitment to his community in a professional and personal capacity. His numerous civic contributions include serving as the head of the March of Dimes campaign in Jones County, as the Chairman of the Jones County Chapter of the American National Red Cross and as the Chairman of the Jones County Heart Fund. In 1963, he was recognized as one of the three Outstanding Young Men in Mississippi.

- Judge Pickering is active in his church and has served many years as a Sunday School teacher, as Sunday School Superintendent and as Church Treasurer.

- Judge Pickering's record demonstrates his strong commitment to improving racial relations and enforcing laws protecting civil rights:

    - In 1967, in a criminal trial, he testified at great risk to both himself and his family against the Imperial Wizard of the KKK for fire bombing a civil rights activist in Mississippi;
    - In 1976, he hired the first African-American Republican political worker in Mississippi;

- In 1988, he chaired a race relations committee for Jones County, Mississippi;
- In 1999, he served on the board of the Institute for Racial Reconciliation at the University of Mississippi;
- In 2000, he worked with at-risk African-American youth in Laurel, Mississippi.

- There has been a broad outpouring of support for Judge Pickering's nomination to the Fifth Circuit from the African-Americans who know him best:

  - James Charles Evers, civil rights activist and brother of slain civil rights leader Medgar Evers;
  - Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit;
  - Judge Henry Wingate of the U.S. District Court, Jackson, Mississippi;
  - Melvin Mack, a member of the Board of Supervisors for Jones County, Mississippi;
  - Judge Johnny L. Williams of the Tenth District Chancery Court of Mississippi;
  - Johnny DuPree, Mayor of Hattiesburg, Mississippi;
  - Reuben Anderson, partner in the law firm of Phelps Dunbar and former Justice of the Mississippi Supreme Court;
  - Phillip West, Representative from Natchez, Mississippi, and Chairman of Mississippi Legislative Black Caucus;
  - James King, the first African-American employee of the Mississippi Republican Party;
  - Henry Naylor, Hattiesburg City Councilman and board member of the Forrest County NAACP;
  - Charles Bolton, the first African-American Deputy Sheriff of Forrest County;
  - Deborah Gambrell, a civil rights attorney who has practiced before Judge Pickering;
  - Reverend George Barnes, Pastor of New Homer Baptist Church, Laurel, Mississippi;
  - Reverend Kenneth E. Fairley, state coordinator for the Rainbow Coalition and former President of the Forrest County NAACP;
  - Reverend Nathan Jordan, Pastor, St. John United Methodist Church, Hattiesburg, Mississippi, and past President of the Forrest County NAACP;
  - Reverend Arthur L. Siggers, Pastor, Mount Olive Baptist Church, Hattiesburg, Mississippi.

STATEMENTS BY SELECT SUPPORTERS OF JUDGE CHARLES W. PICKERING

James Charles Evers, brother of slain civil rights leader Medgar Evers

> "As someone who has spent all my adult life fighting for equal treatment of African-Americans, I can tell you with certainty that Charles Pickering has an admirable record on civil rights issues. He has taken tough stands at tough times in the past, and the treatment he and his record are receiving at the hands of certain interest groups is shameful." (*Op-ed, Wall Street Journal, February 7, 2002 at A16*).

Governor Ronnie Musgrove and other Democratic Mississippi elected officials

> "We are the Democratic statewide officials of Mississippi. We know Charles Pickering personally and have known him for many years. We believe Judge Pickering should be confirmed for this appointment and serve on that court. Judge Pickering chose to take stands during his career that were difficult and courageous . . . . Mississippi has made tremendous progress in race relations since the 1960s and Charles Pickering has been part of that progress. We ask the United States Senate to stand up to those who malign the character of Charles Pickering, and give him an[] up or down vote on the Senate floor." (*Letter to Sen. Frist and Sen. Daschle, September 24, 2003*).

William F. Winter, former Democratic Governor of Mississippi

> "As a former Democratic Governor of Mississippi and as a long-time colleague of Judge Pickering in the legal profession and in the public service, I can vouch for him as one of our state's most respected leaders." (*Letter to Sen. Leahy, October 25, 2001*).

Judge Damon J. Keith, United States Court of Appeals for the Sixth Circuit

> "I am absolutely convinced that Judge Pickering's entire life has been dedicated to the principle spelled out in the Declaration of Independence that says '. . . all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.' I recommend Judge Charles W. Pickering, Sr. to you without reservation." (*Letter to Sen. Leahy, November 8, 2001*).

Judge Henry T. Wingate, United States District Court Judge, Southern District of Mississippi

> "More than just colleagues, we [have] spent quality time together discussing not only our judicial concerns, but also the plight of our country relative to the race issue. I have found Judge Pickering genuinely committed to making a difference on this matter . . . . Since I am highly visible in the Southern District of Mississippi, ... I should like to think that attorneys aggrieved over Judge Pickering's rulings on racial grounds would have mentioned that allegation to me. I have not heard any such criticisms . . . . I am

convinced that he will be a fair judge on the United States Court of Appeals for the Fifth Circuit." (*Letter to Sen. Leahy, October 25, 2001*).

Judge Johnny L. Williams, Tenth Chancery Court District of Mississippi

"As an African American I understand the importance of having leaders like Judge Pickering take a stand for equal justice and racial harmony in our state. I traveled to Washington, D.C. twice in early 2002 to advocate Judge Pickering's elevation to the Fifth Circuit Court of Appeals. One of the things I was most disheartened about was how the mis-characterization of Judge Pickering's reputation on an issue so sensitive as race might undermine efforts to continue the progress we have made on race relations in Mississippi." (*Letter to Pres. Bush, January 7, 2002*).

Ruben V. Anderson, first African American Supreme Court Justice in Mississippi and former associate counsel for the NAACP

"I have known Judge Pickering for at least a quarter of a century. At all times I have found him to be an honorable man. I have had the opportunity to appear before Judge Pickering as an attorney and he was extremely fair and impartial to all parties. I likewise had the occasion to serve with Judge Pickering on the Racial Reconciliation Committee at the University of Mississippi and through that fully understand his commitment to racial justice. Judge Pickering would be an asset to the Fifth Circuit Court of Appeals and I recommend him without reservation." (*Letter to Sen. Leahy, January 8, 2002*).

I.A. Rosenbaum, civil rights activist, past mayor of Meridian, Mississippi and past President of Congregation Beth Israel

"Injustice and character assassination galls me. Charles Pickering is no racist. He stood tall when our Temple was bombed and made every effort to prosecute Sam Bowers who planned the bombing." (*Letter to Sen. Feinstein, September 25, 2003*).

Jorge C. Rangel, prior member of the American Bar Association's Standing Committee on the Federal Judiciary

"I first met Judge Pickering in 1990 in my capacity as a member of the ABA's Standing Committee on the Federal Judiciary. As the Fifth Circuit's representative on the Committee, I conducted the primary investigation into his professional qualifications when he was nominated to a federal district judgeship in Mississippi. I spent many hours discussing his qualifications with judges, lawyers and lay people throughout the state. I also interviewed Judge Pickering, during which we touched on matters relevant to his qualifications to serve as a federal judge. The Charles W. Pickering that I have read about in press reports during the pendency of his current nomination does not comport with the Charles W. Pickering that I have come to know in the last thirteen years. Competent, compassionate, sensitive and free from bias are terms that aptly describe him. Throughout his professional career as a lawyer and as a judge, Judge Pickering has tried to do what he thought was right, consistent with his oaths as an officer of the court and as

a judge. Attempts to demonize him are both unfair and out of place in a judicial confirmation proceeding." (*Letter to Sen. Hatch, April 1, 2003*).

David Z. Chesnoff, criminal defense attorney

"...[Judge Pickering] kept an open mind, listened to our position and gave me as fair a trial as I have received in any United States District Court, anytime. Judge Pickering had a grasp of the difficult legal issues and addressed the case with objectivity and fairness. At no time during my experience before Judge Pickering, including the jury selection process, did I ever note even a scintilla of evidence that Judge Pickering did not treat every citizen of our great country with equal fairness and consideration. Based on my experience with Judge Pickering, I am offended that people are attacking his sterling character." (*Letter to Sen. Hatch, January 16, 2003*).

Johnny Magee, City of Laurel Councilman

"The state of Mississippi has and continues to have its share of challenges as it relates to racial, gender, economic, moral and other issues, but Charles Pickering is in the forefront of bringing together needed changes in all of these and other areas. I have found Mr. Pickering to be open, fair-minded, progressive and one whom I would have every confidence in his assuming the post on the 5th Circuit Court of Appeals." (*Letter to Sen. Leahy, October 25, 2001*).

Reverend George L. Barnes, Pastor, New Homer Missionary Baptist Church, Laurel, Mississippi

"I have known Charles Pickering all my life.... I have always known Judge Pickering to be a fair man that offered help to many individuals regardless of their beliefs or race. He is an open-minded person and has a reputation of being accessible to all individuals. He has started a local program to try to positively influence the young people of the African-American community in Jones County." (*Letter to Sen. Leahy, October 25, 2001*).

Deborah Jones Gambrell, Attorney-at-Law

"As an African American attorney who practices in the federal courts of the Southern District of Mississippi .... I have appeared before Judge Pickering on numerous occasions during the past eleven (11) years, mo[re] often than not, in cases involving violations of civil rights and employment discrimination matters. I have found Judge Pickering not only to be a fair jurist, but one who is concerned with the integrity of the entire judicial process and assures every participant of a "level playing field" and a judge who will apply the law without regard for the sensitive nature of cases of this sort." (*Letter to Sen. Leahy, October 25, 2001*).

Early M. Gray, Taylorsville, Mississippi

"[Pickering] represented my son David Gray in 1981 in an armed robbery trial. My son was accused of robbing a white teenage girl at knifepoint. Judge Pickering believed that my son was entitled to a good defense even though it was not a popular move for him politically. The first trial ended in a mistrial, and the second trial ended with a not-guilty verdict. I knew that Judge Pickering is a strong believer in the constitutional rights of all people. He should be approved for the judiciary position for which President Bush nominated him." (*Letter to Sen. Leahy, October 25, 2001*).

Melanie Rube, Deputy U.S. Marshal

"I am overwhelmed at the compassion that Judge Pickering shows each and every defendant. He truly cares for the welfare of these defendants and their families. I believe it grieves him to see mothers and fathers separated from their loved ones. As a man of great conviction, I know that Judge Pickering would make a positive impact on the Fifth Circuit." (*Letter to Sen. Leahy, October 25, 2001*).

Reverend Nathan Jordan, Pastor, St. John United Methodist Church, former President of the Forrest County NAACP

"Without hesitation, I can truthfully say that Judge Pickering is an extremely fair judge who serves all our citizens . . . . It seemed to me that he pushed very hard to insure the fair treatment of minorities." (*Letter to Sen. Leahy, October 26, 2001*).

Johnny L. DuPree, Mayor, City of Hattiesburg

"Judge Pickering has consistently advocated racial reconciliation for as long as I have known him and has testified against such men as convicted Ku Klux Klan member Sam Bowers in 1967, for the firebombing and murder of civil rights leader Mr. Vernon Dahmer." (*Letter to Sen. Leahy, October 29, 2001*).

Henry E. Naylor, City of Hattiesburg Councilman

"As an executive board member for 12 years with the Forrest County Branch of the NAACP and now serving on the Hattiesburg City Council, I have witnessed Judge Pickering demonstrate fairness, honesty, and certainly integrity through out the court. Also, while it should not matter, Judge Pickering has received much praise from local and state African American leaders who can attest to his commitment to being fair toward all citizens." (*Letter to Sen. Leahy, October 29, 2001*).

Reverend Kenneth E. Fairley, Pastor, Mount Carmel Ministries, former President of Forrest County Branch of the NAACP

"I served as president of the Forrest County Branch of the NAACP, a county adjacent to Jones County, where Judge Pickering has lived. I currently serve as a State Coordinator

for the Rainbow Coalition under the leadership of Reverend Jesse Jackson. While serving in these positions, I have watched Judge Pickering become a major bridge builder in the State of Mississippi. He has developed platforms that have eased racial tensions. I am aware that he serves as a member of the Board of Directors for the Institute of Racial Reconciliation at the University of Mississippi. This institute has helped all Americans of different races to understand and respect each other." (*Letter to Sen. Leahy, October 30, 2001*).

Shane Langston, President, Mississippi Trial Lawyers Association

"Judge Pickering is held in the highest esteem among the members of the Mississippi Bar. His reputation for fairness is shared across the legal spectrum; from the criminal defense lawyer to the prosecutor; from the civil defense lawyer to the plaintiff's lawyer. We practice before him daily. We know that he applies the law fairly and equally without regard to economic status, party affiliation, race, sex or religion." (*Letter to Sen. Leahy, October 30, 2001*).

Charles Bolton, Deputy Sheriff, Forrest County, Mississippi

"I have been involved in law enforcement for approximately 23 years and have had the privilege of holding the highest office that an African American has held in law enforcement for the Forrest County Sheriff's Office . . . . I have had the opportunity to observe Judge Pickering during his administration of the United States District Court . . . and have also had the opportunity to testify on numerous occasions in his Court. He has always demonstrated a policy of not only 'fairness' and one of 'upholding the law' as it applies to all persons, but he has been particularly careful in preserving the rights of all prisoners, including African Americans who sought to pursue remedies in [his] court." (*Letter to Sen. Leahy, October 30, 2001*).

James R. King, first African-American hired by the Mississippi Republican Party

"I find it ironic that there are Civil Rights groups that oppose [Judge Pickering] as being someone they believe will try to suppress their civil rights. I find it ironic because over the many years that I have known Judge Pickering, I can earnestly say that I have never known or met anyone that has said that they knew of any such dealings in which he was involved in that denied or suppressed the civil rights of others. Therefore it is in my opinion that those [who] say such things about Judge Pickering, really do not know him." (*Letter to Sen. Leahy, January 26, 2002*).

JUDGE CHARLES W. PICKERING
Responses to False Allegations

ALLEGATION: **In *United States v. Swan*, Judge Pickering went the "whole nine yards" to ensure that a defendant who burned a cross in an interracial couple's yard received a more lenient sentence than that recommended by the prosecutors in the case.**

RESPONSES:

- Efforts to paint Judge Pickering as racially insensitive because of his actions in the *Swan* case are grossly unfair. While Judge Pickering expressed concerns about the disparity in the sentences the government recommended for the three defendants in the *Swan* case, he repeatedly condemned the cross burning crime as "heinous", "reprehensible", "despicable" and "dastardly".

- Judge Pickering's actions in the *Swan* case were consistent with his general practice of striving to maintain proportionality in sentencing defendants involved in the same criminal activity.

- In the end, Judge Pickering sentenced Swan, the adult defendant who went to trial, to 27 months in prison, even though the other two defendants who pled guilty received no prison time at all, and the facts at trial suggested that one of the other defendants (the juvenile) was the ringleader of the crime.

- Judge Pickering has departed downward in other criminal cases (including those involving African-American defendants) where justice and fairness have supported a departure:

    - In the case of Clinton Myers, a 20-year-old African-American who was convicted of a drug offense, Judge Pickering departed downward from a five-year mandatory minimum sentence and sentenced the defendant to 30 months in prison. He also recommended that the defendant be permitted to participate in an intensive confinement program which further reduced his sentence.

    - In the case of Michael King, a young African-American defendant who was convicted of a drug offense and had no prior felony convictions, Judge Pickering continued the case for a year, placed the defendant under supervised home release, and later cited his good conduct while on supervision as grounds for a downward departure. Although the defendant faced a 40-month prison sentence under the Sentencing Guidelines, Judge Pickering ultimately sentenced him to 18 months of home confinement and 5 years of probation.

- Zachary Barnes, a 20-year-old African-American who was convicted of a drug offense, faced 70-87 months in prison under the Sentencing Guidelines. Judge Pickering departed downward twice as far as the government recommended and sentenced him to 48 months in prison. Judge Pickering also recommended that the defendant participate in an intensive confinement program which further reduced his sentence. Barnes' defense lawyer called Judge Pickering's compassionate sentence a "life changing experience" for Barnes.

- Tammy Carney, an African-American female, faced a minimum sentence of 188 months in prison for her drug conviction. Based on her cooperation, the government filed a motion to depart downward under the Sentencing Guidelines. Over a two and one half year period, Judge Pickering continued Ms. Carney's sentencing six times to enable the government to develop additional grounds for a downward departure. In the end, Judge Pickering departed downward and sentenced Ms. Carney to 63 months imprisonment.

ALLEGATION: **Judge Pickering engaged in improper *ex parte* communications in the *Swan* case.**

RESPONSES:

- Michael Krauss, Professor of Legal Ethics at George Mason University Law School, reviewed two "*ex parte*" communications Judge Pickering allegedly made during the *Swan* case and concluded that neither violated the *Model Code of Judicial Conduct*.

- While it is true that Judge Pickering called an Assistant United States Attorney without defense counsel present to remind him of the Court's request that he consult with his superiors in Washington, according to Professor Krauss, such communications are permitted under the *Model Code of Judicial Conduct*.

- Professor Krauss expressed similar views about conversations Judge Pickering had with Frank Hunger, an old friend who was then serving as the Assistant Attorney for the Civil Division at the Department of Justice, regarding the Department's mishandling of the case. Professor Krauss stated, "one is hard-pressed to see any violation of Judge Pickering's ethical duties here . . . . [T]he communication was not really an *ex parte* communication at all -- it was not a discussion with one party in an effort to alter the trajectory of the trial to the detriment of the other party."

- It is important to note that Frank Hunger, a top Department of Justice official during the Clinton Administration and the person with whom Judge Pickering allegedly had unethical communications, strongly supports Judge Pickering's recollection of the facts surrounding this case. Hunger also supports Judge Pickering's nomination.

ALLEGATION: **In a 1959 law review article, Judge Pickering advocated expanding the law to provide for criminal penalties for interracial marriages, and he "advised" the Mississippi legislature how to amend their laws to continue to penalize interracial marriages.**

RESPONSES:

- Judge Pickering wrote the law review article more than 40 years ago as a law student at the University of Mississippi.

- In the article, Pickering did not advocate in favor of maintaining the ban on interracial marriages. He merely pointed out an inconsistency in Mississippi's miscegenation statute, as compared to similar statutes in other states, and explained what would be required to eliminate the inconsistency.

- In his 1990 confirmation hearing to be a U.S. District Judge, Judge Pickering testified that the 1967 Supreme Court case of *Loving v. Virginia*, which held that state law bans on interracial marriages are unconstitutional, is the law of the land. He also testified, ". . . marriages between people of different races is a matter of personal choice. It is not appropriate for a State to make that decision, and it is my belief, under the present law today, that miscegenation statutes are unconstitutional."

- After Judge Pickering's 1990 confirmation hearing, the Senate Judiciary Committee - including Senators Leahy, Kennedy and Kohl - voted unanimously to approve his nomination to the U.S. District Court.

- In his October 2001 confirmation hearing, Judge Pickering reiterated his belief that ". . . who one marries is a personal choice and that there should not be legislation on that."

- As a district court judge, Judge Pickering has demonstrated no bias towards interracial couples. Indeed, in one case (*Adams v. Walmart*), Judge Pickering set aside a jury verdict – one of only two verdicts he has ever set aside – because he believed that the interracial marriage and race had biased the jury. Boyce Holleman, the couple's attorney in the case, has written a letter in support of Judge Pickering.

ALLEGATION: **New evidence suggests Judge Pickering testified falsely at his 1990 confirmation hearing when he stated he never had any contact with the Sovereignty Commission.**

RESPONSES:

- When Judge Pickering testified before Congress in 1990 that he never had any contact with the Sovereignty Commission, he did not intend to lie or mislead Congress. He simply failed to remember a conversation that had occurred years earlier.

- A single document in the Sovereignty Commission files suggests that in 1971, eighteen years before he testified before Congress, Judge Pickering spoke to an employee of the Commission about a local labor union that had been infiltrated by the KKK.

- Judge Pickering had no reason to deny or cover up this conversation. Indeed, as a State Senator, he voted against destroying the Sovereignty Commission's records because he felt that they should be preserved.

ALLEGATION: **Pickering's opinions evince a hostility to the fundamental protections offered by the Voting Rights Act and the Constitution. In *Fairley v. Forrest County*, 814 F. Supp. 1327 (S.D. Miss. 1993), he called the one person, one vote principle "obtrusive" and "something that legislatures have learned they must live with."**

RESPONSES:

- Judge Pickering has never been reversed in a voting rights case.

- Judge Pickering never called the one person, one vote principle "obtrusive." In *Fairley*, he simply noted that the law often requires federal courts to step in, "be obtrusive", and resolve matters that are the province of the legislative branch. He also noted that it is the responsibility of the courts to resolve such matters in cases making constitutional challenges to reapportionment plans. Judge Pickering's quote reads in full:

> "When courts perform their responsibility and determine that constitutional criteria are not satisfied and that an apportionment plan is unconstitutional, and order new elections, the courts are being obtrusive into matters that under our Constitution should be discharged by others -- elected officials in legislative bodies." 814 F. Supp. at 1330.

- In *Fairley*, Judge Pickering recognized the important, but limited role courts should play in voting rights cases: "The federal judiciary . . . is freed from having to justify its actions to the voters, the citizens or the taxpayers. It is free to correct abuses without fear of political reprisal." 814 F. Supp. at 1336.

- Long ago the Supreme Court recognized that federal courts play a role in reapportionment cases "only when a legislature fails to reapportion in a timely fashion after having had an adequate opportunity to do so." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

- Donnie Ray Fairley, one of the plaintiffs in *Fairley v. Forrest County*, has written a letter in support of Judge Pickering's nomination, in which he stated, "because of Judge Pickering's fairness in my case, and my personal observation of Judge Pickering's rulings while on the bench in other cases, I feel that he has a commitment to fairness, justice and equal protection for all people who come before him."

- The Reverend Ken Fairley, brother of one of the plaintiffs in *Fairley v. Forrest County* and President of the Forrest County NAACP at the time of the lawsuit, also has written a letter in support of Judge Pickering. In his letter, Reverend Fairley stated that he "felt the decision [in *Fairley*] was in accordance with law, was fair, and we did not appeal it."

ALLEGATION: **Judge Pickering is a staunch opponent of *Roe v. Wade* and a woman's right to choose. He was a prime architect of the 1976 Republican Party platform plank that protested the *Roe* decision and called for a constitutional amendment banning abortion.**

RESPONSES:

- Despite Judge Pickering's personal views on abortion, he has testified that he is committed to following Supreme Court precedent, including *Roe v. Wade* and *Planned Parenthood v. Casey*. Judge Pickering's record as a jurist demonstrates his commitment to the rule of law.

ALLEGATION: **Judge Pickering's personal comments in his opinions** demonstrate that he is hostile to plaintiffs in employment discrimination cases.

RESPONSES:

- Judge Pickering's record makes clear that he is not hostile to employees' rights. He has been reversed only twice in employee discrimination cases.

- Judge Pickering's reputation among employment discrimination lawyers belies this allegation.

    - Roger Doolittle, an attorney who represented an employee union in a discrimination suit before Judge Pickering, wrote in a letter of support, ". . . we have always found his decisions to be well-founded in law, fairly and impartially considered, and sensitive to the needs of working men and women."

- Jim Waide, a prominent employee discrimination attorney in Mississippi, wrote an op-ed in which he stated, "Contrary to the information they have apparently received, Judge Pickering is no enemy of civil rights."

- Mary Balter, who filed a sex discrimination suit against her employer and opted to not have a jury trial, stated in a letter to Senator Leahy, "Knowing that Judge Pickering was an honest and fair man, I felt blessed and quite comfortable when he was chosen to be the Judge hearing the complaint."

- Judge Pickering's comments regarding the side effects of anti-discrimination laws evince nothing more than his belief that frivolous claims of discrimination prevent the timely adjudication of meritorious claims.

GRIFFIN

JUDGE RICHARD ALLEN GRIFFIN
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Biographical Information

- Rated "well qualified" to sit on the US Court of Appeals for the Sixth Circuit by the American Bar Association
- Elected to the Michigan Court of Appeals (Third District) and reelected to the Court of Appeals (Fourth District)
- Has authored over 280 published opinions and several hundred unpublished opinions.
- Served as Chief Judge of the YMCA Youth-in-Government Mock Trial program, past Chairman of the Yellow Ribbon Committee welcoming troops home from Desert Storm, past Chairman of the Long Lake Township Building Authority, and former Ambassador to the National Cherry Festival

Allegations

Responses

Judge Richard Allen Griffin
Nominee to the U.S. Court of Appeals for the Sixth Circuit

- **Judge Richard Griffin is eminently qualified to be a judge on the Sixth Circuit, having served with distinction as a state court judge for well over a decade.**
  - ✓ Judge Griffin was elected to the Michigan Court of Appeals (Third District) in 1988 and reelected to the Court of Appeals in 1996 (Fourth District).
  - ✓ As an appellate judge, he has heard civil and criminal matters from across the State of Michigan and has authored over 280 published opinions and several hundred unpublished opinions.
  - ✓ The American Bar Association rated Judge Griffin "Well Qualified" to sit on the U.S. Court of Appeals for the Sixth Circuit.
- **Judge Griffin had a distinguished career as a practicing attorney before serving on the state bench.**
  - ✓ Judge Griffin was a founding partner of Read & Griffin, a firm established in 1985. As a private lawyer, Griffin practiced in the federal district courts in Michigan and before the Sixth Circuit. Prior to founding his own firm, Griffin was a partner with the Traverse City firm of Coulter, Cunningham, Davison & Read, which he had joined as an associate in 1977.
  - ✓ Judge Griffin received his J.D. from the University of Michigan Law School in 1977 and his bachelor's degree, *magna cum laude*, from the Western Michigan University Honors College in 1973.
- **Judge Griffin was born in Traverse City and is a life-long resident of Michigan. He would be the first appointee to the Sixth Circuit from the Traverse City area of Michigan.**
- **Judge Griffin has served his state and local community in many voluntary capacities.**
  - ✓ Judge Griffin has served as Chief Judge of the YMCA Youth-in-Government Mock Trial program.
  - ✓ Judge Griffin is a past chairman of the Yellow Ribbon committee welcoming troops home from Desert Storm, past chairman of the Long Lake Township Building Authority, and a former ambassador to the National Cherry Festival.

Statements by Select Supporters of Judge Griffin

President Gerald R. Ford

"I write to strongly support the nomination of Richard Allen Griffin to the United States Court of Appeals for the Sixth Circuit. He is a highly qualified nominee by President Bush for this important federal judicial post. His approval by the Senate will alleviate the current judicial emergency in the 6th Circuit . . . . I can say with conviction that Judge Griffin is a person of highest quality character. As the record shows, he has been a very excellent Judge with unquestioned integrity." *Excerpt from letter to Senator Patrick Leahy, Chairman, Senate Judiciary Committee, Senator Carl Levin and Senator Debbie Stabenow from the Honorable Gerald R. Ford, 38th President of the United States, August 13, 2002.*

Justice Maura D. Corrigan, Michigan Supreme Court

"Richard Allen Griffin is a man of integrity and probity who is fully capable of discharging the duty of protecting our Constitution and laws. He is deserving of the public trust as he has already proven himself worthy of that trust during his years of service to the State of Michigan. I have every confidence that he will serve our country with honor and distinction." *Excerpt from letter to Senator Carl Levin and Senator Debbie Stabenow, July 5, 2002.*

The Honorable Roman S. Gribbs, Former Mayor City of Detroit and Retired Judge, Michigan Court of Appeals

"I have known Judge Griffin for many years and have worked with him as a colleague on the Michigan Court of Appeals for 14 years. . . . Working together on hundreds of opinions has given me the opportunity to observe and know Rick very well. He is in many respects a 'judge's judge': integrity personified, intelligent, hardworking, fair, sensitive with level temperament and good judgment plus the uncanny ability to decide and write in a clear and understandable manner that resolves complex and obscure issues. He is a dedicated public servant. . . . It has been a pleasure and honor to work with Judge Griffin these many years. I know he will serve with honor and distinction as a Judge of the United States Court of Appeals." *Excerpt from letter to Senator Carl Levin and Senator Debbie Stabenow, August 16, 2002.*

Chief Judge William C. Whitbeck, Michigan Court of Appeals.

"Judge Griffin has served with great distinction on the Michigan Court of Appeals for fourteen years. He is a decisive scholarly judge with an instinct for the core issues and with a flair for authoring crisp understandable opinions. He has written over 280 published opinions, has written hundreds of unpublished opinions, and has decided thousands of cases. . . . Judge Griffin is a good man and a good judge. Considered on the merits, there is no question in my mind that he is fully qualified to serve on the Sixth Circuit; the operative word here is 'serve' as that is precisely what Judge Griffin will do, serve the people and the public interest to the full extent of his considerable abilities." *Excerpt from letter to Senator Carl Levin and Senator Debbie Stabenow, July 19, 2002.*

Judge Stephen L. Borrello, Michigan Court of Appeals.

"Judge Griffin is one of the finest jurists in the State. While we may differ on a particular legal issue, I find that our differences are rooted in honest disagreements about the application of legal standards to a particular set of facts, rather than a difference of judicial or political philosophy. Judge Griffin does not belong to that class of jurists, on either the right or the left, that seek in every case to impose their political will rather than the rule of law." *Excerpt from letter to Chairman Orrin G. Hatch, July 11, 2004.*

KCEC

JUDGE CAROLYN KUHL

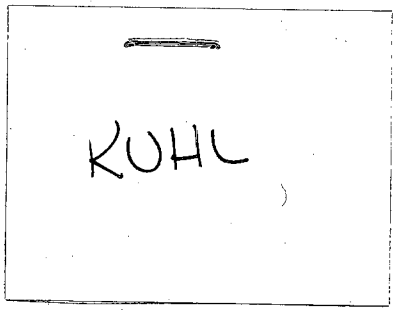
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Biographical Information

- Rated well-qualified by the American Bar Association
- Clerked for the Judge Anthony Kennedy on the 9th Circuit.
- Worked as a Special Advisor to Attorney General William French Smith.
- Served as Deputy Solicitor General and Deputy Assistant Attorney General in the Civil Division at the United States Department of Justice.
- Supported by prominent Democrats such as Vilma Martinez, former President of the Mexican American Legal Defense and Educational, and Ron Olson, as well as a bipartisan group of nearly 100 judges on the Los Angeles Superior Court.

Allegations

Responses



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- **Justice Priscilla Owen**, nominee to the 5th Circuit (Texas), has served on the Texas Supreme Court since 1994. In her successful reelection bid in 2000, every major newspaper in Texas endorsed her. She is supported by a bipartisan group of 15 past Presidents of the state bar, 3 former Democrat Justices of the Texas Supreme Court, and the former head of Legal Aid of Central Texas. She received a *unanimous* well-qualified ABA rating.

- **Judge Carolyn Kuhl**, nominee to the 9th Circuit (California), currently serves as a state trial judge on the Superior Court in California. She clerked for then-Judge Anthony Kennedy on the 9th Circuit, worked as a special adviser to Attorney General Smith and served as Deputy Solicitor General of the United States. She then became a partner at a leading Los Angeles law firm. She is supported by prominent Democrats such as Vilma Martinez, former President of the Mexican American Legal Defense and Educational Fund, and Ron Olson, as well as a bipartisan group of nearly 100 judges on the Los Angeles Superior Court. She received a well-qualified ABA rating.

- **Bill Pryor**, nominee to the 11th Circuit (Alabama), currently serves as Alabama Attorney General. He has earned great respect for his integrity and fairness as Alabama Attorney General. He is supported by prominent Democrats and African-American in Alabama, including former Democrat Governor Siegelman and Dr. Joe Reed, chair of the state's African-American caucus. He began his career as a law clerk for civil rights legend, Judge John Minor Wisdom. He received a qualified ABA rating. Some interest groups are opposing him because he is pro-life.

- **Judge Terrence Boyle**, nominee to the 4th Circuit (North Carolina), was unanimously confirmed to be a federal district judge in 1984 and has served with distinction since, now as Chief Judge. Judge Boyle has been appointed twice by Chief Justice Rehnquist to serve on Judicial Conference committees and has sat by designation on the Fourth Circuit. The former chairman of the state Democratic Party supports Judge Boyle's nomination, stating that he gives everyone "a fair trial."

- **Judge David McKeague**, nominee to the 6th Circuit (Michigan), was unanimously confirmed by the Senate to be a federal district judge in 1992. He served in private

practice for 25 years before that and is widely respected for his intellect and integrity. He received a well-qualified ABA rating.

- **Judge Susan Neilson**, nominee to the 6th Circuit (Michigan), has been a judge on the Michigan 3rd Judicial Circuit Court since 1991. She has more than 10 years of experience in private practice and was co-editor and author of Michigan Civil Procedure, a two-volume treatise on all areas of Michigan civil practice that received an award from the State Bar of Michigan. Judge Neilson is also active in numerous community service organizations. She received a *unanimous* well-qualified ABA rating.

- **Judge Henry Saad**, nominee to the 6th Circuit (Michigan), has served since 1994 on the Michigan Court of Appeals. In his re-election, he received broad bipartisan support, including endorsements from the Michigan Chamber of Commerce and the UAW. Since 1996, Judge Saad has taught legal ethics at Wayne State University Law School. He received the Arab-American and Chaldean Council Civic and Humanitarian Award for Outstanding Dedication to Serving the Community with Compassion and Understanding in 1995. He received a qualified ABA rating.

- **Claude A. Allen**, nominee to the 4th Circuit (Virginia), was confirmed by the Senate in 2001 as Deputy Secretary for the Department of Health and Human Services and is currently serving in that position. Before joining HHS, Allen served as Secretary of Health and Human Resources for the Commonwealth of Virginia and led Governor Gilmore's initiative to pass a Patients Bill of Rights in 1999. Allen has also served with distinction as Virginia's Deputy Attorney General for the Civil Litigation Division and as Counsel to the Attorney General. Before joining the Virginia state government, Allen practiced law at Baker & Botts in Washington, D.C., where he specialized in government contracts, litigation, and legislative affairs. He has received a qualified ABA rating.

- **Miguel Estrada** (nomination to the D.C. Circuit was withdrawn at Estrada's request). Estrada has argued 15 cases before the U.S. Supreme Court and has worked as a federal prosecutor, Assistant U.S. Solicitor General, and Supreme Court law clerk for Justice Kennedy. Estrada came to America as a teenager who spoke virtually no English, and had he been confirmed would have been the first Hispanic to serve on the D.C. Circuit. He represented a capital defendant pro bono before the Supreme Court. He was supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and received a *unanimous* well-qualified ABA rating.

decide and write in a clear and understandable manner that resolves complex and obscure issues. He is a dedicated public servant .... I know he will serve with honor and distinction as a Judge of the United States Court of Appeals." *(Excerpt of letter from The Honorable Roman S. Gribbs, Former Mayor City of Detroit and Retired Judge, Michigan Court of Appeals to Senator Carl Levin and Senator Debbie Stabenow, Aug. 16, 2002.)*

✓ "Judge Griffin has served with great distinction on the Michigan Court of Appeals for fourteen years. He is a decisive scholarly judge with an instinct for the core issues and with a flair for authoring crisp understandable opinions.... Judge Griffin is a good man and a good judge. Considered on the merits, there is no question in my mind that he is fully qualified to serve on the Sixth Circuit; the operative word here is 'serve' as that is precisely what Judge Griffin will do, serve the people and the public interest to the full extent of his considerable abilities." *(Excerpt of letter from Chief Judge William C. Whitbeck, Michigan Court of Appeals, to Senator Carl Levin and Senator Debbie Stabenow, July 19, 2002.)*

CAROLYN KUHL
Nominee for the U.S. Court of Appeals for the Ninth Circuit

Carolyn Kuhl, a sitting judge in California, has a wide range of experience in public service and private practice. She is highly qualified for the U.S. Court of Appeals for the Ninth Circuit.

✓ Having served as a civil and criminal judge on the Los Angeles County Superior Court since 1995, Judge Kuhl is now the Supervising Judge of the Civil Division, the first woman to hold that position.

✓ The American Bar Association has rated Judge Kuhl "Well Qualified" to sit on the U.S. Court of Appeals for the Ninth Circuit.

✓ Prior to becoming a state judge, Judge Kuhl was a partner in the prestigious Los Angeles law firm of Munger Tolles & Olson from 1986 to 1995.

✓ From 1981 to 1986, Judge Kuhl served in the United States Department of Justice as Deputy Solicitor General, Deputy Assistant Attorney General in the Civil Division, and as Special Assistant to Attorney General William French Smith. While in the Department of Justice, Judge Kuhl argued cases before the United States Supreme Court and supervised all civil appellate litigation handled by the Justice Department nationwide.

✓ In 1977-78, Carolyn Kuhl clerked for the Honorable Anthony Kennedy, then a Judge on the Ninth Circuit.

- ✓ In 1977, Judge Kuhl graduated with honors from the Duke Law School where she was an editor of the Duke Law Journal. In 1974, she received a B.A. in Chemistry with honors from Princeton University.

Judge Kuhl has extraordinary bipartisan support:

- ✓ "Kuhl is what I think of as an old fashioned judge. She cares about due process for everyone. In her seven years on the Superior Court bench, she has shown that she is careful to hear both sides. She does not try to influence the outcome of a case to favor one side or the other. She is serious about her oath to follow the law, whatever the result. . . . Both the plaintiff and defense bars in Los Angeles actively support Kuhl." ***(Vilma Martinez, former Director of the Mexican American Legal Defense and Educational Fund, quoted in Los Angeles Daily Journal, April 30, 2003.)***

- ✓ "As sitting judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary." ***(Letter from a bipartisan group of 23 women judges on the Superior Court who serve with Judge Kuhl, to Senators Orrin G. Hatch, Patrick J. Leahy, Dianne Feinstein, and Barbara Boxer, Feb. 22, 2002.)***

- ✓ "We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge." ***(Letter from a bipartisan group of nearly 100 judges who serve with Judge Kuhl, to Senators Orrin G. Hatch and Patrick J. Leahy, (Feb. 28, 2003.)***

- ✓ "I had the pleasure of serving on the Los Angeles Superior Court with Judge Kuhl. She was widely respected among her fellow colleagues and lawyers for her dedication, scholarship, fairness, and adherence to the law.... her reputation and practice is to decide matters with an open mind as to all issues. Judge Kuhl is a warm, intelligent, and decent person who should be fairly considered for this distinguished appointment. I can think of no one more qualified or deserving for this office." ***(Justice Carlos Moreno, California Supreme Court, letter to Senator Dianne Feinstein, March 19, 2003.)***

DAVID MCKEAGUE
Nominee for the U.S. Court of Appeals for the Sixth Circuit

Judge David W. McKeague is a distinguished federal district court judge with over a decade of experience on the bench.

✓ "Judge Griffin has served with great distinction on the Michigan Court of Appeals for fourteen years. He is a decisive scholarly judge with an instinct for the core issues and with a flair for authoring crisp understandable opinions.... Judge Griffin is a good man and a good judge. Considered on the merits, there is no question in my mind that he is fully qualified to serve on the Sixth Circuit; the operative word here is 'serve' as that is precisely what Judge Griffin will do, serve the people and the public interest to the full extent of his considerable abilities." *(Excerpt of letter from Chief Judge William C. Whitbeck, Michigan Court of Appeals, to Senator Carl Levin and Senator Debbie Stabenow, July 19, 2002.)*

CAROLYN KUHL
Nominee for the U.S. Court of Appeals for the Ninth Circuit

Carolyn Kuhl, a sitting judge in California, has a wide range of experience in public service and private practice. She is highly qualified for the U.S. Court of Appeals for the Ninth Circuit.

✓ Judge Kuhl, who has served as a civil and criminal judge on the Los Angeles County Superior Court since 1995, is the first woman to hold her current position as Supervising Judge of the Civil Division.

✓ The American Bar Association has rated Judge Kuhl "Well Qualified" to sit on the U.S. Court of Appeals for the Ninth Circuit.

✓ Prior to becoming a state judge, Judge Kuhl was a partner in the prestigious Los Angeles law firm of Munger Tolles & Olson from 1986 to 1995.

✓ From 1981 to 1986, Judge Kuhl served in the United States Department of Justice as Deputy Solicitor General, Deputy Assistant Attorney General in the Civil Division, and as Special Assistant to Attorney General William French Smith. While in the Department of Justice, Judge Kuhl argued cases before the United States Supreme Court and supervised all civil appellate litigation handled by the Justice Department nationwide.

✓ In 1977-78, Carolyn Kuhl clerked for the Honorable Anthony Kennedy, then a Judge on the Ninth Circuit.

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BOYLE

JUDGE TERRENCE BOYLE
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Biographical Information

- Unanimously confirmed to be a federal district judge in 1984 and has served with distinction since, now as Chief Judge.
- Appointed twice by Chief Justice Rehnquist to serve on Judicial Conference committees and has sat by designation on the Fourth Circuit.
- Former Chairman of the North Carolina Democratic Party supports Judge Boyle's nomination, stating that he gives everyone "a fair trial."

Allegations

Responses

BOYLE

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Nominees who have been deemed "controversial" by interest groups include the following:

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NEILSON

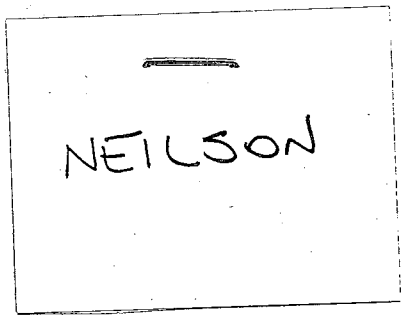
JUDGE SUSAN NEILSON
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Biographical Information

- Unanimously rated well-qualified by the American Bar Association
- Has been a Judge on the Michigan 3rd Judicial Circuit court since 1991.
- Has more than 10 years of experience in private practice
- Received an award from the State Bar of Michigan for her work as co-editor and author of Michigan Civil Procedure, a two-volume treatise on all areas of Michigan civil practice

Allegations

Responses



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JUDGE SUSAN BIEKE NEILSON
Nominee to the U.S. Court of Appeals for the Sixth Circuit

- **Judge Susan Neilson is a distinguished judge on the State of Michigan's largest trial court with well over a decade of experience on the bench.**
  - ✓ Judge Neilson was appointed to the 3rd Judicial Circuit Court of Michigan in 1991, and has been reelected three times.
  - ✓ Judge Neilson has significant experience on Michigan's largest state trial court bench, serving in both the civil and criminal divisions.
  - ✓ The American Bar Association unanimously rated Judge Neilson "Well Qualified" to sit on the U.S. Court of Appeals for the Sixth Circuit.
- **Judge Neilson had a distinguished career as a practicing attorney before ever serving on the state bench.**
  - ✓ From 1980 until 1991, Judge Neilson practiced law, first as an associate and later as a partner, with the prestigious Detroit firm of Dickinson, Wright. She specialized in products liability claims, medical malpractice claims, and commercial litigation.
  - ✓ Judge Neilson received her bachelor's degree in 1977 from the honors college at the University of Michigan (Phi Beta Kappa), and her J.D. (*cum laude*) in 1980 from Wayne State University, where she was a member of the law review.
- **Judge Neilson was born in Ann Arbor and she is a life-long resident of Michigan. If confirmed, she would be the only active female judge from Michigan on the Sixth Circuit.**
- **Judge Neilson is dedicated to the improvement of the law.**
  - ✓ She has written numerous articles and was co-editor an author of Michigan Civil Procedure, a two-volume treatise on all areas of Michigan civil practice. The Michigan Judicial Institute selected the treatise to purchase for every trial court judge in the state. The State Bar of Michigan awarded the treatise its prestigious "Plain English Award," due to its remarkable clarity.

Statements by Select Supporters of Judge Neilson

Justice Maura Corrigan, Michigan Supreme Court

"Judge Susan Bieke Neilson has earned the reputation of being one of the most dedicated and knowledgeable trial court jurists in the State of Michigan. I believe her experience as a trial court judge coupled with her legal writing abilities will make her an outstanding addition to the U.S. Court of Appeals for the 6th Circuit."

John Engler, former Governor of Michigan

"Judge Susan Bieke Neilson is an experienced jurist with a well established reputation for intellect, diligence and temperament. She is personally and professionally committed to the highest ethical standards and is genuinely esteemed by lawyers for her preparation, knowledge of the laws and decisiveness. Judge Neilson brings comprehensive, in-the-trenches experience to the federal appellate bench."

Thomas G. Kienbaum, Past President of the State Bar of Michigan

"[Judge Neilson brings] unique qualities to the bench—a quick, perceptive mind and a tremendous work ethic which she applies evenly to all matters that come before her—when appropriate, with a degree of good humor. She has an unbridled enthusiasm for the law—even with respect to the most tedious aspects of the work required of judicial officers. She deserves to be quickly confirmed."

Roger Winkelman, former Treasurer of the Michigan Democratic Party

"I have known Judge Neilson for many years. She is well deserved of her reputation as a fair-minded judge who treats all parties who appear before her with a high degree of respect and dignity. Her knowledge of the law and dedication to rendering rulings in conformity with controlling legal authority will make her an excellent addition to the Court of Appeals."

Jules Olsman, Past President of the Michigan Trial Lawyers Association and member of the Board of Governors of the American Trial Lawyers Association

"I have known Judge Neilson for sixteen years. As a lawyer she was both reasonable and honorable. Since she became a judge, she has distinguished herself as a fair minded individual who treats both sides with respect and who truly cares about the rights of people to have access to the courts. Many members of the Michigan Trial Lawyers Association regard her as an excellent trial judge who lets lawyers try their case without unsolicited intervention by the court."

Edward Kronk, President of the Michigan Defense Trial Counsel

"I have known Judge Neilson since she took the bench as a Wayne County, Michigan trial judge. She quickly developed a reputation as hard-working, thoroughly knowledgeable and prepared, appropriately respectful of the law, courteous to all who appear before her, decisive and fair. She is held in high esteem by both sides of the civil trial bar and will be a worthy addition to the distinguished bench of the Sixth Circuit."

ALLEN

JUDGE CLAUDE A. ALLEN
NOMINEE FOR THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

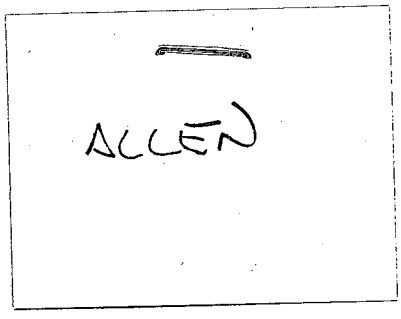
Biographical Information

- Clerked for Judge David B. Sentelle on the U.S. Court of Appeals for the D.C. Circuit
- Rated qualified by the American Bar Association.
- Confirmed by the Senate as Deputy Secretary for the Department of Health and Human Services.
- Served as Secretary of Health and Human Resources for the Commonwealth of Virginia.
- Led Governor Gilmore's initiative to pass a Patients Bill of Rights.
- Served as Virginia's Deputy Attorney General for the Civil Litigation Division and as Counsel to the Attorney General.
- Served as Deputy Staff Director on the Senate Foreign Relations Committee.

Allegations

Responses

- While working in the Virginia Office of the Attorney General, Secretary Allen organized Southern Attorneys General to work together to prevent and investigate the church burnings that were taking place in the summer of 1996.
- Worked on innovative programs to prevent crime and protect consumers.
- Secretary Allen has been a leading voice in the effort to put an end to trafficking in persons – a modern form slavery.
- Secretary Allen led Virginia's welfare reform initiative, which decreased the number of citizens receiving welfare and enabled former recipients to find quality jobs.



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Nominees who have been deemed "controversial" by interest groups include the following:

- **Judge Charles Pickering**, nominee to the 5th Circuit (Mississippi), was unanimously confirmed to be a federal district judge in 1990. He was rated well-qualified by the ABA. He has a long record of advancing race relations in Mississippi: investigating and prosecuting the KKK in the 1960's, sending his daughters to newly integrated public schools, hiring the first African-American staffer for the state party in 1976, chairing a Jones County committee on racial progress, and serving on the board of the Mississippi Institute for Racial Reconciliation. He is strongly supported by local African-Americans and Democrats, including Democrat Governor Musgrove, Attorney General Moore, and former Clinton Administration Assistant Attorney General Frank Hunger, as well as Sixth Circuit Judge Damon Keith and U.S. District Judge Henry Wingate.

- **Justice Priscilla Owen**, nominee to the 5th Circuit (Texas), has served on the Texas Supreme Court since 1994. In her successful reelection bid in 2000, every major newspaper in Texas endorsed her. She is supported by a bipartisan group of 15 past Presidents of the state bar, 3 former Democrat Justices of the Texas Supreme Court, and the former head of Legal Aid of Central Texas. She received a *unanimous* well-qualified ABA rating.

- **Judge Carolyn Kuhl**, nominee to the 9th Circuit (California), currently serves as a state trial judge on the Superior Court in California. She clerked for then-Judge Anthony Kennedy on the 9th Circuit, worked as a special adviser to Attorney General Smith and served as Deputy Solicitor General of the United States. She then became a partner at a leading Los Angeles law firm. She is supported by prominent Democrats such as Vilma Martinez, former President of the Mexican American Legal Defense and Educational Fund, and Ron Olson, as well as a bipartisan group of nearly 100 judges on the Los Angeles Superior Court. She received a well-qualified ABA rating.

- **Bill Pryor**, nominee to the 11th Circuit (Alabama), currently serves as Alabama Attorney General. He has earned great respect for his integrity and fairness as Alabama Attorney General. He is supported by prominent Democrats and African-American in Alabama, including former Democrat Governor Siegelman and Dr. Joe Reed, chair of the state's African-American caucus. He began his career as a law clerk for civil rights legend, Judge John Minor Wisdom. He received a qualified ABA rating. Some interest groups are opposing him because he is pro-life.

- **Judge Terrence Boyle**, nominee to the 4th Circuit (North Carolina), was unanimously confirmed to be a federal district judge in 1984 and has served with distinction since, now as Chief Judge. Judge Boyle has been appointed twice by Chief Justice Rehnquist to serve on Judicial Conference committees and has sat by designation on the Fourth Circuit. The former chairman of the state Democratic Party supports Judge Boyle's nomination, stating that he gives everyone "a fair trial."

- **Judge David McKeague**, nominee to the 6th Circuit (Michigan), was unanimously confirmed by the Senate to be a federal district judge in 1992. He served in private

practice for 25 years before that and is widely respected for his intellect and integrity. He received a well-qualified ABA rating.

- **Judge Susan Neilson**, nominee to the 6th Circuit (Michigan), has been a judge on the Michigan 3rd Judicial Circuit Court since 1991. She has more than 10 years of experience in private practice and was co-editor and author of Michigan Civil Procedure, a two-volume treatise on all areas of Michigan civil practice that received an award from the State Bar of Michigan. Judge Neilson is also active in numerous community service organizations. She received a *unanimous* well-qualified ABA rating.

- **Judge Henry Saad**, nominee to the 6th Circuit (Michigan), has served since 1994 on the Michigan Court of Appeals. In his re-election, he received broad bipartisan support, including endorsements from the Michigan Chamber of Commerce and the UAW. Since 1996, Judge Saad has taught legal ethics at Wayne State University Law School. He received the Arab-American and Chaldean Council Civic and Humanitarian Award for Outstanding Dedication to Serving the Community with Compassion and Understanding in 1995. He received a qualified ABA rating.

- **Claude A. Allen**, nominee to the 4th Circuit (Virginia), was confirmed by the Senate in 2001 as Deputy Secretary for the Department of Health and Human Services and is currently serving in that position. Before joining HHS, Allen served as Secretary of Health and Human Resources for the Commonwealth of Virginia and led Governor Gilmore's initiative to pass a Patients Bill of Rights in 1999. Allen has also served with distinction as Virginia's Deputy Attorney General for the Civil Litigation Division and as Counsel to the Attorney General. Before joining the Virginia state government, Allen practiced law at Baker & Botts in Washington, D.C., where he specialized in government contracts, litigation, and legislative affairs. He has received a qualified ABA rating.

- **Miguel Estrada** (nomination to the D.C. Circuit was withdrawn at Estrada's request). Estrada has argued 15 cases before the U.S. Supreme Court and has worked as a federal prosecutor, Assistant U.S. Solicitor General, and Supreme Court law clerk for Justice Kennedy. Estrada came to America as a teenager who spoke virtually no English, and had he been confirmed would have been the first Hispanic to serve on the D.C. Circuit. He represented a capital defendant pro bono before the Supreme Court. He was supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and received a *unanimous* well-qualified ABA rating.

Claude Allen
Nominee to the U.S. Court of Appeals for the Fourth Circuit

- **Claude Allen is well qualified to serve as a judge on the 4th Circuit. He has extensive legal experience in state and federal government and in private practice.**

  - ✓ Claude Allen presently serves as Deputy Secretary of the Department of Health and Human Services.

  - ✓ Before joining HHS, Allen was Virginia's Secretary of Health and Human Resources, where he oversaw 13 agencies and 15,000 employees.

  - ✓ He was also Virginia's Deputy Attorney General for the Civil Litigation Division, which required managing a team of 75 lawyers and staff. The Commonwealth's civil litigation activities included consumer protection, labor/employment, real estate, elections, insurance, and other related areas. Prior to that, Secretary Allen served as Counsel to Virginia's Attorney General.

  - ✓ Before joining Virginia state government, Mr. Allen practiced law in Washington, D.C. at the prestigious law firm of Baker & Botts. He had a general litigation practice, focusing on appellate work and government contracts.

- Claude Allen came from humble beginnings. He was born in Philadelphia, Pennsylvania, and grew up in the inner city of Washington, D.C. and later Raleigh, North Carolina.

  - ✓ Claude Allen was greatly influenced by his grandfather, who died at the age of 114. Mr. Allen's Grandpa Wray was the first in his family who was not born a slave.

- Secretary Allen received both his law degree and a Masters of Law in International and Comparative Law from Duke University Law School, one of the nation's best law schools. He earned undergraduate degrees in Political Science and Linguistics at the University of North Carolina at Chapel Hill.

- He also brings unique experience to the federal bench having served with distinction in all three branches of the federal government.

  - ✓ Secretary Allen served as a law clerk for the Honorable David B. Sentelle on the U.S. Court of Appeals for the D.C. Circuit, which is regarded as second in importance only to the Supreme Court.

  - ✓ Prior to attending law school, Secretary Allen worked on the Senate Foreign Relations Committee, ultimately becoming the Deputy Staff Director.

  - ✓ Secretary Allen would bring to the 4th Circuit an understanding of the workings of an executive agency and the U.S. Congress.

- Claude Allen is deeply committed to civil rights. While working in the Virginia Office of Attorney General, Claude Allen organized Southern Attorneys General to work together to prevent and investigate the church burnings that were taking place in the summer of 1996.

  - ✓ Claude Allen organized a National Summit at Howard University School of Divinity where 9 Attorneys General, faith community representatives, civil rights leaders, and other corporate and community leaders gathered to discuss and develop strategies to combat church burning and other crimes against the faith community.

  - ✓ As part of his efforts to assist the victims of the church burnings, Claude Allen worked with insurance companies to urge them to cover the losses incurred by houses of worship that were the targets of arson. Consequently, church arson victims received payment for their losses.

- During his tenure in the Virginia Attorney General's Office, Claude Allen worked on innovative programs to prevent crime and protect consumers.

  - ✓ Claude Allen worked with the Virginia Secretaries of Public Safety and Health and Human Resources to launch Virginia's Weed-and-Seed Program.

  - ✓ Claude Allen helped to launch public safety programs to protect senior citizens from consumer fraud and crimes against their persons and property.

- Secretary Allen has devoted countless hours to improving the lives of the mentally disabled, including persons with autism.

  - ✓ In 2002, HHS spent over $80 million to support basic research on autism. And the NIH allocated $60 million to support nine Collaborative Programs on Excellence in Autism, which links 129 researchers in 23 universities.

  - ✓ Thanks to HHS assistance, states are providing programs and services that enable autistic children to remain in their own schools, homes, and communities, rather than being placed in institutional settings.

  - ✓ In July of 2003, Secretary Allen announced a new HHS initiative that will educate parents about the benefits of early autism screening. Early diagnosis and intervention is extremely successful in helping autistic children reach their full potential.

- Secretary Allen has been a leading voice in the effort to put an end to trafficking in persons – a modern form of slavery.

  - ✓ An increasing number of South American women and girls have been lured into sex slavery due to economic hardship. They are smuggled into the U.S. with the promise of employment, but then are handed over to pimps who beat and rape them before coercing them into prostitution and enslavement.

- ✓ Under Secretary Allen's leadership, HHS provides trafficking victims with the benefits and services they need to get their lives back on track. HHS's matching grant program helps trafficking victims attain self-sufficiency within four months, emphasizing employment and English language training. HHS also provides women with mental health counseling, food stamps, medical assistance, and cash assistance.

- Secretary Allen spearheaded Virginia's initiative for a Patients Bill of Rights passed in 1999, which allows patients to appeal adverse coverage decisions made by health plans, and gives direct access to physician specialists.

- Secretary Allen led Virginia's welfare reform initiative, which decreased the number of citizens receiving welfare and enabled former recipients to find quality jobs.

  - ✓ Under Secretary Allen's leadership, the number of Virginians on welfare declined more than 30%. And about 70% of participants in the welfare-to-work program are employed when they leave the welfare rolls.

  - ✓ From 1998 through 1999, the welfare reform initiative saved Virginia taxpayers more than $126 million.

- Secretary Allen is working to implement Project BioShield, an HHS initiative to develop and make available modern, effective drugs and vaccines to protect against attack by biological and chemical weapons or other dangerous pathogens.

  - ✓ This 10-year, $6 billion effort will ensure that resources are available to pay for "next-generation" medical countermeasures, strengthen NIH development capabilities, and give FDA the ability to make promising treatments quickly available in emergency situations.

BROWN

JUDGE JANICE ROGERS BROWN
U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Biographical Information

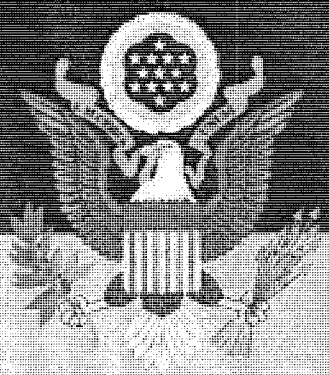
- Served as an Associate Justice for the California Supreme Court and was returned to the Court with the approval of 76% of California voters.
- Served as an Associate Justice on the Third District Court of Appeals of California.
- First African-American woman to serve on the California Supreme Court.
- Justice Brown has dedicated all but two years of her twenty-seven year legal career to public service in California's legislative, executive, and judicial branches.
- Served as a Member of the California Commission on the State of African-American Males.
- Served on the Governor's Child Support Task Force.

Allegations

- Accused of being ideologically extreme in her opposition to government.
- Accused of being unduly harsh towards criminal defendants
- In her First Amendment cases, she was accused of providing broad protections for corporate speech but fails to protect the First Amendment rights of average citizens.
- By striking down a minority program as unconstitutional, she was accused of being hostile to civil rights.
- Accused of being opposed to abortion rights and to the Supreme Court's decision in *Roe v. Wade*.

Responses

- Justice Brown has been a public servant in California for 25 years. In her own words: "I don't hate government, I am part of government." She also noted that "there are some things that only government should do."
- Justice Brown has been a staunch defendant of the constitutional rights of criminal defendants. She has issue several opinions arguing for reversals of criminal convictions, including death sentences, when she believed that the Constitution warranted it.
- Justice Brown firmly defends the First Amendment free speech rights of all citizens, but recognizes that these rights must on occasion be balanced against other important considerations.
- Justice Brown struck down the minority contracting program because it violated the Proposition 209 of the California Constitution that prohibits preferential treatment to any individual or group on the bases of race, sex, color, ethnicity, or national origin. In her opinion she stated that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.
- Justice Brown has never publicly stated her views on abortion. At her hearing, she testified that she would *Roe* and *Planned Parenthood v. Casey*, and that she would follow those precedents.



JANICE ROGERS BROWN

NOMINEE TO THE D.C. CIRCUIT

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TABLE OF CONTENTS: THE HONORABLE JANICE ROGERS BROWN

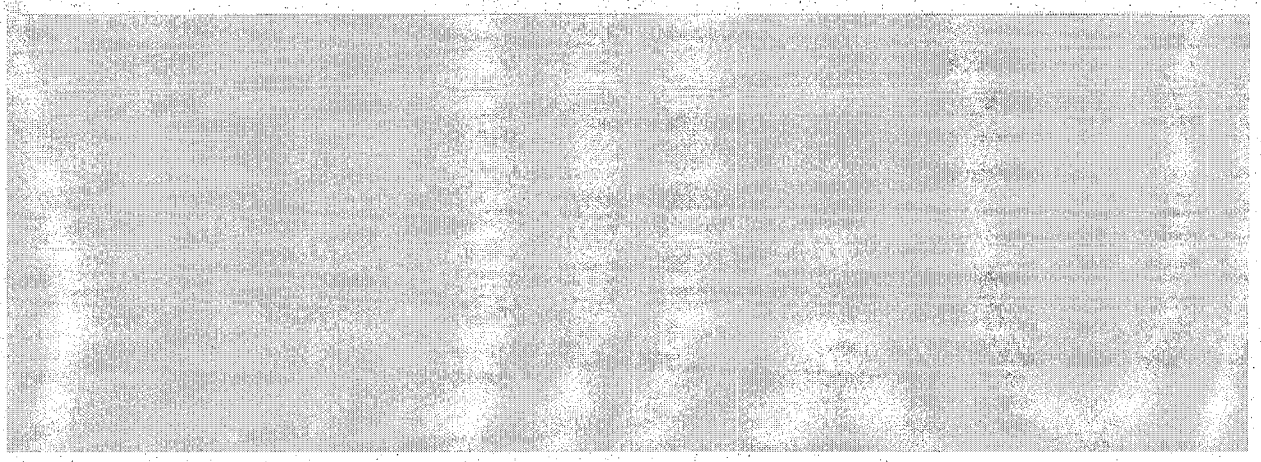
Summary and Biographical Points for Justice Brown 1

Statements by Select Supporters of Justice Brown 4

Responses to False Allegations against Justice Brown 9

Select Letters of Support for Justice Brown 17

Letter of a group of Justices on the California Court of Appeal, Second Appellate District 17
Letter of a group of Professors from the Pepperdine University School of Law 19
Letter of a bipartisan group of present and former judicial colleagues of Justice Brown 22
Letter of Justice Robert H. Edmunds, Jr., Supreme Court of North Carolina 24
Letter of Judge Daniel A. Barker, Arizona Court of Appeal 26
Letters of Judge John M. Tyson, North Carolina Court of Appeal 28
Letter of Judge David De Alba, Sacramento County Superior Court, California 36
Letter of Judge Talmadge R. Jones, Sacramento County Superior Court, California 38
Letter of Ward A. Campbell, Supervising Deputy Attorney General, California Department of Justice 41
Letter of Judge Patricia C. Esgro, Sacramento County Superior Court, California 43
Letter of Judge Eddie T. Keller, El Dorado County Superior Court, California 44
Letter of Jon B. Eisenberg, Horvitz & Levy LLP 46
Letter of Roy Innis, Chairman, Congress of Racial Equality 48
Letter of Regis Lane, Executive Director, Minorities in Law Enforcement 49
Letter of Joseph P. Maloney, Ph.D., Center for Youth Citizenship 51
Letter of Thomas J. Trimble, Chairman, Board of Regents, Pepperdine University 52



THE HONORABLE JANICE ROGERS BROWN
Nominee to the U.S. Court of Appeals for the District of Columbia Circuit

- In her nine years on the California Supreme Court, Justice Janice Rogers Brown has earned the reputation of being a brilliant and fair jurist who is committed to the rule of law. Her nomination has received support from across the political spectrum.

- She was recently returned to the Court with the approval of 76% of California voters, belying the contention that she could possibly be out of the mainstream.

- Justice Brown has dedicated over 25 years of her legal career to public service.

    - Justice Brown has served on the California Supreme Court since May 1996, when her historic appointment made her the first African-American woman to sit on that court. From 1994 to 1996, Justice Brown served on an intermediate California appellate court.

    - Prior to her judicial appointments, Justice Brown worked as Legal Affairs Secretary to California Governor Pete Wilson and served as the Deputy Secretary and General Counsel for the California Business, Transportation and Housing Agency. She also was a Deputy Attorney General in the Office of the California Attorney General for eight years.

- In additional to her commitment to public service, Justice Brown has participated in a variety of statewide and community organizations dedicated to improving the quality of life for all California citizens. These are just a few of her activities:

    - Justice Brown served as a Member of the California Commission on the Status of African-American Males. The Commission made recommendations on how to address inequities in the treatment of African-American males in employment, business development, and the criminal justice and health care systems.

    - Justice Brown served on the Governor's Child Support Task Force, which reviewed and made recommendations on how to improve California's child support enforcement system.

    - While serving as a Member of the Community Learning Advisory Board of the Rio Americano High School, Justice Brown developed a program to provide government service internships to high school kids in Sacramento.

    - Justice Brown also consistently volunteers for moot court programs. The head of the Center for Youth Citizenship wrote of Justice Brown's volunteer activities that she "has set both high academic and ethical standards for students. It is in our judgment that Justice Brown not only 'talks the talk,' but she 'walks the walk.'"

- Justice Brown's personal story is an inspiring example of the American dream.
    - Born to sharecroppers in Greenville, Alabama, Justice Brown attended segregated schools and came of age in the midst of Jim Crow laws.
    - She grew up listening to her grandmother's stories about NAACP lawyer Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks. Her experience as a child of the South motivated her to become a lawyer and to devote her life to public service.
    - When she was in her teens, Justice Brown's family moved to Sacramento, California. Justice Brown received her B.A. in economics from California State University in Sacramento and her law degree from the University of California Los Angeles School of Law.
    - Her distinguished career serving the California public earned her an appointment to the California Supreme Court, where she was retained with 76 percent of the vote in the last election.
- Justice Brown's impressive judicial record demonstrates her commitment to judicial restraint and the rule of law.
    - Justice Brown consistently defers to legislative decision making where moral and philosophical issues are involved. She firmly expresses the view that judges must not create policy, but must simply decide specific cases before them.
    - Justice Brown has repeatedly expressed the view that judicial lawmaking is inappropriate and that a careful balance must be maintained between the legislature and the courts.
    - Justice Brown has also championed civil rights. In one decision she wrote that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."
    - Her criminal law decisions evidence her impartiality and evenhandedness. In following the law, she often has authored opinions reversing verdicts or sentences for capital defendants. Justice Brown has also been sensitive to claims of racial profiling where the facts strongly supported such an inference.

- Justice Brown's nomination has garnered support from across the political and ideological spectrum.

    - A bipartisan group of former judicial colleagues have written: "We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor, without bias, and with an even hand. Because of these qualities, she has quickly become one of the most prolific authors of *majority* opinions on the California Supreme Court."

    - A group of professors from Pepperdine University School of Law said, "Since we are of differing political beliefs and perspectives, Democratic, Republican and Independent, we wish especially to emphasize what we believe is Justice Brown's strongest credential for appointment to this most important seat on the D.C. Circuit: her open-minded and thorough appraisal of legal argumentation — even when her personal views may conflict with those arguments."

    - Judge Eddie Keller of the Superior Court in California, wrote, "Most people tell me that the qualities they expect most from a judge are: intelligence, good judgment, an open mind, compassion, a sense of fairness, and integrity. Janice Brown has all of these qualities and more. ... Janice Brown is one of those rare individuals who come along in life and set a standard for all of us to admire. She is in the same category as our greatest jurists."

    - Jon B. Eisenberg, a lawyer and law professor, wrote. "In every case where I appeared before [Justice Brown] as practicing attorney, as well as in her decisions generally, which I have closely studied in my roles as law professor and author, I have found her to be a talented, sincere, and thoroughly dedicated appellate judge of the highest integrity – and, by the way, a marvelous writer. I respectfully disagree with those of my political soulmates who view our disapproval of her political philosophy as grounds for opposing her confirmation, for I believe that an appointee's judicial qualifications, not political philosophy, should be the focus of the confirmation process."

STATEMENTS BY SELECT SUPPORTERS OF JUSTICE JANICE BROWN

Group of Justices on the California Court of Appeal, Second Appellate District

"We, the undersigned, are justices of the California Court of Appeal. As intermediate appellate court justices, we are thoroughly familiar with Justice Brown's opinions. In her role as a justice of the California Supreme Court, Justice Brown has served California well. She has written many important decisions establishing and reaffirming important points of law. Her opinions reflect her belief in the doctrine of stare decisis and are noteworthy for their clarity and conciseness. She sets forth her views logically and intelligently. We are each personally acquainted with Justice Brown. We know her to be intelligent, thoughtful, well-read, well-rounded, insightful, and personable. We believe she will be an excellent judge of the United States Court of Appeals." (*Letter to Sen. Hatch*, October 21, 2003)

Group of Professors from the Pepperdine University School of Law

"As members of law faculties here in California, we know Justice Brown to be a person of high intelligence, unquestioned integrity, and even-handedness. Since we are of differing political beliefs and perspectives, Democratic, Republican and Independent, we wish especially to emphasize what we believe is Justice Brown's strongest credential for appointment to this most important seat on the D.C. Circuit: her open-minded and thorough appraisal of legal argumentation — even when her personal views may conflict with those arguments." (*Letter to Sen. Hatch*, October 15, 2003)

Bipartisan group of present and former judicial colleagues of Justice Brown

"We are members of and present and former colleagues of Justice Janice Rogers Brown on the California Supreme Court and California Court of Appeal for the Third Appellate District. Although we span the spectrum of ideologies, we endorse her for appointment to the U.S. Court of Appeals for the D.C. Circuit.

Much has been written about Justice Brown's humble beginnings, and the story of her rise to the California Supreme Court is truly compelling. But that alone would not be enough to gain our endorsement for a seat on the federal bench. We believe that Justice Brown is qualified because she is a superb judge. We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor, without bias, and with an even hand. Because of these qualities, she has quickly become one of the most prolific authors of *majority* opinions on the California Supreme Court." (*Letter to Sen. Hatch*, October 16, 2003)

Justice Robert H. Edmunds, Jr., Supreme Court of North Carolina

"I have gotten to know Justice Brown during the last two summers as we both participated in a masters degree program sponsored by the University of Virginia School of Law for appellate judges. Speaking as a former United States Attorney who has appeared before the Fourth Circuit numerous times, I believe she is unusually qualified for a position on the federal judiciary. She is as smart as they come and has an ideal judicial temperament. When she would ask a question in class, everyone else would quiet down to hear what she had to say.

She does not force her own views on others. I went through the first summer in the U. Va. program with her without realizing that she was a Republican. As far as I could tell both from her class participation and from chatting with her in social settings, her interest is in the fair and intellectually honest application of the law." (*Letter to Sen. Hatch*, October 17, 2003)

Judge Daniel A. Barker, Arizona Court of Appeal

"Without hesitation, and unequivocally, I can tell you that Janice Brown is a judge of the highest order. She is eloquent and clear spoken; she is balanced and compassionate; and, she has the ability to cut to the core of a legal issue and resolve it squarely on constitutional and legal principles. She is not swayed by the passions or emotions present in hotly contested issues, but is able to remain well grounded and firm in applying the applicable law... She will be someone that both the lay person on the street, and the legal scholar at the university, can look to with assurance in knowing that she will faithfully and impartially apply the law and uphold the highest legal standards." (*Letter to Sen. Hatch*, October 17, 2003)

Judge John M. Tyson, North Carolina Court of Appeal

"By any measure, Justice Janice Brown is highly and uniquely qualified to be confirmed to serve on the United States Court of Appeals. Janice is a very approachable, humble, and seasoned jurist who will render impartial and dedicated service to our nation for many years." (*Letters to Senators Hatch, Leahy, Dole, and Edwards*, October 17, 2003)

Judge David De Alba, Sacramento County Superior Court, California

"Since our days as deputy attorneys general, I have always admired Justice Brown's dedication to the law and her work ethic... She has grown immensely as a jurist and today is one of the most productive members of our state Supreme Court. No one can criticize her fidelity to the law and her work. She is a tireless worker and cares deeply about her convictions." (*Letter to Sen. Feinstein*, October 20, 2003)

Judge Talmadge R. Jones, Sacramento County Superior Court, California

> "Justice Brown is nothing less than a truly exceptional attorney, judge, and public servant. She is in my personal book of great Americans... Justice Brown will encourage collaboration and unanimity with her fellow judges by her answers of persuasion and reason. She will honor the rule of law and precedent of the United States Supreme Court and other Circuit Court decisions.
>
> Justice Brown is about the smartest (and wisest) judge I know, but would be the last person to tout her intellect or use it to her personal advantage. She is a quick study, with the ability to research and write about the law in a way that all will understand." (*Letter to Sen. Hatch*, October 17, 2003)

Ward A. Campbell, Supervising Deputy Attorney General, California Department of Justice

> "[Justice Brown] is a thoughtful, reflective, and compassionate person. She reaches her own conclusions independently only after great deliberation." (*Letter to Sen. Hatch*, October 20, 2003)

Judge Patricia C. Esgro, Sacramento County Superior Court, California

> "I have known Justice Brown for over twenty years. She is a good friend and a former colleague in the California Attorney General's Office. I also served as her Chief Deputy in the Legal Affairs Unit of Governor Pete Wilson's office. I have personally observed her deep integrity and passion for justice. She has devoted her life to public service and the public good. She is a woman of humility who yet possesses a fierce sense of history and patriotism." (*Letter to Sen. Hatch*, October 20, 2003)

Judge Eddie T. Keller, El Dorado County Superior Court, California

> "Most people tell me that the qualities they expect most from a judge are: intelligence, good judgment, an open mind, compassion, a sense of fairness, and integrity. Janice Brown has all of these qualities and more.
>
> In tracking her legal opinions as an appellate court justice, I note that they are distinguished by the same scholarship, thoroughness, intelligence, and unique literary style that makes her stand out from most others. She has a brilliant legal mind. She cares intensely about the legal and social values that each case presents. She is open to being persuaded on any legal point. She is an independent thinker. No one could ask more from any judge.
>
> Having been in a position to have read and evaluated the legal opinions of a countless number of judges over my legal career, I can truly say that Janice Brown is one of those rare individuals who come along in life and set a standard for all of us to admire. She is in

the same category as our greatest jurists. She would be an invaluable addition to the federal judiciary." (*Letter to Sen. Hatch*, October 20, 2003)

Jon B. Eisenberg, Horvitz & Levy LLP

"In every case where I appeared before [Justice Brown] as practicing attorney, as well as in her decisions generally, which I have closely studied in my roles as law professor and author, I have found her to be a talented, sincere, and thoroughly dedicated appellate judge of the highest integrity – and, by the way, a marvelous writer. I respectfully disagree with those of my political soulmates who view our disapproval of her political philosophy as grounds for opposing her confirmation, for I believe that an appointee's judicial qualifications, not political philosophy, should be the focus of the confirmation process." (*Letter to Sen. Hatch*, October 21, 2003)

Roy Innis, Chairman, Congress of Racial Equality

"Judge Janice Rogers Brown (the President's nominee for the DC Circuit Court of Appeals) is an outstanding candidate for the position. Her judicial temperament is fair, but focused. This is why her colleagues on the bench often depended on Justice Brown to write the majority opinion for the Court last year. She did this more times than any other Justice. In 1998, the people of California, who knew her best, re-elected her with the highest winning majority of any judge in the state with 76% of the vote." (*Letter to Sen. Hatch*, October 21, 2003)

Regis Lane, Executive Director, Minorities in Law Enforcement

"We recommend the confirmation of Justice Brown based on her broad range of experience, personal integrity, good standing in the community and dedication to public service... Justice Brown is a fair and just person with impeccable honesty, which is the standard by which justice is carried out." (*Letter to Sen. Hatch*, undated)

Joseph P. Maloney, Ph.D., Center for Youth Citizenship

"Justice Brown has been a consistent volunteer for the Center's Gordon D. Schaber Mock Trial and Moot Court program. In a speech delivered to these high school students in 2000, she spoke to them about the importance of character development and the law. Specifically, she shared the virtues of honor, courage, responsibility, generosity, and respect.

Justice Brown has set both high academic and ethical standards for students. It is in our judgment, that Justice Brown not only 'talks the talk,' but she 'walks the walk.'" (*Letter to Sen. Hatch*, October 21, 2003)

Thomas J. Trimble, Chairman, Board of Regents, Pepperdine University

"Justice Brown has proven herself to be a fair-minded judge who considers all sides of an issue before deciding a case. She has a keen interest in the workings of our government and would make a valuable addition to the D.C. Circuit Court." (*Letter to Sen. Hatch*, October 17, 2003)

JUSTICE JANICE ROGERS BROWN
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: Justice Brown is ideologically extreme in her opposition to government.

RESPONSES:

- Justice Brown has been a public servant in California for 25 years. In her own words: "I don't hate government, I am part of government." She also noted that "there are some things that only government should do."

- A review of Justice Brown's opinions demonstrates that she understands that government can and does play an important role in her state and in America. For instance:

    - Justice Brown voted to uphold stringent state standards for identifying and labeling milk and milk products, thereby protecting the health and safety of California consumers.

    - Justice Brown agreed that the phrase "source of drinking water" in the government's Safe Drinking Water program includes faucets allegedly containing lead, allowing the Attorney General to sue faucet manufacturers to protect California consumers.

    - Justice Brown agreed that state regulations regarding overtime pay were validly enacted and should be liberally interpreted to provide greater protection for Californians than is provided under federal law.

- Although Justice Brown has delivered speeches that are critical of expansive government, she has repeatedly expressed the view that government has a legitimate, albeit limited, role to play.

    - As she said in one speech: "Government is not here to save us. Government was created to allow us to save ourselves."

    - In another speech she stated, "A little government is necessary, but a little government goes a long way."

- Justice Brown's skepticism of expansive government is a personally held view, expressed in speeches and writing, but not reflected in her judicial opinions, which seek to apply the law as it exists and which consistently defer to legislative judgments on how best to address social and economic problems.

ALLEGATION: Justice Brown is unduly harsh towards criminal defendants.

RESPONSES:

- Justice Brown has been a staunch defender of the constitutional rights of criminal defendants. She has issued several opinions arguing for reversals of criminal convictions, including death sentences, when she believed that the Constitution warranted it. The following are just a few examples of cases in which she has defended criminal rights:
    - Justice Brown argued for the exclusion of evidence of drug possession that was discovered after the defendant was arrested for riding his bicycle the wrong way on a residential street, which she believed suggested the possibility of racial profiling.
    - In a dissent, Justice Brown argued for the exclusion of evidence obtained during a warrantless search of a person's home based on consent given by the person's roommate.
    - Justice Brown authored an opinion reversing a verdict and death sentence in a case where the prosecutor deprived the defendant of a fair trial by failing to both discover and disclose an arguably exculpatory blood test.
    - In another case, Justice Brown dissented from the majority opinion, arguing that a defendant's death sentence should be set aside on grounds of ineffective assistance of counsel.
- Justice Brown's critics have unfairly focused on her dissent in *People v. Mar*, the so-called "stun belt" case. In that case, Justice Brown argued that because a defendant had not demonstrated that he was in any way prejudiced because he was required to wear a stun belt during his trial – a showing he was required to make – the Court should not overturn his conviction for assaulting a police officer.
    - The use of the stun belt in this case was reasonable, given that the defendant's own attorney argued that the defendant was incompetent, that he was incapable of having rational conversations with counsel, that his behavior was "explosive," and that he was psychotic.
    - Numerous federal and state courts have upheld the use of stun belts at trial, including the United States Courts of Appeals for the Fifth, Seventh, Ninth and Tenth Circuits, and state appeals courts in Colorado, Delaware, Minnesota and Washington.
- Justice Brown's overall record in criminal cases demonstrates her fair and evenhanded treatment of criminal defendants.

ALLEGATION: In First Amendment cases, Justice Brown provides broad protections for corporate speech but fails to protect the First Amendment rights of average citizens.

RESPONSES:

- Justice Brown firmly defends the First Amendment free speech rights of all citizens, but recognizes that these rights must on occasion be balanced against other important considerations.

- In the commercial speech context, Justice Brown's sharp dissent in the *Nike v. Kasky* case has drawn criticism from some of her detractors because of her defense of Nike's speech rights. Justice Brown expressed the view that proper application of the First Amendment should seek to "maximize the ability of businesses to participate in the public debate while minimizing consumer fraud."

- Many notable liberal professors and advocates supported Justice Brown's position and were also critical of the majority opinion.

    - Ann Brick of the ACLU stated of the California Supreme Court's decision that it "essentially shuts business speakers out of the public debate on any issue that affects them. That kind of analysis is antithetical to the basic First Amendment principle that we let the people, not the government, decide who's right and who's wrong on an issue of public dispute."

    - Harvard law professor Laurence H. Tribe represented Nike in this case and noted that "if companies can be sued for alleged misstatement in their press releases, they will be reluctant to speak at all."

    - The AFL-CIO filed an amicus brief on behalf of Nike, noting that although the union agrees with plaintiff's view of Nike's labor practices; "Where we part company with the plaintiff, however, is that we are certain that this debate is, and in the interest of the disputants and the public should be, an open free speech debate under the First Amendment and not one subject to legal regulation under the commercial speech doctrine."

    - Justice Breyer, in a dissent to the dismissal of certiorari in *Nike*, concluded that the California law at issue likely "disproportionately burdens speech; and that the First Amendment consequently forbids it." In effect, Justice Breyer indicated that Justice Brown had the better constitutional argument.

    - The editorial boards of *USA Today*, the *Los Angeles Times*, the *Washington Post*, and the *Chicago Tribune* all supported Justice Brown's position in the case.

- Some critics have alleged that in a decision to uphold an injunction denying the rights of gang members to congregate near one another, Justice Brown denied the First Amendment right of Latino youths to peaceful assembly.

- The undisputed facts in the case indicate that gang members were not peacefully assembling, but rather openly drank, smoked marijuana, snorted cocaine from the hoods of cars, sold drugs, engaged in gunfights, and intimidated and retaliated against neighbors who dared complain to the police.

- Justice Brown wrote for the majority to uphold the City of San Jose's injunction that prohibited gang members from intimidating, harassing, threatening or assaulting other individuals. Only one member of the California Supreme Court dissented from the decision.

- The injunction apparently greatly reduced crime in the city and was lauded by editorials in both the *Los Angeles Times* and the *San Francisco Examiner*.

ALLEGATION: By striking down a minority contracting program as unconstitutional, Justice Janice Rogers Brown has demonstrated hostility to civil rights.

RESPONSES:

- As a child of Alabama sharecroppers who grew up in the midst of Jim Crow laws, Justice Brown has a personal appreciation for the importance of civil rights and equal opportunity.

- Justice Brown wrote for a unanimous court in *Hi-Voltage Wire Works*, which struck down a San Jose minority contracting program because it violated Proposition 209, a provision of the California Constitution that prohibits discrimination against, or preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

- Justice Brown stated in her opinion in *Hi-Voltage* that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."

- Justice Brown's opinion noted that the Constitution permits race-conscious programs and she favorably cited U.S. Supreme Court decisions establishing an affirmative duty to desegregate where there has been a showing of prior discrimination.

- Justice Brown's decision was fully in accordance with the law -- every other judge in California who reviewed the program also found it unconstitutional.

- Moreover, a significant bi-partisan group of California law professors have written to express their agreement with this result: "The holding in *Hi-Voltage* – disallowing race and gender-based contracting preferences by the State – is a faithful application of California's constitutional instruction...The nation may disagree on the nuances of policy in this area, but in this instance, the California constitution is unequivocal." (*Letter to Sen. Hatch*, October 15, 2003).

- Justice Brown's commitment to civil rights has been recognized by numerous groups, including Minorities in Law Enforcement, whose executive director wrote, "In many conversations with Justice Brown, I have discovered that she is very passionate about the plight of racial minorities in America, based on her upbringing in the south. Justice Brown's views that all individuals who desire the American dream, regardless of their race or creed, can and should succeed in this country are consistent with MILE's mission to ensure brighter futures for disadvantaged youth of color." (*Letter to Sen. Hatch*, undated)

ALLEGATION: Justice Brown is opposed to abortion rights and to the Supreme Court's decision in *Roe v. Wade.*

RESPONSES:

- Justice Brown has never publicly stated her views on abortion. At her hearing, she acknowledged that the Supreme Court has found a right to privacy in the Constitution, and that such right extends to a woman's right to have an abortion. She testified that she accepted *Roe* and *Planned Parenthood v. Casey* as the law of the land, and that as a member of the D.C. Circuit Court of Appeals she would follow those precedents.

- Justice Brown voted to uphold a California law requiring minors to get the consent of their parents or a court order before receiving an abortion. Her dissenting opinion in *American Academy of Pediatrics v. Lungren* argued that the parental consent law should be upheld in accordance with settled Supreme Court precedents, which have upheld the constitutionality of statutes similar to the one at issue in the *Lungren*.

- In *Lungren*, Justice Brown refused to substitute her own views for that of the legislature, because of her firm belief that issues surrounding abortion should be left to the political process. She explained that "abortion 'is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles.'" She also took issue with the majority's analysis for its "utter lack of deference to the ordinary constraints of judicial decisionmaking – deference to state precedent, to federal precedent, to the collective judgment of our Legislature, and, ultimately to the people we serve."

- Justice Brown's arguments regarding parental consent are well within the mainstream of American law. Parental consent laws have been upheld in several decisions of the U.S. Supreme Court, including *Planned Parenthood v. Casey*, the decision that reaffirmed the central holding of *Roe v. Wade*. Similar laws have also passed constitutional muster in other states.

- Moreover, parental notice or consent laws do not prevent minor girls from having abortions. They simply require abortion providers to obtain the consent of a parent before performing an abortion on a minor girl or to obtain a judicial bypass.

ALLEGATION: Justice Brown's decisions demonstrate lack of concern for ordinary consumers.

RESPONSES:

- Justice Brown faithfully follows the requirements of the law, which means that she has authored numerous opinions in favor of ordinary consumers and worker's rights. For example, Justice Brown has held that:
    - a settlement agreement between an injured passenger and the driver which released the driver, his insurer, and "all other persons, firms, corporations, and associations or partnerships" did not bar the plaintiff's action against the vehicle manufacturer;
    - even when a mother was not a direct victim of a physician's negligence, the mother could recover for emotional distress absent a showing of outrageous conduct on the part of the physician;
    - medical monitoring claims are susceptible to class action treatment.
- Justice Brown has been criticized for dissenting from two decisions relating to California's unfair competition law. In these dissents, however, she demonstrated her willingness to protect small businesses and consumers who ultimately bear the expense of the abusive use of California's unfair competition law.
- Her dissents in these cases originated from the California Law Revision Commission, which noted, "No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review."
    - Justice Brown's dissents were motivated by important constitutional considerations relating to the separation of powers between the legislature and the executive. Furthermore, they were consistent with the plain meaning of the statute and the legislative intent motivating its enactment.
    - Under the view taken by Justice Brown's dissents, the public would have ample remedies for unfair business practices, but the prosecution and enforcement of such problems would be left to public officials charged with that task.
- Justice Brown's decisions in this, as in other, areas reflect a fair-minded application of the appropriate laws – she follows the law wherever it leads her. A group of her former colleagues who span the ideological spectrum have written, "We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor, without bias, and with an even hand. Because of these qualities, she has quickly become one of the most prolific authors of *majority* opinions on the California Supreme Court." (*Letter to Sen. Hatch*, October 16, 2003)

ALLEGATION: Justice Janice Rogers Brown believes that property rights trump individual rights and would turn back the clock to the *Lochner*-era invalidation of important social legislation.

RESPONSES:

- Although Justice Brown has publicly criticized specific portions of Justice Holmes' dissent in *Lochner*, she has not advocated support of the majority opinion in that case.

- Justice Brown testified and has acknowledged in her opinions that the *Lochner* court has been justly criticized for using the due process clause in the Constitution as "a blank check to alter the meaning of the Constitution as written."

- She also noted in her testimony that *Lochner* has been discredited, and that it has come to be known as one of the worst judicial opinions in history.

- The *Lochner* majority invalidated a state's minimum hour law on the grounds that such legislation violated the individual's Fourteenth Amendment due process right to contract with employers. Justice Holmes had argued in his dissent that the Framers did not consider any particular economic theory when drafting the Constitution, and that the Constitution did not protect the contract rights articulated by the majority opinion.

- In a speech at the University of Chicago, Justice Brown argued that the collectivist impulse that inspired the end of the *Lochner* era was contrary to the thinking of the Framers, who had a specific political philosophy and conception of humanity in mind when they drafted the Constitution.

- In a speech before the Institute for Justice, Justice Brown explained that the founders "revered private property" and that their philosophy "relied heavily on the indissoluble connection between rationality, property, freedom, and justice." Indeed, the U.S. Supreme Court has in three recent decisions scrutinized government action under the Takings Clause of the Fifth Amendment. Justice Brown has argued that in these decisions the U.S. Supreme Court has held out the "possibility of a revival of what might be called *Lochnerism*-lite."

- The legacy of *Lochner* continues to be a much debated issue amongst legal academics and Justice Brown's reconsideration of *Lochner* and its relevance to the contemporary consideration of property rights is hardly unusual.

- Whatever Justice Brown's personal views regarding the scope of government, she has repeatedly demonstrated her ability to follow relevant precedent. For instance, in *Kasler v. Lockyer*, Justice Brown wrote the majority opinion upholding an assault weapon ban against constitutional attack. She also wrote a separate concurring opinion in *Kasler* to register her concern over the Supreme Court's disparate treatment of social and economic rights as opposed to "fundamental" rights. Despite her apparent disagreement with long-settled precedent, Justice Brown adhered to stare decisis and wrote the opinion for the Court.

Court of Appeal
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
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LOS ANGELES, CA 90013

October 21, 2003

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

This letter is written in support of the confirmation of California Supreme Court Associate Justice Janice Rogers Brown as a judge of the United States Court of Appeals for the District of Columbia Circuit. We, the undersigned, are justices of the California Court of Appeal. As intermediate appellate court justices, we are thoroughly familiar with Justice Brown's opinions.

In her role as a justice of the California Supreme Court, Justice Brown has served California well. She has written many important decisions establishing and reaffirming important points of law. Her opinions reflect her belief in the doctrine of stare decisis and are noteworthy for their clarity and conciseness. She sets forth her views logically and intelligently. We are each personally acquainted with Justice Brown. We know her to be intelligent, thoughtful, well-read, well-rounded, insightful, and personable.

We believe she will be an excellent judge of the United States Court of Appeals. We request that you take our views into consideration during the confirmation proceedings. If you desire any further information, any of us would be pleased to provide it.

Very truly yours,

Margaret M. Grignon

MARGARET M. GRIGNON, Associate Justice

Orville A. Armstrong

ORVILLE A. ARMSTRONG, Associate Justice

PATTI S. KITCHING, Associate Justice

RICHARD M. MOSK, Associate Justice

ROGER W. BOREN, Presiding Justice

MICHAEL G. NOTT, Associate Justice

H. WALTER CROSKEY, Associate Justice

MIRIAM A. VOGEL, Associate Justice

DANIEL A. CURRY, Associate Justice

J. GARY HASTINGS, Associate Justice

PAUL A. TURNER, Presiding Justice

CHARLES S. VOGEL, Presiding Justice

yd

cc: Honorable Patrick J. Leahy, United States Senate
Office of Legal Policy

PEPPERDINE UNIVERSITY

School of Law

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October 15, 2003

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

Re: Justice Janice Rogers Brown

Dear Senator Hatch:

We are writing to express our support for President Bush's nomination of Justice Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit. As members of law faculties here in California, we know Justice Brown to be a person of high intelligence, unquestioned integrity, and even-handedness. Since we are of differing political beliefs and perspectives, Democratic, Republican and Independent, we wish especially to emphasize what we believe is Justice Brown's strongest credential for appointment to this most important seat on the D.C. Circuit: her open-minded and thorough appraisal of legal argumentation – even when her personal views may conflict with those arguments.

Justice Brown has served with distinction for more than seven years on our State's highest court. The first African-American woman serving on this bench, she was elevated to the California Supreme Court following several years on this State's appellate court. She has carried out these judicial assignments with diligence and effectiveness. Known for her comprehensive, rigorous, and direct (and yes, sometimes analytically critical) writing, Justice Brown's clarity of thought has often captured the mainstream of California jurisprudence. Perhaps nothing is more revealing of her mainstream views than the fact that in 2002, Justice Brown was relied upon by her colleagues to write the majority opinion more often than any other member of the Court.

A fair examination of her work reveals that Justice Brown resolves matters as individual *cases*, not generalized or abstract *causes*. As the *Los Angeles Daily Journal* concluded, it is often said among those who have followed her decisions closely that "she also defies ideological labeling, having shown [for example] libertarian leanings on free speech and search-and-seizure issues . . ."

Justice Brown received considerable attention, of course, for her majority opinion in *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537 (2000). The holding in *Hi-Voltage* – disallowing race and gender-based contracting preferences by the State – is a faithful application of California's constitutional instruction that neither race nor sex, among other criteria, shall be a basis to either discriminate against, nor give preference to, any individual or group. Cal. Const. Art. I, section 31. It is only natural that a decision in this sensitive context would attract

headlines and be assailed by some as politically mistaken. The nation may disagree on the nuances of policy in this area, but in this instance, the California constitution is unequivocal. In any event, what is deserving or special commendation is that Justice Brown wrote as a jurist, not a politician, and she wrote for a court that was unanimous in judgment and in agreement with the two lower courts that addressed the issue.

As scholars of the bill of rights, we most certainly differ among ourselves, and with Justice Brown, on particular outcomes. Nevertheless, it is certainly hard to contest Justice Brown's commitment to individual freedom, even when rights are asserted by unpopular litigants. For instance, in *People v. Woods*, 21 Cal. 4th 668 (1999), a felony probationer obtained her freedom by consenting to probationary searches. A majority of the Court in *Woods* casually extended this consent to include the liberty interests of two non-consenting third parties, but who months later came to share a dwelling with the probationer. Justice Brown, for herself and two other members of the Supreme Court, vigorously dissented, articulating the view that a law enforcement officer may not conduct a general investigatory search of a non-probationer based upon the probation search condition of another individual.

In her judicial and professional writing, Justice Brown has often reminded us of the historical aspirations of our constitutional system. As the daughter of sharecroppers in rural and segregated Alabama, these lessons and reminders have special poignancy. Soft-spoken and humble in nature, Justice Brown does not, without considerable prompting, elaborate upon her success in overcoming adverse economic circumstances and irrational societal discrimination. She simply lets her hard work and excellence of character speak for themselves.

For the reasons briefly articulated here, we believe that Justice Janice Rogers Brown possesses the intelligence, learning, judicial experience and demeanor to fulfill the weighty and important responsibilities of the U.S. Court of Appeals. We urge the Senate Judiciary Committee and the full Senate to act promptly and favorably upon her nomination.

Respectfully submitted,*

Douglas W. Kmiec
Caruso Chair & Professor
of Constitutional Law
Pepperdine University

Stephen R. Barnett
Elizabeth J. Boalt Professor of Law,
Emeritus
University of California, Berkeley

Stephen Bainbridge
Professor of Law
University of California, Los Angeles

Thomas Bost
Professor of Law
Pepperdine University

* All school references are for identification only. Confirmations of signature on file with Professor Kmiec.

Robert Cochran
Brandeis Professor of Law
Pepperdine University

John Coons
Professor of Law, Emeritus
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Professor of Law
Chapman University School of Law

David Davenport
Distinguished Professor of Public Policy and Law, Pepperdine University
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Maimon Schwarzschild
Professor of Law
University of San Diego School of Law

Nhan Vu
Professor of Law
Chapman University School of Law

James R. Wilburn
Dean, School of Public Policy
Pepperdine University

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee
on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

United States Department of Justice
Office of Legal Policy

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October 16, 2003

The Honorable Orrin G. Hatch
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Re: Nomination of Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

We are members of and present and former colleagues of Justice Janice Rogers Brown on the California Supreme Court and California Court of Appeal for the Third Appellate District. Although we span the spectrum of ideologies, we endorse her for appointment to the U.S. Court of Appeals for the D.C. Circuit.

Much has been written about Justice Brown's humble beginnings, and the story of her rise to the California Supreme Court is truly compelling. But that alone would not be enough to gain our endorsement for a seat on the federal bench. We believe that Justice Brown is qualified because she is a superb judge. We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor, without bias, and with an even hand. Because of these qualities, she has quickly become one of the most prolific authors of majority opinions on the California Supreme Court.

Although losing Justice Brown would remove an important voice from the Supreme Court of California, she would be a tremendous addition to the D.C. Circuit. Justice Brown would bring to the court a rare blend of collegiality, modesty, and intellectual stimulation. Her judicial opinions are consistently thoughtful and eloquent. She interacts collegially with her colleagues and maintains appropriate judicial temperament in dealing with colleagues, court personnel and counsel.

If Justice Brown is placed on the D.C. Circuit, she will serve with distinction and will bring credit to the United States Senate that confirms her. We strongly urge that the Senate take all necessary steps to approve her appointment as expeditiously as possible.

Joining me in this letter are Justices Marvin R. Baxter, Ming W. Chin and Carlos R. Moreno of the California Supreme Court and Presiding Justice Arthur G. Scotland and Justices Rodney Davis, Harry E. Hull, Jr., Daniel M. Kolkey, Fred K. Morrison, George W. Nicholson, Vance W. Ray and Ronald B. Robie of the California Court of Appeal, Third Appellate District.

I am informed that Justice Joyce L. Kennard of the California Supreme Court has already written a letter in support of Justice Brown's nomination.

Chief Justice Ronald M. George and Justice Kathryn M. Werdegar of the California Supreme Court are not opposed to Justice Brown's appointment but it is their long standing policy not to write or join in letters of support for judicial nominees.

Thank you for your consideration of this letter.

Very truly yours,

Robert K. Puglia
Retired Presiding Justice
Court of Appeal, Third Appellate District

RKP/aep

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
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SUPREME COURT
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CHAMBERS OF
JUSTICE ROBERT H. EDMUNDS, JR.

P.O. BOX 104
TEL. (919) 733-3718

17 October 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Honorable Janice R. Brown

Dear Senator Hatch:

I understand that Justice Janice R. Brown's confirmation hearing as a Judge of the District of Columbia circuit is pending. I hope that she will receive favorable consideration.

I have gotten to know Justice Brown during the last two summers as we both participated in a masters degree program sponsored by the University of Virginia School of Law for appellate judges. Speaking as a former United States Attorney who has appeared before the Fourth Circuit numerous times, I believe she is unusually qualified for a position on the federal judiciary. She is as smart as they come and has an ideal judicial temperament. When she would ask a question in class, everyone else would quiet down to hear what she had to say.

She does not force her own views on others. I went through the first summer in the U. Va. program with her without realizing that she was a Republican. As far as I could tell both from her class participation and from chatting with her in social settings, her interest is in the fair and intellectually honest application of the law.

She also has a very pleasing personality. People just like Janice and are happy to be around her. That's one reason a diverse bunch of cranky old state judges and justices could agree on at least one thing--to elect her class president. She will do a splendid job if confirmed.

Please do not hesitate to contact me if I can provide any further information.

Sincerely,

Robert H. Edmunds, Jr.

NOT PRINTED OR MAILED AT GOVERNMENT EXPENSE

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

cc: Office of Legal Policy

CHAMBERS OF
DANIEL A. BARKER
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October 17, 2003

Via Facsimile: (202) 228-1698

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

Re: Nomination of Justice Janice R. Brown to the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Hatch:

I write with pleasure to wholeheartedly and enthusiastically endorse the nomination of Justice Janice R. Brown to the United States Court of Appeals for the District of Columbia Circuit.

It has been my privilege to be associated with Justice Brown for the past two years. I have literally spent hours in the classroom with Justice Brown on topics as diverse as environmental federalism to constitutional law and international human rights. For the past two summers, we have been fellow participants in a graduate program for judges at the University of Virginia that includes twelve weeks of classroom discussion and work. I have had the opportunity to see her analytical skills, her reasoning, her understanding of complex factual and legal issues and her ability to fairly and evenhandedly apply facts to law in a myriad of circumstances.

Without hesitation, and unequivocally, I can tell you that Janice Brown is a judge of the highest order. She is eloquent and clear spoken; she is balanced and compassionate; and, she has the ability to cut to the core of a legal issue and resolve it squarely on constitutional and legal principles. She is not swayed by the passions or emotions present in hotly contested issues, but is able to remain well grounded and firm in applying the applicable law.

I can appreciate that my comments may seem uncommonly high. But Janice Brown is an uncommon woman. She has that rare gift of extraordinary life experiences that are combined with intellectual training and rigor to make her uniquely qualified to sit on one of our nation's highest courts. Just as she has been a strengthening asset to the state of California on its supreme court, so she will be on the Court of Appeals. She will be someone that both the lay person on the street, and the legal scholar at the university, can look to with assurance in knowing that she will faithfully and impartially apply the law and uphold the highest legal standards.

It is my present privilege to serve on the same court that Justice Sandra Day O'Connor served on before her appointment to the United States Supreme Court. I do not know Justice O'Connor, but I know the court from whence she came. I can tell you from one who serves on that court that Janice Brown possesses all of the attributes and talents that any fair-minded individual would look for in a judge for the United States Court of Appeals.

I urge you, and each member of the Senate Committee on the Judiciary, to confirm the nomination of Janice R. Brown. I recommend her unhesitatingly.

My thanks to you and all the senators for your service on behalf of our country.

Sincerely,

Daniel A. Barker

cc: The Honorable Patrick J. Leahy (via facsimile–202-224-9516)
The Office of Legal Policy (via facsimile–202-514-5715)

TOTAL P.03

State of North Carolina
Court of Appeals
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CHAMBERS OF
JUDGE JOHN M. TYSON

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17 October 2003

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

Re: Nomination and Confirmation of Justice Janice R. Brown for Judge of the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Hatch,

Please accept this letter in support and my unqualified recommendation of the Honorable Janice R. Brown, currently Justice of the California Supreme Court, for confirmation as Judge on the United States Court of Appeals for the District of Columbia Circuit. Justice Brown will be an outstanding Federal jurist.

The confirmation process by the United States Senate presents an opportunity to examine the qualifications of our President's judicial nominees. By any measure, Justice Janice Brown is highly and uniquely qualified to be confirmed to serve on the United States Court of Appeals. Janice is a very approachable, humble, and seasoned jurist who will render impartial and dedicated service to our nation for many years.

Her life experiences are diverse, being born in Alabama, while her father served our Country on active military duty. She has personally witnessed, experienced, and excelled during great changes that occurred as America matured over the past 50 years. Justice Brown has overcome formidable challenges to rise to the pinnacle of the legal and judicial profession. These experiences produced a jurist who is uniformly fair, works hard, and acts with calm dignity.

My personal knowledge of Justice Brown is derived from daily contact with her over the past two summers. Janice and I recently completed all course work to be awarded LL.M. degree (Masters of Law) in Judicial Process from the University of Virginia School of Law. She immediately distinguished herself among the thirty-one State and Federal Judges and Justices by being elected President of

our law class. During her tenure, she planned and presided over all activities of the class and served as liaison with the faculty and law school administration. Her work was uniformly excellent and praised by all members of the class.

During our summers together in Charlotteville, judges had the opportunity to observe and learn the work habits and personal demeanor of our peers and classmates. Janice Brown was always prepared and contributed to the discussions of timely legal issues. Her reasoning was clear, focused, and demonstrated the knowledge, experience, and judicial temperament to diligently address thorny legal issues, particularly the administrative law cases, presented to the District of Columbia Circuit. She demonstrated a commitment to excellence. Despite a heavy class and reading schedule (5 hours of in-class instruction and 150 pages to read daily), Janice extended a helping hand, accepted extra responsibilities, and wrote a note to or visited those experiencing personal or family tragedies. Janice Brown is an encourager, a team leader, and a good friend and example to all judges in our class.

I am certain that all members of our class, who currently serve as State and Federal judges, will heartily concur that Justice Janice R. Brown is highly and unconditionally qualified to serve, and will serve with distinction, as a Judge of the United States Court of Appeals for the District of Columbia Circuit.

Her confirmation by the Senate to the United States Court of Appeals for the District of Columbia Circuit will certify to the American People that distinguished jurists are recruited, nominated, confirmed, and seated on our Federal Bench.

Please do not hesitate to call upon me for any further information that you or the Judiciary Committee desire regarding her confirmation.

Very truly yours,

John M. Tyson

JMT/dww
Enclosure
cc: Office of Legal Policy

State of North Carolina
Court of Appeals
P.O. BOX 888
Raleigh, NC 27602-0888

CHAMBERS OF
JUDGE JOHN M. TYSON

TELEPHONE: 919-733-4294
TELECOPY: 919-733-8003
jtyson@coa.state.nc.us

17 October 2003

The Honorable Senator John Edwards
United States Senate
225 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination and Confirmation of Justice Janice R. Brown for Judge of the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Edwards,

Please accept this letter in support and my unqualified recommendation of the Honorable Janice R. Brown, currently Justice of the California Supreme Court, for confirmation as Judge on the United States Court of Appeals for the District of Columbia Circuit. Justice Brown will be an outstanding Federal jurist.

The confirmation process by the United States Senate presents an opportunity to examine the qualifications of our President's judicial nominees. By any measure, Justice Janice Brown is highly and uniquely qualified to be confirmed to serve on the United States Court of Appeals. Janice is a very approachable, humble, and seasoned jurist who will render impartial and dedicated service to our nation for many years.

Her life experiences are diverse, being born in Alabama, while her father served our Country on active military duty. She has personally witnessed, experienced, and excelled during great changes that occurred as America matured over the past 50 years. Justice Brown has overcome formidable challenges to rise to the pinnacle of the legal and judicial profession. These experiences produced a jurist who is uniformly fair, works hard, and acts with calm dignity.

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JMT/dww
Enclosure
cc: Office of Legal Policy

State of North Carolina
Court of Appeals
P.O. BOX 888
Raleigh, NC 27602-0888

CHAMBERS OF
JUDGE JOHN M. TYSON

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jtyson@coa.dcin.nc.us

17 October 2003

The Honorable Senator Elizabeth Dole
United States Senate
Senate Russell Building
Room 120
Washington, D.C. 20510

Re: Nomination and Confirmation of Justice Janice R. Brown for Judge of the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Dole,

Please accept this letter in support and my unqualified recommendation of the Honorable Janice R. Brown, currently Justice of the California Supreme Court, for confirmation as Judge on the United States Court of Appeals for the District of Columbia Circuit. Justice Brown will be an outstanding Federal jurist.

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Very truly yours,

John M. Tyson

JMT/dww
Enclosure
cc: Office of Legal Policy

State of North Carolina
Court of Appeals
P.O. BOX 888
Raleigh, NC 27602-0888

CHAMBERS OF
JUDGE JOHN M. TYSON

TELEPHONE: 919-733-4294
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jtyson@...

17 October 2003

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination and Confirmation of Justice Janice R. Brown for Judge of the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Leahy,

Please accept this letter in support and my unqualified recommendation of the Honorable Janice R. Brown, currently Justice of the California Supreme Court, for confirmation as Judge on the United States Court of Appeals for the District of Columbia Circuit. Justice Brown will be an outstanding Federal jurist.

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Very truly yours,

John M. Tyson

JMT/dww
Enclosure
cc: Office of Legal Policy

Superior Court of California,

County of Sacramento

David De Alba,
Judge

October 20, 2003

SERVED BY FACSIMILE AND MAILED

Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D. C. 20510

RE: Janice R. Brown's
Nomination to the United States Court of Appeal
District of Columbia

Dear Senator Feinstein,

It is with great pleasure that I write in support of Janice Brown's nomination to serve as a member of the United States Court of Appeal for the District of Columbia. I have known Justice Brown for approximately twenty-four years. We were colleagues as young lawyers in the Office of the Attorney General for the State of California. Indeed, we worked closely together as members of the same team in the Criminal Division of that office for several years. Since our days as deputy attorneys general, I have always admired Justice Brown's dedication to the law and her work ethic.

Since our days as young prosecutors, I have observed and admired Justice Brown's development as a lawyer and as a judge. I have appeared before her during her tenure as a member of the Court of Appeal and as a member of the California Supreme Court. Of course, like many others, I have read many of her published opinions. Even though I may not always agree with her opinions, I have always found them to be scholarly, thorough in their analysis and well reasoned. She has grown immensely as a jurist and today is one of the most productive members of our state Supreme Court. No one can criticize her fidelity to the law and her work. She is a tireless worker and cares deeply about her convictions.

720 Ninth Street • Department 29 • Sacramento, CA 95814
(916) 874-5684 • FAX (916) 874-8229

The most impressive qualities about Justice Brown are her honesty and humility. She is never boastful or arrogant despite her success and position. She is a kind and humble person who is always gracious to people irrespective of their title or position in life.

I am aware that many will be critical of philosophical positions she has espoused in her various opinions. However, I believe that she deserves confirmation and would serve with distinction. She is imminently qualified to sit as a judge of the Court of Appeals for the District of Columbia. Thank you for considering my views.

Sincerely yours,

David De Alba
Judge of the Superior Court
Sacramento County, California

cc: Justice Janice R. Brown

720 Ninth Street • Department 29 • Sacramento, CA 95814
(916) 874-5684 • FAX (916) 874-8219

Sacramento Superior Court

TALMADGE R. JONES
Superior Court Judge
Department 31

Friday, October 17, 2003

Honorable Orrin Hatch
United States Senate
Chair, Senate Judiciary Committee

Attention: Ms. Rena Comisac
(via FAX)

Re: **Hon. Janice Rogers Brown**
Associate Justice, California Supreme Court
(Full Hearing, October 22, 2003, 10 am, Dirksen Rm. 226)

Dear Senator Hatch:

I urge the Senate Judiciary Committee to approve the appointment of the Honorable Janice R. Brown, currently Associate Justice of the California Supreme Court, to the position of United States Circuit Judge for the District of Columbia.

The Committee's approval will bring great distinction to the Circuit Court for the District of Columbia and will most certainly add a judge of great intellectual depth, compassion, intellect, and integrity to that bench.

More importantly, the exceptional judicial performance of Justice Brown as a Circuit Judge will be quickly apparent to everyone, and a worthy tribute to the confidence placed in her by both the President and the United States Senate.

I have known Justice Brown for twenty years, worked side by side with her as a practicing attorney, traveled with her, know her son and husband, eaten in her home, and have closely followed her political and judicial career with both interest and admiration.

Justice Brown is nothing less than a truly exceptional attorney, judge, and public servant. She is in my personal book of great Americans.

I have been a Judge of the Sacramento Superior Court for 14 years, 4 of those years as a judge of the juvenile court, including its presiding judge for 3 years. I have received numerous community service awards, local and national, for working with youth as well as adults in order to break the cycles of violence and crime.

I am presently chair of the Intermediate Punishments Committee of our Sacramento Criminal Justice Cabinet, whose members constitute all of the major public law enforcement officials in Sacramento County, our State Capitol.

Prior to my judicial appointment in 1989, I served for over 2 years as Director of California's Department of Fair Employment and housing, which enforces our state civil rights laws.

Justice Brown and I have had a close acquaintanceship over our mutual careers, and share many of the same values and visions for our future.

I always enjoy her good company because she is light-hearted, is enthusiastic about any task assigned to her, has a wonderful sense of humor (filled with life's anecdotes), and is easy to laugh at the world and the world's problems. We share the same love of theater, especially Shakespeare. We both love music as well.

Justice Brown is an optimist, and expects (and receives) the best of those around her.

She is a patriot in the best sense of that term, and loves her country. She has an abiding respect for the family members, teachers, professors, and colleagues who have encouraged her along life's path. She is deeply grateful for the opportunities afforded to her by others.

Justice Brown always puts others at ease around her, makes them comfortable, makes them laugh, makes them feel like family.

She is open and approachable, never at a distance. She is a fantastic listener, mindful of others needs and wishes. She enjoys a good legal debate but is always amiable, never contentious or strident. She is patient even in the midst of difficulties.

In one particular federal case, heard over 15 years ago in the United States District Court for the Northern District (San Francisco), Justice Brown revealed the true depth of her character to me (and her co-counsel). She always remained calm and confident in the face of an irrational opponent and a somewhat hostile and mercurial U.S. District Judge.

Those who worked with her during this protracted and tenacious federal litigation were so impressed not only with her work ethic, but her attention to detail, her commitment to the case, her professionalism, and by her caring and encouraging attitude towards the legal secretaries, assistants, and investigators who helped her.

Looking back, it was perhaps one of the most stressful cases of my legal career, and I feel so fortunate to have had Justice Brown as the lead attorney in that difficult case.

720 Ninth Street • Department 31 • Sacramento, CA 95814
(916) 874-6353 • FAX (916) 874-8229

Justice Brown will bring these same qualities to the D.C. Circuit, and will be a valued and trusted colleague to the other members of that court. She will bring immeasurable intellect and wisdom to a bench already respected for those fine traits, and will reflect the values of truth, honesty, and integrity that are so much a part of her persona.

Justice Brown will encourage collaboration and unanimity with her fellow judges by her powers of persuasion and reason. She will honor the rule of law and precedent of the United States Supreme Court and other Circuit Court decisions.

Justice Brown is about the smartest (and wisest) judge I know, but would be the last person to tout her intellect or use it to her personal advantage. She is a quick study, with the ability to research and write about the law in a way that all will understand.

Justice Brown is a Christian, but never allows her personal walk with God to interfere with her duties as a jurist. Her faith has sustained her in some of life's struggles (she lost her first husband to cancer) and has given her a larger family of believers that have consoled and comforted her in the valleys of life.

For these reasons, I encourage you and the other Honorable Senators of the Senate Judiciary Committee to approve Associate Justice Janice Rogers Brown to the position of Circuit Judge for the District of Columbia Circuit.

The Committee's approval will be not only a great honor to Justice Brown, but also an admirable action of the Senate that will enrich the federal appellate bench for years to come.

Very truly yours,

TALMADGE R. JONES
Judge of the Superior Court

720 Ninth Street • Department 31 • Sacramento, CA 95814
(916) 874-6353 • FAX (916) 874-8229

WARD A. CAMPBELL

October 20, 2003

The Honorable Orrin Hatch
United States Senator
Chairman, Senate Judiciary Committee
104 Hart Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am a former colleague of Justice Janice Rogers Brown in the California Attorney General's office. I also dealt with her during her tenure as legal affairs secretary to Governor Pete Wilson. I am honored that she is listed as my sponsor as a member of the Bar of the United States Supreme Court. I enthusiastically support her nomination as a judge to the DC Circuit.

Janice Brown is affectionately remembered by her fellow deputies who worked with her at the Department of Justice. I had the opportunity to work with her on a co-defendant appeal in which we both filed petitions for writ of certiorari to the United States Supreme Court. Her excellent written work ultimately prevented the retrialsof two confessed murderers. It was a pleasure to work with her. She was highly respected in the very collegial atmosphere of our appellate division.

Later in 1992, I again had the pleasure of working with Janice in a very different capacity during her tenure as legal affairs secretary to Governor Pete Wilson in 1992. She successfully navigated the first death penalty clemency proceeding in California since 1967. At all times, she was open to suggestion and advice in devising an unique review process that fairly fit the needs of the Governor, the prosecutor, and the prisoner.

As a friend, I was moved personally to write this letter because of the unfair criticisms levelled at Janice in the time leading to her confirmation hearing. Needless to say I was shocked by depictions of her which are completely inconsistent with the person I have known and worked with here in California. The critical "analyses" of Janice's work strike me as as more visceral, than objective. There is something incongruous about asserting that Janice Brown, a true American success story, is not sufficiently committed to constitutional and civil rights.

Janice is a thoughtful, reflective, and compassionate person. She reaches her own conclusions independently only after great deliberation. Not surprisingly, she has diverse interests and she has shown the ability to handle varied work assignments throughout her career. Her background and experience have superbly prepared her for the federal bench. She will be greatly missed here in California. The President has shown great wisdom in his selection and I urge the Senate to ratify his nomination of Janice Rogers Brown to the DC Circuit..

Sincerely,

WARD A. CAMPBELL
Supervising Deputy Attorney General
California Department of Justice

cc: The Honorable Dianne Feinstein
United States Senator

Superior Court of California,

County of Sacramento

Patricia C. Esgro
Superior Court Judge
Department 13

October 20, 2003

Honorable Orrin Hatch
United States Senate
Chair, Senate Judiciary Committee
Attention: Ms. Rena Comisac (via FAX)

Re: **Hon. Janice Rogers Brown**
Circuit Justice for the District of Columbia - Nomination
(Full Hearing, October 22, 2003, 10:00 a.m., Dirksen Rm. 226)

Dear Senator Hatch:

I urge the Senate Judiciary Committee to approve the appointment of the Honorable Janice Rogers Brown, currently Associate Justice of the California Supreme Court, to the position of United States Circuit Justice for the District of Columbia.

Justice Brown's brilliant legal scholarship and powerful intellect are, I believe, established by the written record before your committee. I would like to address her outstanding personal characteristics, evidencing her excellent judicial temperament.

I have known Justice Brown for over twenty years. She is a good friend and a former colleague in the California Attorney General's Office. I also served as her Chief Deputy in the Legal Affairs Unit of Governor Pete Wilson's office. I have personally observed her deep integrity and passion for justice. She has devoted her life to public service and the public good. She is a woman of humility who yet possesses a fierce sense of history and patriotism.

Justice Brown is a woman of calm deliberation with a self-deprecating sense of humor. Raised in a strict home in the segregated South she is unfailingly courteous and thoughtful of others. Her experience of segregation and her admiration for the lawyers who fought against it formed her early love and respect for the law. It is that background that informs her carefully worded and expressed opinions.

I commend to you a woman who has lived the struggles of her race and emerged a compassionate and strong individual. She will serve as a bastion of justice in an uncertain world. I urge your approval, and that of the Committee, for this outstanding nominee of the President of the United States to the federal bench

Sincerely,

Patricia C. Esgro

Patricia C. Esgro
Judge of the Superior Court

720 Ninth Street • Department «DEPARTMENT» • Sacramento, CA 95814
(916) 440-0000 • FAX (916) 874-8229

The Superior Court

STATE OF CALIFORNIA
COUNTY OF EL DORADO
495 MAIN STREET
PLACERVILLE, CALIFORNIA 95667
(530) 621-6459

October 20, 2003

Senator Orrin Hatch
U.S. Senate Judiciary Committee
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch,

I have been informed that the Senate Judiciary Committee will soon hold hearings on the President's nomination of the Honorable Janice Rogers Brown to a seat on the Court of Appeals for the District of Columbia Circuit. I write to you to offer my input on her qualifications.

First, my background, so that you will know how I can speak to her qualifications. I have been a Superior Court Judge of El Dorado County in California for over fourteen years. Prior to that, I was a Deputy Attorney General in the Sacramento office of the California Attorney General for over twenty-one years. It was during my time as a lawyer that I first met Janice Brown.

I was a supervising attorney and was on the selection committee when Janice Brown interviewed for a job. I was impressed by her from the start. When she was selected, I requested that she be placed on my team in the criminal division. Over the course of the next several years, I supervised all of her legal work, which usually meant reviewing the legal briefs she prepared in criminal cases for presentation to state and federal courts.

Ms. Brown did exceptional legal work. Her briefs were well-researched and persuasively argued. More importantly, she had a unique and special writing style, which made her briefs a special attraction and model for other deputies in the criminal division. In fact, I can recall that at least one court of appeal quoted some of her memorable prose in the final legal opinion in one case.

During this time, I also had the opportunity to get to know Janice Brown as a person. I learned that she was a person from humble beginnings who had the intelligence and fortitude to rise above all obstacles and excel in life. I also learned that she was a person of sound judgment, common sense, compassion, and the highest level of integrity. She also had a work ethic second to none.

I have followed her later legal career in the civil division of the Attorney General's Office, legal counsel to Governor Wilson, court of appeal justice, and as a jurist on the California Supreme Court. I am not surprised that she has excelled in all that she has done.

Most people tell me that the qualities they expect most from a judge are: intelligence, good judgment, an open mind, compassion, a sense of fairness, and integrity. Janice Brown has all of these qualities and more.

In tracking her legal opinions as an appellate court justice, I note that they are distinguished by the same scholarship, thoroughness, intelligence, and unique literary style that makes her stand out from most others. She has a brilliant legal mind. She cares intensely about the legal and social values that each case presents. She is open to being persuaded on any legal point. She is an independent thinker. Noone could ask more from any judge.

Having been in a position to have read and evaluated the legal opinions of a countless number of judges over my legal career, I can truly say that Janice Brown is one of those rare individuals who come along in life and set a standard for all of us to admire. She is in the same category as our greatest jurists. She would be an invaluable addition to the federal judiciary.

If I can supply any other information or be of assistance, you can contact me at (530) 621-6464.

Sincerely,

Eddie T. Keller

EDDIE T. KELLER
Judge of the Superior Court

HORVITZ & LEVY LLP

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David M. Axelrad
Frederic D. Cohen
Jon B. Eisenberg
David S. Ettinger
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Wendy S. Albers
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Loren H. Kraus•
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Jeremy B. Rosen
Katherine Perkins Ross
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October 21, 2003

VIA FACSIMILE

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

Dear Chairman Hatch:

I write in support of President Bush's nomination of Justice Janice Rodgers Brown to the United States Court of Appeals for the District of Columbia Circuit.

I am a practicing attorney in California, specializing in civil appeals. I teach appellate procedure as an adjunct professor at the University of California, Hastings College of the Law, and am principal co-author of a treatise on California appellate practice. I have filed briefs and presented oral argument before the California Supreme Court in numerous cases during Justice Brown's tenure at that court, as both counsel of record and counsel for amici curiae.

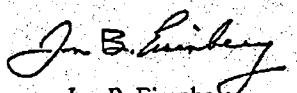
Among those cases is *High-Voltage Wire Works v. City of San Jose*, 24 Cal.4th 537 (2000), where I submitted an amicus curiae brief urging the court to uphold the "affirmative action" program at issue in that case.

I was deeply disappointed with Justice Brown's *High-Voltage* decision, which rejected my position. That does not, however, change my opinion of her qualifications for appointment to the United States Court of Appeals. In every case where I appeared before her as a practicing attorney, as well as in her decisions generally, which I have closely studied in my roles as law professor and author, I have found her to be a talented, sincere, and thoroughly dedicated appellate judge of the highest integrity – and, by the way, a marvelous writer. I respectfully disagree with those of my political soulmates who view our

disapproval of her political philosophy as grounds for opposing her confirmation, for I believe that an appointee's judicial qualifications, not political philosophy, should be the focus of the confirmation process.

I therefore urge the Senate Judiciary Committee and the full Senate to approve Justice Brown's nomination.

Very truly yours,



Jon B. Eisenberg

JBE:mmg

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

Congress of Racial Equality
817 Broadway • 3rd Floor • New York, NY 10003
(212) 598-4000 • Fax: (212) 598-4141/982-0184

Hon. Orin Hatch
U.S. Senator
Chairman of the Judiciary Committee
Hart Office Building
Suite 104
Washington, D.C. 20510

October 21, 2003

Dear Senator Hatch:

Judge Janice Rogers Brown (the President's nominee for the DC Circuit Court of Appeals) is an outstanding candidate for the position. Her judicial temperament is fair, but focused. This is why her colleagues on the bench often depended on Justice Brown to write the majority opinion for the Court last year. She did this more times than any other Justice. In 1998, the people of California, who knew her best, re-elected her with the highest winning majority of any judge in the state with 76% of the vote.

The daughter of sharecroppers, Justice Brown is a native of Greenville, Alabama. Born in 1949, she came of age in the midst of Jim Crow policies in the south and attended segregated schools. She has truly pulled herself up by her own bootstraps. After her family moved to Sacramento, California, she attended school there, receiving her J.D. from the UCLA School of Law in 1977. After her scholastic achievements, Justice Rodgers Brown dedicated most of her professional career to public service and is the first African-American woman to serve on the state of California's highest court. Justice Brown has also served as a Member of the California Commission on the Status of African-American Males: a commission that addresses inequities in the treatment of African-American males in employment, business development and in the criminal justice and health care systems.

Justice Brown is an ideal candidate for this office. She does not bow down to the altar of "political correctness", as demanded by the *civil rights aristocracy*. Predictably, she is being opposed by left wing liberal extremists. I have spent several decades fighting discrimination so that women of color, like Janice Rogers Brown, could rise to the top of their profession. I now fight ideological discrimination, so that Justice Brown can receive a fair hearing and be elevated to the DC Circuit Court of Appeals. We did not fight the Civil Rights Revolution for an elite few in the black community, but for all.

Sincerely,

Roy Innis
Chairman

MILE
Minorities In Law Enforcement

Honorable Senator Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
President of the United States
224 Dirksen Senate Office Building
Washington, D.C. 20510

Eli R. Molina
MILE President

Laura Lorenzen

Jose Vasquez
MILE Secretary

Glen Humphries
MILE Executive Board Member
Southern California Representative

Regis Lane
MILE Executive Director

Maria Zavala
MILE Publications Editor

Demetri Burris
Membership/MILE Outreach Coordinator

Dear Mr. Chairman:

On behalf of the Executive Board and members of the Minorities In Law Enforcement organization (MILE), we recommend that you confirm President George W. Bush's nomination of California Supreme Court Associate Justice Janice Rogers Brown to the United States Circuit Court of Appeals for the District of Columbia. MILE is a coalition of ethnic minority law enforcement officers in California dedicated to ensuring brighter futures for disadvantaged youth and ensuring that no child is left behind.

We recommend the confirmation of Justice Brown based on her broad range of experience, personal integrity, good standing in the community and dedication to public service. Justice Brown's powerful and exhilarating display of jurisprudence exhibited in the written legal opinions she has issued as a California Supreme Court justice, is respected by all, regardless of race, political affiliation, or religious background. Justice Brown is a fair and just person with impeccable honesty, which is the standard by which justice is carried out.

In many conversations with Justice Brown, I have discovered that she is very passionate about the plight of racial minorities in America, based on her upbringing in the south. Justice Brown's views that all individuals who desire the American dream, regardless of their race or creed, can and should succeed in this country are consistent with MILE's mission to ensure brighter futures for disadvantaged youth of color.

It is with great honor and pleasure that MILE and our members urge you to confirm President Bush's nomination of California Supreme Court Associate Justice Janice Rogers Brown to the United States Circuit Court of Appeals for the District of Columbia.

Respectfully Submitted,

Regis Lane
Executive Director

cc: The Honorable Patrick J. Leahy
Via Facsimile 202-224-9516

Office of Legal Policy
Via Facsimile 202-514-5715

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CITIZENSHIP

Preparing Youth for Today's World and Tomorrow's Responsibilities

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October 21, 2003

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

Dear Chairman Hatch:

Please accept this letter as a statement of support for Justice Janice Brown. As your committee considers her qualifications, our Center wishes to bring to your attention her service and commitment to youth. As a longtime volunteer and supporter of the Center's programs, she has modeled the character and citizenship needed by our elected and appointed officials.

Justice Brown has been a consistent volunteer for the Center's Gordon D. Schaber Mock Trial and Moot Court program. In a speech delivered to these high school students in 2000, she spoke to them about the importance of character development and the law. Specifically, she shared the virtues of honor, courage, responsibility, generosity, and respect.

Justice Brown has set both high academic and ethical standards for students. It is in our judgment, that Justice Brown not only "talks the talk", but she "walks the walk".

Her long career in public service and commitment to quality youth education programs has shown her to be a distinguished guardian of the law. On behalf of the Center for Youth Citizenship's youth participants and those who have benefited from her service, I would endorse Justice Janice Brown for the United States Court of Appeals and appreciate the opportunity to highlight her good character and citizenship.

Sincerely,

Joseph P. Maloney, Ph.D.

cc: The Honorable Patrick J. Leahy,
Ranking Member, Committee on the Judiciary
Office of Legal Policy, Department of Justice
CYC Executive Committee

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PEPPERDINE UNIVERSITY

BOARD OF REGENTS

October 17, 2003

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

RE: Justice Janice R. Brown,
California Supreme Court

Dear Senator Hatch:

I am writing in support of the nomination of Justice Janice R. Brown, of the California Supreme Court, to be a judge on the D.C. Circuit Court of Appeals.

I serve as Chairman of the Board of Regents of Pepperdine University and Justice Brown is a very valuable and productive member of that board. This has given me a firsthand opportunity to become well acquainted with her and to develop a great admiration for her. Hers is a great American success story and she is much admired by all who know her.

Justice Brown has proven herself to be a fair-minded judge who considers all sides of an issue before deciding a case. She has a keen interest in the workings of our government and would make a valuable addition to the D.C. Circuit Court. I request that you give her your wholehearted support.

Sincerely,

Thomas J. Trimble

Thomas J. Trimble
Chairman

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate

cc: Office of Legal Policy

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001	Letter	[Recommendation Letter] - To: Dianna Feinstein - From: Jack Hightower	1	08/20/2002	P6/b6;
002	Letter	Confirmation of the Honorable Priscilla R. Owen [page 1] - To: Patrick Leahy - From: Lor R.E. Ploeger	1	06/27/2002	P6/b6;

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MIGUEL ESTRADA

NOMINEE TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Biographical Information –

- Estrada is currently a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher, LLP, where he is a member of the firm's Appellate and Constitutional Law Practice Group and the Business Crimes and Investigations Practice Group.
- The ABA unanimously rated Estrada "Well Qualified."
- If confirmed, Estrada would be the first Hispanic ever to sit on the U.S. Court of Appeals for the D.C. Circuit, which many consider to be the second most important federal court in the United States after the Supreme Court.
- Estrada has argued 15 cases before the U.S. Supreme Court and is widely regarded as one of the country's best appellate lawyers.
- Estrada received his J.D. *magna cum laude* from Harvard Law School where was editor of the Harvard Law Review.
- Estrada served as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court in 1988-89.
- Estrada has performed significant *pro bono* service, including representation of a death row inmate before the Supreme Court – a case to which he dedicated approximately 400 hours.

Controversial Issues –

- Because Estrada has no judicial experience, he should not be confirmed.
- The Administration has refused to produce memoranda that Estrada wrote when he was an Assistant to the Solicitor General.
- Estrada does not have support in the Hispanic Community.
- Estrada did not answer questions on critical issues.

Responses –

- Five of the eight judges currently serving on the D.C. Circuit had no previous judicial experience, including President Clinton's nominees, Merrick Garland and David Tatel.. Judge Harry Edwards, appointed by President Carter, also had no judicial experience when appointed, and was younger than Estrada. Two Supreme Court Justices had no judicial experience when appointed to the Supreme Court: Byron White and Chief Justice Rehnquist.
- These confidential attorney-client memos were not requested for the seven previous nominees to the Courts of Appeals who had worked in the Solicitor General's office. In addition, every living former Solicitor General—both Democrat and Republican—signed a joint letter to the Committee, stating that this request would have a debilitating effect on the ability of the DOJ to represent the U.S. before the Supreme Court.
- Estrada has overwhelming support among Hispanic organizations and in the Hispanic community. For example, the League of United Latin American Citizens, the Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, the Hispanic Business Roundtable, the Latino Coalition, and many other Latino organizations strongly support Estrada.
- Estrada properly refused to say how he would rule on specific matters or cases that might come before him as a judge, which is both traditional and appropriate for a judicial nominee. He testified that he would "follow binding case law in ever case" even when he may disagree with that precedent.

TABLE OF CONTENTS: MIGUEL ESTRADA

Summary and Biographical Points for Miguel Estrada 2

Select List of Hispanic Community Support of Miguel Estrada 4

Statements by Select Supporters of Miguel Estrada 5

Responses to Allegations against Miguel Estrada 9

Select Editorials and Letters of Support for Miguel Estrada 12

Judge Alberto Gonzales op-ed 12
Washington Post (9/29/02) 14
Washington Post (5/28/02) 15
Wall Street Journal (5/24/02) 16
LULAC letter 18
LULAC Office of Florida State Director letter 19
Hispanic National Bar Association release 20
Hispanic National Bar Association letter 21
Hispanic Business Roundtable letter 23
Hispanic Business Roundtable release 24
U.S. Hispanic Chamber of Commerce letter 26
U.S. Hispanic Chamber of Commerce letter 29
Herman Badillo op-ed 30
Latino Coalition release 31
Seth Waxman letter 33
14 former colleagues at Office of Solicitor General letter 34
Richard Seamon letter 38
Judge Gonzales summary of Estrada performance reviews 39
Ron Klain letter 40
Randy Moss letter 43
Otto Obermaier letter 45
Leonard Joy letter 47
Barbara Hartung letter 49
Fraternal Order of Police letter 51
Former Solicitors General letter on SG memos 52
Department of Justice letter on SG memos (6/5/02) 54
Department of Justice letter on SG memos (10/8/02) 56
Department of Justice letter on SG memos (1/23/03) 62

MIGUEL ESTRADA
NOMINEE TO U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT
(Nominated May 9, 2001)

Summary

Miguel Estrada is an American success story who represents the mainstream of American law and American values. He came to this country at age 17 as an immigrant from Honduras speaking little English. He has risen to the top of the legal profession – a *magna cum laude* graduate of Harvard Law School, law clerk to Supreme Court Justice Anthony Kennedy, federal prosecutor in New York, Assistant Solicitor General of the United States for one year in the Bush Administration and for four years in the Clinton Administration, and leading appellate lawyer at a national law firm. Miguel Estrada has argued 15 cases before the Supreme Court of the United States, including one case in which he represented a death row inmate *pro bono*. He has strong bipartisan support from prominent Democrats, including from many high-ranking officials in the Clinton Administration such as Ron Klain, Seth Waxman, Bob Litt, and Randy Moss. The American Bar Association *unanimously* rated Miguel Estrada "well-qualified," its highest possible ranking. Miguel Estrada has strong support in the Hispanic community, including from LULAC, the Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, and numerous other Hispanic organizations. This is an historic appointment: If confirmed, Estrada would be the first Hispanic ever to serve on the D.C. Circuit, which many consider to be the second most important federal court in America. Miguel Estrada's nomination has been pending since May 9, 2001. The Senate should confirm him promptly.

BIOGRAPHICAL INFORMATION ON MIGUEL ESTRADA

- Estrada is currently a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, where he is a member of the firm's Appellate and Constitutional Law Practice Group and the Business Crimes and Investigations Practice Group.

- The American Bar Association unanimously rated Estrada "Well Qualified," its highest possible rating.

- Estrada was born and raised in Honduras, and came to the United States at age 17. If confirmed, Estrada would be the first Hispanic ever to sit on the U.S. Court of Appeals for the D.C. Circuit, which many consider to be the second most important federal court in the United States after the Supreme Court.

- Estrada has extensive appellate experience and is widely regarded as one of the country's best appellate lawyers. He has argued 15 cases before the U.S. Supreme Court.

    - From 1992 until 1997, Estrada served as Assistant to the Solicitor General of the United States under both President Clinton and President George H.W. Bush.

    - From 1990 to 1992, Estrada served as Assistant U.S. Attorney and Deputy Chief of the Appellate Section, U.S. Attorney's Office, Southern District of New York, where he argued appeals before the Second Circuit and tried cases in federal district court.

    - Estrada served as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court in 1988-89, and to Judge Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit in 1986-87.

- Estrada received a J.D. degree *magna cum laude* in 1986 from Harvard Law School, where he was editor of the Harvard Law Review. Estrada graduated with a bachelor's degree *magna cum laude* and Phi Beta Kappa in 1983 from Columbia College.

- Estrada has performed significant *pro bono* service, including representation of a death row inmate before the Supreme Court – a case to which he dedicated approximately 400 hours.

SELECT HISPANIC COMMUNITY SUPPORT FOR MIGUEL ESTRADA

The following groups, among others, have announced their support for Estrada:

- League of United Latin American Citizens (LULAC) (nation's oldest and largest Hispanic civil rights organization)
- U.S. Hispanic Chamber of Commerce
- Hispanic National Bar Association
- Hispanic Business Roundtable
- The Latino Coalition
- National Association of Small Disadvantaged Businesses
- Mexican American Grocers Association
- Phoenix Construction Services
- Hispanic Chamber of Commerce of Greater Kansas City
- eHEBC Hispanic Engineers Business Corporation
- Hispano Chamber of Commerce de Las Cruces
- Casa Del Sinaloense
- Republican National Hispanic Assembly
- Hispanic Engineers Business Corporation
- Hispanic Contractors of America, Inc.
- Charo - Community Development Corporation

STATEMENTS BY SELECT SUPPORTERS OF MIGUEL ESTRADA

League of United Latin American Citizens, Rick Dovalina, National President

"On behalf of the League of United Latin American Citizens (LULAC), the nation's oldest and largest Hispanic civil rights organization, I write to express our strong support for the confirmation of Mr. Miguel A. Estrada. . . . Few Hispanic attorneys have as strong educational credentials as Mr. Estrada who graduated magna cum laude and Phi Beta Kappa from Columbia and magna cum laude from Harvard Law School, where he was editor of the Harvard Law Review. He also served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court making him one of a handful of Hispanic attorneys to have had this opportunity. He is truly one of the rising stars in the Hispanic community and a role model for our youth." *(Excerpt from Letter to Senator Leahy, July 3, 2001.)*

The Latino Coalition, Robert Deposada, President

"To deny Latinos, the nation's largest minority, the opportunity to have one of our own serve on this court in our nation's capital is unforgivable." (*April 10, 2002, press release.*)

United States Hispanic Chamber of Commerce, Elizabeth Lisboa-Farrow, President

"We unanimously endorse this nominee and strongly urge you to move on the confirmation of Miguel Estrada. As a judge, he will be a credit to the federal judiciary, the President, Hispanics, and all Americans." (*Excerpt from Letter to Senator Leahy, October 23, 2001)*

Hispanic National Bar Association, Rafael A. Santiago, National President

"The Hispanic National Bar Association, national voice of over 25,000 Hispanic lawyers in the United States, issues its endorsement ... Mr. Estrada's confirmation will break new ground for Hispanics in the judiciary. The time has come to move on Mr. Estrada's nomination. I urge the Senate Committee on the Judiciary to schedule a hearing on Mr. Estrada's nomination and the U.S. Senate to bring this highly qualified nominee to a vote." *(Excerpt from HBNA Press Release, October 12, 2001).*

National Association of Small Disadvantaged Businesses, Henry T. Wilfong, Jr., President

"The NASDB would like to add our support . . . for Miguel Estrada's nomination as United States Court of Appeals Judge for the District of Columbia Circuit. Mr. Estrada is a brilliantly talented and accomplished attorney who will make an outstanding addition to the prestigious D.C. Circuit. . . . While we do not dwell on symbolism, we feel that Mr. Estrada's appointment as the first Hispanic member of the DC Circuit will be of benefit to us in further illustrating the wide range of talent in the minority communities, just waiting to be effectively and fully used." (*Excerpt from Letter to Senator Leahy, July 12,*

2001.)

Hispanic Business Roundtable, Mario Rodriguez, President

"From his humble beginnings as an immigrant from Honduras who achieved a stellar academic career at Columbia University and Harvard Law School, to his varied and impressive achievements in the Justice Department and private firms, Mr. Estrada has shown himself to be of superior talents and accomplishments. . . . I am confident that this first Hispanic member of the DC Circuit will continue to lead a distinguished career with thoughtful and fair decisions." (*Excerpt from Letter to Senator Leahy, July 17, 2001.)*

Barbara Hartung, co-counsel with Estrada in pro bono case representing death row inmate

"Miguel's respect for the Constitution and the law may explain why he took on Mr. Strickler's case [the death row inmate], which at bottom concerned the fundamental fairness of a capital trial and death sentence. One would not expect the defense of a death row inmate to become the legal mission of a strong political conservative." (*Excerpt from Letter to Senator Leahy, September 10, 2002.*)

Herman Badillo, former Congressman from New York

"When confirmed by the Senate, Miguel Estrada, a brilliant lawyer with extraordinary credentials, will be the first Hispanic on the second most prestigious court in the land. He will be a role model not just for Hispanics, but for all immigrants and their children. His is the great American success story. . . . This treatment of Mr. Estrada is demeaning and unfair." (*Wall Street Journal, January 30, 2003*)

Seth Waxman, former Solicitor General to President Clinton

"During the time Mr. Estrada and I worked together, he was a model of professionalism and competence. . . . I greatly enjoyed working with Miguel, profited from our interactions, and was genuinely sorry when he decided to leave the office in favor of private practice. . . . I have great respect both for Mr. Estrada's intellect and for his integrity. . . . In no way did I ever discern that the recommendations Mr. Estrada made or the views he propounded were colored in any way by his personal views – or indeed that they reflected anything other than the long-term interests of the United States." (*Excerpt from Letter to Senator Leahy, September 17, 2001.)*

Ronald Klain, former Counselor to Vice President Al Gore

"Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. . . . Miguel will rule justly toward all, without showing favor to any group or individual. . . . the challenges he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need." (*Excerpt from Letter to Senator Leahy, January 16, 2002.*)

Bipartisan group of 14 former colleagues in the Office of the Solicitor General at U.S. Department of Justice

"Miguel is a brilliant lawyer, with an extraordinary capacity for articulate and incisive legal analysis and a commanding knowledge and appreciation for the law. Moreover, he is a person whose conduct is characterized by the utmost integrity and scrupulous fairness, as befits a nominee to the federal bench. In addition, Miguel has a deep and abiding love for his adopted country and the principles for which it stands, and in particular the rule of law. We hold varying ideological views and affiliations that range across the political spectrum, but we are unanimous in our conviction that Miguel would be a fair and honest judge who would decide cases in accordance with the applicable legal principles and precedents, not on the basis of personal preferences or political viewpoints." *(Excerpt from Letter to Senator Leahy, September 19, 2002.)*

Randolph Moss, former Assistant Attorney General for the Office of Legal Counsel for President Clinton

"I write to express my strong support for the nomination of Miguel Estrada to the United States Court of Appeals for the District of Columbia ... Although I am a Democrat and Miguel and I do not see eye-to-eye on every issue, I hold Miguel in the highest regard, and I urge the Committee to give favorable consideration to his nomination." *(Excerpt from Letter to the Senate Judiciary Committee, May 18, 2001).*

"Randolph Moss, who clerked for Justice John Paul Stevens while Estrada clerked for Kennedy, says he 'did not find Estrada at all divisive. He was always an extremely principled guy, very honest and ethical. I worked amicably with him.'" *(Legal Times, June 25, 2001.)*

Leonard F. Joy, Attorney-in-Charge, Federal Defender Division, Legal Aid Society of New York

"Over Miguel's tenure in the United States Attorney's Office, we became good friends and frequently had lunch together. He has a good sense of humor and never had an ivory tower approach to life. It is fair to say that all the lawyers in my office liked him. Many of them are liberal in their politics and it is a credit to Miguel that he was able to get along with people who may have had different views than he. I think Miguel would make an excellent Circuit Court Judge. He is as fine a lawyer as I have met and, on top of all his intellectual abilities and judgment he would bring to bear, he would bring a desirable diversity to the Court. I heartily recommend him." *(Excerpt of Letter to Senator Leahy, September 16, 2002.)*

Robert S. Litt, Deputy Assistant Attorney General for President Clinton

"I disagreed with Mr. Estrada on a number of the issues that we faced, but I have no doubt that his positions were sincerely held and honestly advocated. . . . I never felt that

the arguments he made were in any way outside the scope of legitimate legal analysis. . . . While I may disagree with some aspects of Mr. Estrada's legal philosophy, I believe that he is eminently qualified to serve on the Court of Appeals." (*Excerpt from Letter to Senator Leahy, August 28, 2002.*)

***Washington Post* Editorial, September 29, 2002**

"Democrats have suggested opposing him because of general concerns about the partisan 'balance' on the D.C. Circuit or because they don't know enough about his views to trust him. They also continue to fish for dirt on him. Sen. Charles E. Schumer (D-N.Y.) grilled him at his hearing about questions that have been raised anonymously concerning his aid to Justice Anthony M. Kennedy in picking clerks. And Democrats are still pushing to see confidential memos Mr. Estrada wrote in the solicitor general's office and trumpeting criticism of him by a single supervisor in that office -- criticism that has been discredited by that same colleague's written evaluations. Seeking Mr. Estrada's work product as a government lawyer is beyond any reasonable inquiry into what sort of judge he would be. Nor is it fair to reject someone as a judge because that person's decision to practice law, rather than write articles or engage in politics, makes his views more opaque. And it is terribly wrong to demand that Mr. Estrada answer charges to which nobody is willing to attach his or her name. . . . **At the end of the day, Mr. Estrada must be considered on his merits. His confirmation is an easy call.**"

MIGUEL ESTRADA
Responses to False Allegations

ALLEGATION: Because Estrada has no judicial experience, he should not be confirmed.

FACTS:

- Those making this claim are employing a double standard.
  - Five of the eight judges currently serving on the D.C. Circuit had no previous judicial experience. That includes two of President Clinton's nominees, Merrick Garland, whose Justice Department record was quite similar to that of Miguel Estrada, and David Tatel. That also includes Judge Harry Edwards, who was appointed by President Carter in 1980 (when Edwards was younger than Estrada currently is).
    - Indeed, two recent *Supreme Court Justices* – Byron White, nominated by President Kennedy, and William Rehnquist, currently the Chief Justice -- had no prior judicial experience when appointed to *the Supreme Court*.
  - The American Bar Association, which Democrat Senators Leahy and Schumer have referred to as the "gold standard," *unanimously* rated Estrada "well qualified" for the D.C. Circuit, the ABA's highest possible rating.
  - Estrada has argued 15 cases before the Supreme Court and was a member of the Solicitor General's office in both the Bush and Clinton Administrations. He also has been a highly respected federal prosecutor in New York.

ALLEGATION: The Administration has refused to produce memoranda that Estrada wrote when he was an Assistant to the Solicitor General.

FACTS:

- Again, a double standard is being applied to Miguel Estrada. These confidential attorney-client memos were not requested for the seven previous nominees to the Courts of Appeals who had worked in the Solicitor General's office.
- In addition, every living former Solicitor General – Democrat and Republican – signed a joint letter to the Committee, stating that this request would have a debilitating effect on the ability of the Department of Justice to represent the United States before the Supreme Court. The letter was signed by Democrats Archibald Cox, Seth Waxman, Drew Days, and Walter Dellinger.

ALLEGATION: Estrada's memoranda would be particularly important in light of a critical comment about him made by former Clinton Administration Deputy Solicitor General Paul Bender.

FACTS:

- Estrada received an "outstanding" rating in every performance category in the years that he worked in the Solicitor General's office. In the two years when Mr. Bender and Mr. Estrada worked together, the reviews were signed *by Mr. Bender*. (All ratings during those years were then reviewed and approved by Solicitor General Days.)
    - In the contemporaneous performance reviews, Mr. Bender stated the following about Mr. Estrada to support his judgment that Mr. Estrada's performance was "outstanding."
        - "states the operative facts and applicable law completely and persuasively, with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity, and conciseness."
        - "[i]s extremely knowledgeable about resource materials and uses them expertly; acting independently, goes directly to the point of the matter and gives reliable, accurate, responsive information in communicating position to others."
        - "[a]ll dealings, oral, and written, with the courts, clients, and others are conducted in a diplomatic, cooperative, and candid manner."
        - "[a]ll briefs, motions or memoranda reviewed consistently reflect no policies at variance with Departmental or Governmental policies, or fails to discuss and analyze relevant authorities."
        - "constantly sought for advice and counsel [and] inspires co-workers by example."
- Estrada's superiors and colleagues have stated that Estrada's work in the Solicitor General's office was superb and that he was a well-respected colleague.
    - Seth Waxman, who was President Clinton's Solicitor General, wrote that Estrada is a "model of professionalism and competence" and that he has "great respect both for Mr. Estrada's intellect and for his integrity." He continued: "In no way did I ever discern that the recommendations Mr. Estrada made or the views he propounded were colored in any way by his personal views – or indeed that they reflected anything other than the long-term interests of the United States."
    - A bipartisan group of 14 colleagues from the Office of Solicitor General wrote to the Committee that Estrada "would be a fair and honest judge who would decide cases in accordance with applicable legal principles and precedents."

ALLEGATION: In private practice, Estrada defended anti-loitering laws that civil rights groups have attacked.

FACTS:

- In private practice, Estrada's primary *pro bono* work was to defend a death row inmate in the Supreme Court seeking to overturn the death sentence.

- Estrada was retained to defend the constitutionality of anti-gang ordinances, which were enacted in Chicago with the strong public support of Democrat Mayor Daley, after Estrada was contacted by the Democrat City Solicitor of Chicago.

ALLEGATION: Estrada does not have support in the Hispanic community.

FACTS:

- Estrada has overwhelming support among Hispanic organizations and in the Hispanic community. For example, the League of United Latin American Citizens (which is the country's oldest Hispanic civil rights organization), the Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, the Hispanic Business Roundtable, the Latino Coalition, and many other Latino organizations strongly support Estrada.

ALLEGATION: Estrada did not answer questions on critical issues.

FACTS:

- Estrada testified at his hearing that he would "follow binding case law in every case" even when he may disagree with that precedent. He also stated that he recognized that "the Supreme Court has said in numerous occasions in the area of privacy and elsewhere that there are unenumerated rights in the Constitution. And I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the Court."

- Estrada properly refused to say how he would rule on specific matters or cases that might come before him as a judge, which is both traditional and appropriate for a judicial nominee. He also refused to say how he might have ruled in certain past cases given that he had not read the briefs, heard oral arguments, and taken the other steps that are necessary before any good and neutral judge would or could indicate how he or she would rule.

- Lloyd Cutler, who served as Counsel to President Carter and President Clinton, has stated that "candidates should decline to reply when efforts are made to find out how they would decide a particular case."

No More Stalling; It's time for the Senate to confirm Miguel Estrada.
By Alberto R. Gonzales, Counsel to the President
***Washington Post*, September 26, 2002**

After 16 months of delay, the Senate Judiciary Committee will hold a hearing today on Miguel Estrada, one of President Bush's nominees to the U.S. Court of Appeals for the D.C. Circuit. Estrada is superbly qualified for the job and would be the first Hispanic to serve on that court, which some consider to be the second-most-important federal court in America after the Supreme Court.

His extraordinary intellect, experience, integrity and support normally would mean a swift Senate confirmation -- particularly given the historic nature of the nomination. But some Senate Democrats have deemed Estrada controversial and are apparently threatening to block his confirmation. Sen. Charles E. Schumer (D-N.Y.) stated last April: "From my perusal of the record, [Estrada] is way out of the mainstream." I do not know what record Schumer could have been referring to. Estrada has not been the author of controversial opinions or articles, nor has he spoken out on divisive issues. He is not a politician or an interest-group leader who has sought to make policy. What he has done is serve, in a variety of public and private capacities, as a brilliant and careful lawyer devoted to the courts and the law.

But in the current political atmosphere, some nominees are not being assessed by the traditional standards of quality and ability to follow the law as a judge, but rather are being delayed or outright blocked because of distorted analyses of their perceived policy or personal views. As the president, the chief justice and the American Bar Association have stated, every judicial nominee deserves a prompt hearing and fair vote -- no matter who is president or which party controls the Senate. In the words of the ABA, "Vote them up or down, but don't hang them out to dry." It is past time for the Senate to act on a bipartisan basis to institute a fair and timely judicial confirmation process that will endure well into the future.

The problems in the judicial confirmation process have gone beyond mere delay, however. Even after hearings, for example, the Senate Judiciary Committee has refused to allow full Senate votes on well-qualified nominees -- despite the fact that the president's nominees would be confirmed if they received a full Senate vote. Single-issue Washington interest groups have played an unfortunate role in the process, moreover, by distorting records, leveling unfair charges and ignoring bipartisan support for the president's nominees.

That Estrada could be seen as controversial is an example of this regrettable trend. By any reasonable standard, he is an American success story. He came to this country as a teenager from Honduras speaking little English. He attended Columbia College and Harvard Law School, graduating with honors from both. He clerked for Justice Anthony M. Kennedy on the Supreme Court, served as an assistant U.S. attorney in the Southern District of New York and has worked at leading law firms in New York and Washington. He spent five years -- four during the Clinton administration -- in the U.S. solicitor general's office, which represents the United States before the Supreme Court. Estrada has argued 15 cases before the high court and is well known for his written and oral advocacy.

While in private practice, he devoted hundreds of hours -- for free -- to the representation of a death row inmate before the Supreme Court. Estrada's co-counsel in that case has written to the Senate that "[o]ne would not expect the defense of a death row inmate to become the legal mission of a strong political conservative." Estrada's decision to involve himself in that case demonstrates his devotion to the rule of law.

Estrada also has tremendous bipartisan support. He received a unanimous "well qualified" rating -- the highest possible -- from the ABA, which Schumer and Democratic Sen. Patrick J. Leahy (Vt.) have referred to as the "gold standard" for evaluating judicial nominees. A number of prominent Hispanic organizations have supported Estrada and urged the Senate to treat him fairly. He is supported by leading Democratic lawyers, including Ron Klain, who served as chief of staff to Vice President Al Gore, and by high-level officials of the Clinton Justice Department.

Former colleagues in the solicitor general's office also have publicly praised Estrada. Seth Waxman, solicitor general under President Clinton, has written to the Senate that he has "great respect both for Mr. Estrada's intellect and for his integrity" and that he is "a model of professionalism and competence." A bipartisan group of 14 former colleagues who served with Estrada in that office wrote to the Senate that Estrada "would be a fair and honest judge who would decide cases in accordance with applicable legal principles and precedents."

Few lawyers in the United States have the combination of intellect and experience that Miguel Estrada will bring to the D.C. Circuit. A mainstream nominee who has exhibited throughout his career the integrity and temperament to be a superb appeals court judge, a Hispanic immigrant who has risen to the peak of the legal profession, Miguel Estrada is an inspiration to Hispanics and to all Americans. The Senate should confirm him promptly.

WILLIAM JAMES HAYNES II
Nominee to the U.S. Court of Appeals for the Fourth Circuit

➢ **Jim Haynes, the current General Counsel for the Department of Defense, is a highly respected attorney with bipartisan support. He received a "Well Qualified" rating from the ABA.**

✓ Mr. Haynes is nominated to the 4th Circuit, which hears appeals from the district courts of Virginia, Maryland, West Virginia, North Carolina, and South Carolina.

✓ He has the strong support of both of his home state senators, Senator Warner and Senator Allen. He also has the support of prominent Democrats, including Floyd Abrams and Newt Minow.

T The U.S. Senate unanimously confirmed Mr. Haynes as General Counsel for the Department of Defense in May of 2001.

➢ **Jim Haynes has dedicated the majority of his career to serving his country.**

T As the chief legal officer of the Department of Defense and the legal adviser to the Secretary of Defense, Mr. Haynes provides oversight, guidance, and direction regarding legal advice on all matters arising within DoD. He oversees legal services delivered by the military and civilian attorneys in all DoD components.

T In March of 1990, Mr. Haynes was nominated by President George H.W. Bush, and confirmed by the U.S. Senate, to the position of General Counsel of the Department of the Army, a position he served in until January of 1993. Prior to this service, Mr. Haynes had been a Special Assistant to the General Counsel of the Department of Defense since November of 1989.

T Mr. Haynes served at the Department of Defense as Counsel to the Transition from January through April of 1989.

T From 1984 through 1989, Mr. Haynes served on active duty in the U.S. Army, attaining the rank of Captain before his honorable discharge in January of 1989.

➢ **In addition to his public service, Mr. Haynes has considerable experience in the private sector.**

T Mr. Haynes was a partner in the Washington, D.C. office of Jenner & Block from 1993 through 1996, and then again from 1999 through 2001, where his practice focused, among other things, on regulatory law, business law, and civil litigation/arbitration.

T From July of 1996 through January of 1999, Mr. Haynes served as Associate General Counsel and Staff Vice President for General Dynamics Corporation. He also served

as General Counsel of General Dynamics Corporation's Marine Group from 1997 through 1998. Mr. Haynes' practice with General Dynamics focused on corporate law, antitrust, labor law, and environmental law.

- Mr. Haynes served as an associate in the Washington, D.C. firm of Sutherland, Asbill & Brennan where he handled matters dealing with antitrust regulation.

➢ **Mr. Haynes has impeccable educational credentials and a record of hard work.**

- He attended Davidson College on an Army ROTC Scholarship and the Lunsford-Richardson Honor Scholarship.

- Mr. Haynes received his B.A. from Davidson in 1980 and graduated Phi Beta Kappa and Omicron Delta Kappa.

- Mr. Haynes attended Harvard Law School and received his juris doctor in 1983.

- Upon graduating from law school, Mr. Haynes obtained a federal clerkship, serving for the Honorable James B. McMillan of the U.S. District Court for the Western District of North Carolina.

➢ **Throughout his career, Mr. Haynes has engaged in volunteer work to help those that are less fortunate.**

- In 1999, Mr. Haynes served in Kazakhstan as a volunteer consultant for Mercy Corps International, a non-governmental relief organization.

- While at Jenner & Block as a partner, Mr. Haynes served as pro bono counsel to indigent clients accused of crimes in D.C. Superior Court.

- In his second year of law school, Mr. Haynes was a member of the Harvard Legal Aid Bureau where he provided pro bono legal services for indigent clients needing help with landlord-tenant, child custody, and social security disability matters.

➢ **Mr. Haynes has received a number of awards for his public and military service, including:**

- The Distinguished Public Service Award from the Department of the Navy in 2003;

- An Honorary Doctor of Laws from Stetson University in 1999;

- The Meritorious Civilian Service Medal from the Department of the Army in 1992; and

- The Army Meritorious Service Medal (Oak Leaf Cluster) in 1986 and 1998.

Statements from Select Supporters of Jim Haynes

Floyd Abrams, noted First Amendment Expert and partner at Cahill, Gordon & Reindel

Jim has attended and participated actively in a number of our meetings [of the Technology and Privacy Advisory Committee] and I have had occasion to speak with him on a number of occasions about the difficult task of balancing national security interests with those of a variety of civil liberties' interests including privacy. I have found him to be unusually able, easy to work with and deeply sensitive to the need to accommodate civil libertarian interests even as we seek to prevent new acts of terrorism against us.... I urge favorable consideration of his nomination. Letter to Chairman Hatch, Nov. 18, 2003.

Newton N. Minow, former Chairman of the FCC under President Kennedy,

Having practiced law for more than 53 years, I can recognize a good lawyer. In my opinion, Jim Haynes is an excellent lawyer, deeply committed to protecting each citizen's right under our constitution. He is sensitive to the importance of preserving our civil liberties. The project we are working on requires us to examine the balance of national security and civil liberties. Jim Haynes brings to our task an enduring understanding of the necessity of maintaining our civil liberties and our civil rights, even at a time of national danger.

I am a Democrat. I am confident that he will be a fair, moderate, thoughtful and respected judge. Letter to Chairman Hatch, Nov. 17, 2003.

The Honorable William H. Webster, former Judge of the U.S. Court of Appeals for the Eighth Circuit and Director of the FBI

Having served myself as a judge of the United States District Court for the Eastern District of Missouri (three years) and as a judge of the Eighth Circuit (five years), I think I can recognize judicial temperament when I see it. I believe Jim Haynes to be an able lawyer and one who would work every day to provide equal justice under the law. Moreover, I believe that he would be a positive and constructive member of the Court to which he has been nominated.

Finally, I believe Jim Haynes to be a man of exceptional integrity and character. I sincerely hope that the Committee will act favorably and soon to confirm his nomination. Letter to Chairman Hatch, Nov. 18, 2003.

The Honorable John O. Marsh, Jr., former Secretary of the Army, National Security Advisor to President Ford, and Congressman from Virginia

Having known [Jim Haynes] for a number of years, and observed his performance in different posts, I can vouch for his ability, dedication to Country, and sterling character. In my view, he would make an outstanding jurist. Letter to Chairman Hatch, Nov. 14, 2003.

Myth: Jim Haynes lacks the relevant legal experience necessary for a seat on the 4th Circuit Court of Appeals.

Facts:

- The ABA, the "Gold Standard" according to many Democrats, determined that Mr. Haynes was "Well Qualified" for the position as a judge on the U.S. Court of Appeals for the 4th Circuit.

- Mr. Haynes is a well-respected attorney with experience in many different areas of law.

  - ✓ He serves as General Counsel for the Department of Defense, an organization with a budget of hundreds of billions of dollars and with more than two million military and civilian personnel, including thousands of lawyers. Earlier in his career, he served as the General Counsel for the Department of the Army.

    - Mr. Haynes provides legal advice on a broad range of issues ranging from the conduct of warfare, to the establishment of government in occupied territories, to the operation of industrial facilities, to the compliance with environmental laws, and to the development of legislative proposals.

    - Mr. Haynes oversees litigation conducted by and against the Department of Defense and manages the legal resources of the Department.

  - ✓ Mr. Haynes was a partner at Jenner & Block, a prominent law firm in Washington, D.C. His practice consisted of matters involving administrative/regulatory law, business law, telecommunications law, government contracts, as well as civil litigation.

    - Mr. Haynes personally handled several civil matters in district court and in administrative proceedings.

  - ✓ Mr. Haynes served as an Associate General Counsel at large corporation, General Dynamics. He handled matters related to corporate law, administrative law, transactional law, antitrust, business law, labor law, environmental law, government contracts, as well as oversight of litigation.

- Mr. Haynes has been responsible, both as corporate counsel and as General Counsel at the Department of Defense, for supervising the conduct of litigation, including many appellate matters. His role includes developing litigation strategy and reviewing pleadings and briefs filed on behalf of his client.

Myth: Mr. Haynes refuses to commit to recuse himself from specific issues that he worked on while at the Department of Defense.

Facts:

- Mr. Haynes has committed, if confirmed, to following all applicable statutes, court decisions, policies and ethical rules pertaining to recusal. He cannot be expected to blindly promise to recuse himself in hypothetical cases that have not yet been brought.
  - ✓ Mr. Haynes has affirmatively stated that he would recuse himself from any proceeding in which he had "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. 455(b)(3).
  - ✓ Mr. Haynes also has committed to recusing himself in cases in which he had "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. 455(b)(1).
- Mr. Haynes has stated that, "deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." Responses to Senator Feingold, Feb. 16, 2004. If confirmed, he has committed to recusing himself in cases where is impartiality might reasonably be questioned.

Myth: Mr. Haynes, as General Counsel for the Department of Defense, is responsible for the Administration's policy on enemy combatants and the deprivation of the rights of the detainees at Guantanamo Bay.

Facts:

- Mr. Haynes is the chief legal officer for the Department of Defense – he does not make policy. He advises the Secretary of Defense and other senior civilian and military officials on legal issues.
- In matters in litigation involving the conduct of the war on terrorism – or individuals detained pursuant to the war – Mr. Haynes is obligated to make the best legal arguments possible on behalf of his client.
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

➢ All of the positions taken by the Department of Defense with regard to enemy combatants are grounded in law and precedent.

✓ There are currently two cases pending before the Supreme Court relating to the status of American citizen enemy combatants.

✓ The government has relied upon well-established Supreme Court precedent in making its arguments. For example, in *Ex parte Quirin*, 317 U.S. 1 (1942), the Court stated:

> "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."

✓ The 4th Circuit in the *Hamdi* case held that Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." (citing Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a)). The court stated: "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for 'the maintenance, pay and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined ... to be similar to prisoners of war.'" 10 U.S.C. § 956(5) (2002).

✓ Presently, there is no U.S. citizen being held without access to counsel. On February 3, 2004, Yaser Hamdi, an American citizen captured in Afghanistan and detained in Charleston, S.C., met with counsel. On March 3, 2004, Jose Padilla, also an American citizen, met with counsel.

HOLMES

ESTRADA

LEON HOLMES
NOMINEE FOR THE #TH CIRCUIT COURT OF APPEALS

Biographical Information

- Leon Holmes has practiced commercial litigation at the trial and appellate level in state and federal court for many years, and has acquired significant courtroom experience. He is currently a partner at Quattlebaum, Grooms, Tull & Barrow in Little Rock, Arkansas.
- The ABA gave Holmes a "Well-Qualified" rating.
- Both Democrat home-state senators, Senator Blanche Lincoln and Senator Mark Pryor, support Leon Holmes's nomination.
- On two occasions Leon Holmes has been appointed to serve as a special judge of the Arkansas Supreme Court, a great honor for a practicing attorney. The justices praised his service in those cases, and more than one has encouraged him to run for a seat on the Arkansas Supreme Court.
- Leon Holmes has served as director of the Florence Crittendon Home of Little Rock in 1986-1987, helping young women cope with teen pregnancy.

Controversial Issues

- Some have stated that Leon Holmes's views on gender equality and gay rights cast into doubt his ability to provide equal justice to women and gays and lesbians who would appear before him.
- Some have stated that Leon Holmes' views about abortion raise serious questions about his fitness for a lifetime appointment to the federal bench.

Responses

- Leon Holmes is a member of the Roman Catholic Church. Support for male-only ordination and distinctions between the sexes are among the religious teachings of the Church. Membership in the Catholic Church, and faithful adherence to its traditional teachings in one's personal life, cannot be a disqualifying factor in the selection of a federal judge.
- Leon Holmes supports a Human Life Amendment to the U.S. Constitution. This support indicates that he respects precedent. Holmes's support for a constitutional amendment simply demonstrates his understanding that *Roe v. Wade* and *Casey v. Planned Parenthood* are settled law that would have to be overturned by constitutional amendment. His view that abortion deserves the same response that slavery got in this country simply means that he believes abortion should be ended by constitutional amendment, just as slavery was.

Leon Holmes

- The Arkansas Democrat-Gazette, Holmes' hometown paper that knows his record best, strongly supports his candidacy. The paper, writing while his candidacy was being considered, indicated that Holmes was a well qualified, mainstream nominee:

  ✓ "What distinguishes Mr. Holmes is the rare blend of qualities he brings to the law—intellect, scholarship, conviction, and detachment. A reverence not just for the law but for ideas, for the life of the mind. All of that would shine through the clutter of argument that awaits any judge . . . . He would not only bring distinction to the bench but promise. . . . In choosing Leon Holmes, [the President] could bequeath a promise of greatness." Editorial, *Name on a List in a Field of Seven, One Stands Out*, ARKANSAS DEMOCRAT GAZETTE, Dec. 1, 2002, at 86.

- Leon Holmes has practiced commercial litigation at the trial and appellate level in state and federal court for many years, and has acquired significant courtroom experience. He is currently a partner at Quattlebaum, Grooms, Tull & Barrow in Little Rock, Arkansas.

- The American Bar Association gave Holmes a "well-qualified" rating.

- Both Democrat home-state senators, Senator Blanche Lincoln and Senator Mark Pryor, support Leon Holmes's nomination.

- Leon Holmes knows the value of hard work. He came from humble roots and is the only one among his seven siblings to attend college. He worked his way through college, and finished law school at night while working a full-time day job in order to support his family.

- Leon Holmes is an accomplished scholar, and has taken the time out of his law practice to teach a variety of legal classes.

  ✓ Mr. Holmes finished law school at the top of his class, was inducted into Phi Beta Kappa while a doctoral student at Duke University, and was named Outstanding Political Science Student upon graduation from college.

  ✓ During the academic years from 1990-1992, Holmes taught a variety of courses at Thomas Aquinas College in California. He also taught law at the University of Arkansas during the year that he clerked for Justice Holt on the Arkansas Supreme Court.

  ✓ Mr. Holmes has displayed a wide-ranging academic interest. His doctoral dissertation discusses the political philosophies of W.E.B. DuBois and Booker T. Washington, and it analyzes the effort Dr. Martin Luther King, Jr. made to reconcile their divergent views. He has also written substantial essays dealing with subjects in law, political philosophy, and theology.

- Mr. Holmes has been an active participant in the Arkansas Bar:

  - ✓ Holmes has taught continuing legal education courses to the bar on numerous occasions. He has been awarded the state bar's "Best CLE" award four times.
  - ✓ Holmes sits on the Board of Advisors to the Arkansas Bar Association's magazine.
  - ✓ Holmes chaired the editorial board for the bar's publication of *Handling Appeals in Arkansas*.
  - ✓ Holmes sits on the judicial nominations committee for the Arkansas state courts, which recommends attorneys to the Governor for judicial appointment in supreme court cases where one or more justices must recuse themselves.

- Leon Holmes is one of the top handful of appellate lawyers in Arkansas. In 2001, the Arkansas Bar Association bestowed its "Writing Excellence" award on Holmes.

- On two occasions Leon Holmes has been appointed to serve as a special judge of the Arkansas Supreme Court, a great honor for a practicing attorney. The justices praised his service in those cases, and more than one has encouraged him to run for a seat on the Arkansas Supreme Court.

- Leon Holmes is very well respected by the plaintiffs' bar in Arkansas. Holmes is currently defending on appeal the largest jury verdict ever awarded in Arkansas's history, in the case of a nursing home resident who allegedly died from neglect. On account of his outstanding reputation, Holmes was retained to handle the appeal.

- Mr. Holmes believes in giving back to the community, and has generously provided his services on a pro bono basis.

  - ✓ Holmes was *habeas* counsel for death-row inmate Ricky Ray Rector, the mentally retarded man whose execution then-Governor Clinton refused to commute during the 1992 Presidential election. Holmes helped to prepare the case for the evidentiary hearing in federal district court after the *habeas* petition had already been filed.

  - ✓ Holmes represented a Laotian immigrant woman suffering from terminal liver disease when Medicaid refused to cover treatment for a liver transplant.

  - ✓ Holmes represented a woman who lost custody of her children to her ex-husband and could not afford counsel for an appeal.

  - ✓ Holmes represented an indigent man with a methamphetamine felony history in connection with some traffic misdemeanors.

- Leon Holmes has given back to his community in areas outside the law as well. He was a houseparent for the Elon Home for Children while a graduate student in North Carolina.

He also served as the director of the Florence Crittenton Home of Little Rock in 1986-87, helping young women cope with teen pregnancy.

- Leon Holmes's former law partner Philip Anderson (of Williams & Anderson) is a recent past President of the American Bar Association. He strongly supports Holmes.

Leon Holmes: Response to Alliance for Justice Letter

Allegations: Leon Holmes's "zealous advocacy for doing away with ... a fundamental right [to abortion], along with extreme statements he has made about the separation of church and state, gay rights, and gender equality, raises serious questions about his fitness for a lifetime appointment to the federal bench." Alliance for Justice letter to Sens. Hatch and Leahy, March 25, 2003.

Facts:

Abortion

- Holmes's support for a Human Life Amendment to the U.S. Constitution indicates that he respects precedent.

  ✓ Holmes's support for a constitutional amendment simply demonstrates his understanding that *Roe v. Wade* and *Casey v. Planned Parenthood* are settled law that would have to be overturned by constitutional amendment.

  ✓ Holmes's view that abortion deserves the same response that slavery got in this country simply means that he believes abortion should be ended by constitutional amendment, just as slavery was.

  ✓ Holmes has written that if a constitutional amendment were passed under which Arkansas could determine its own abortion policy, abortion would most likely be permitted in certain cases.

- Holmes has been a member of the National Lawyers Association (NLA), but he has also been a member of the American Bar Association (ABA).

  ✓ The NLA was formed in part to provide lawyers the opportunity to join a professional organization in which all members would have the opportunity to vote on socio-political issues. The ABA, in contrast, allows its 539-member House of Delegates to decide political questions on behalf of its 370,000 members, such as the controversial decision in 1992 to support abortion rights.

  ✓ Philip Anderson, a recent President of the ABA, was a long-time law partner of Leon Holmes and has written the Senate Judiciary Committee in support of him:

  "I believe that [Leon Holmes] is superbly qualified for the position for which he has been nominated. He is a scholar first, and he has had broad experience in federal court. He is a person of rock-solid integrity and sterling character. He is compassionate and even-handed. He has an innate sense of fairness. He is temperamentally suited for the bench. He works with dispatch. In short, he has all of the qualities that one would hope to find in a federal judge, and seldom are they found in a person so amiable and with his degree of genuine humility."
  -letter from Philip Anderson to Sen. Hatch on March 25, 2003.

- Holmes's representation of Arkansas Right to Life in 2001 as *amicus curiae* in the *Aka v. Jefferson Hosp. Ass'n* case was entirely appropriate, and the Arkansas Supreme Court agreed with him.

  - ✓ Gross negligence in that case on the part of the hospital and the attending physicians led to the needless death of a pregnant woman and her unborn full-term child. The woman needed a caesarean section, but the doctors who were qualified to perform it did not come to the hospital in time, and the residents in charge of the woman's care were not qualified to perform the procedure.
  - ✓ The father brought a wrongful death suit on behalf of his deceased wife's estate and his deceased unborn son's estate. The hospital and doctors defended in part by challenging the father's ability to sue on behalf of his unborn son's estate.
  - ✓ The Arkansas Supreme Court ruled in favor of the position supported by Holmes's client, holding that a viable fetus was a "person" for the purposes of Arkansas's wrongful death statute, and that the plaintiff-father could bring suit under that statute on behalf of his unborn son's estate.

- Holmes's representation of the defendant in *Pursley v. Arkansas* in 1987 was entirely appropriate.

  - ✓ Dow Richard Pursley was a therapist in Springdale, Arkansas. In his professional counseling practice, he had counseled a number of women who suffered serious psychological harm as a result of having had an abortion. Several of these women had attempted suicide. One patient of his had a daughter who was so traumatized by having had an abortion that she could not live with herself and committed suicide.
  - ✓ Pursley became distraught that women were not being told the possible psychological consequences of getting an abortion, and he went to a clinic in Fayetteville where he thought abortions were being performed with the intention of warning women about the psychological consequences they might suffer if they underwent an abortion.
  - ✓ Pursley stationed himself on a public sidewalk near the clinic. As women went into the clinic, he followed them onto the private sidewalk to warn them of psychological risks of abortion and offer them alternatives. The clinic was a stand-alone facility with a separate parking lot, so it was not possible to approach the women entering the clinic without venturing onto private property. Pursley persisted in entering the private property "despite repeatedly being told not to do so." He never entered the front porch of the clinic or the clinic building itself.
  - ✓ Pursley was arrested and charged on a misdemeanor trespassing count. He retained Leon Holmes to defend him at trial and on appeal.
  - ✓ The trial court found Pursley guilty and imposed a $300 fine and 15-day suspended jail sentence. On appeal, Holmes argued that the trial court erred in excluding evidence that Pursley had observed instances of abortion's harmful psychological results in his professional counseling practice. Holmes also argued that the trial court erred in refusing to give a "choice of evils" instruction to the

jury, which is a statutory defense in Arkansas whereby an ordinarily criminal act may be excused in light of extraordinary attendant circumstances.

- ✓ Every criminal defendant is entitled to competent defense counsel, which Holmes provided Pursley. Because Pursley freely admitted that he had entered the private property, the choice of evils defense was the only one available to Pursley that Holmes could make.
- ✓ The court of appeals ruled that the trial court did not err in refusing to give the "choice of evils" defense, because Pursley put himself near the clinic, there was no proof of imminent danger to the women, and there was no evidence that any of the women were pregnant or had come to the clinic for an abortion. The court of appeals did not reach the question of whether the psychological harm evidence was properly excluded.
- ✓ Pursley was only charged with trespassing. He approached the women in a conversational tone, and did not obstruct their entrance to the clinic. He was not charged with threatening behavior of any kind. Pursley was thus a very different defendant than Paul Jennings Hill, the man who was denied the choice of evils defense in his 1994 Florida murder trial for killing an abortion doctor and his two escorts.

Separation of Church and State

- The Alliance for Justice letter falsely claims that Leon Holmes questioned the separation of church and state in a speech to the Society of Catholic Social Scientists. To level this pernicious accusation, the Alliance for Justice letter lifts a quote from that speech entirely out of context. Any fair reading would construe Holmes's remarks to reach the conclusion that Christianity and political authority have separate spheres of jurisdiction, which is the exact opposite of the Alliance for Justice's claim that Holmes questions the separation of church and state.

  - ✓ When Holmes states that, "Christianity, in principle, cannot accept subordination to the political authorities," Holmes is explicitly contrasting Christianity with the pagan religions about which Aristotle wrote. Aristotle, according to Holmes, "stated that in a properly constituted polity, appointment of the priests and custodians of the temples, as well as the management of public sacrifices, are political concerns." Holmes makes the obvious point that the appointment of priests and the like is not the business of modern public authorities. In other words, unlike the control the state exerted over religion in Aristotle's day, Holmes recognizes that there is a separation of church and state in America today.

  - ✓ Taken in context, it is patently obvious that the quote used by the Alliance for Justice is simply one of the four theoretical possibilities that Holmes discusses. He does not endorse it. In fact, he argues that when political rulers have tried to subordinate Christianity to their political authority, "the results have been disastrous," regardless of whether the political authorities were seeking to help or hinder it.

- ✓ Holmes notes that there are four possibilities for the proper relationship between Christianity and the political order:

- ✓ The only possibility Holmes sees as realistic is the fourth, "that Christianity and political authority would be assigned separate spheres of jurisdiction." Holmes describes this in shorthand as a "[g]ive to Caesar what is Caesar's and to God what is God's" way of doing things, and he notes that separate spheres of jurisdiction is the approach favored by modern liberalism—including John Locke, Thomas Jefferson, and Alexis de Tocqueville—and the modern Catholic Church.

- ✓ Holmes comes down squarely on the side of supporting this separation of religion and politics. For Tocqueville, "Christianity and the political order are assigned separate spheres, separate jurisdictions: to politics is assigned jurisdiction over the material interests of men; to religion is assigned concern for their spiritual well-being." Holmes raises some questions about Tocqueville's reasoning, but he notes that "[t]he Church has come to a teaching that is akin to that of Tocqueville." Under the Church's version, however, church and state must be separate because Adam's original sin separated human nature and original justice. Holmes espouses this view, thereby offering the Catholic social scientists theological grounds for the separation of church and state, as well as political ones.

Summaries of Editorials and Letters to the Editor

- "Embryo Is a Living Human," *Arkansas Democrat Gazette,* August 22, 1996, p. 9B. Holmes discussed the testimony of a doctor who performed the abortion that "created the Medicaid crisis," and noted that the doctor indicated that at that time the abortion is commenced, "the womb contains a member of the human species, a human embryo, with arms and legs, hands and feet." Holmes concludes from this description that "the unborn is a living human who is killed by abortion."

- "Generation Faces Major Questions Over Nation's Soul," *Arkansas Democrat Gazette*, July 4, 1992, p. 6D. Holmes argues that abortion is the most important issue of our time—as was slavery more than a century ago—and that failing to stop it will poison the spiritual soul of the nation and reduce the commitment to life and liberty. In passing, Holmes says "[b]easts are intended to be governed by us for our purposes, and we violate no principle of right when we take their lives for some legitimate purpose of our own, including to use for food."

- "Anti-abortion Movement Has Only One Goal: Life," *Arkansas Democrat*, June 24, 1987, p. 7B. Written while Holmes was President of Arkansas Right to Life, Holmes argues that political views of pro-lifers on other issues are irrelevant and that pro-life liberals can form their own groups. He rejects those who say they agree with pro-lifers but won't join them because pro-lifers have "bad attitudes." Such critics don't really "believe taking innocent life is wrong," according to Holmes. He discusses the Declaration of Independence as a document that liberals today reject and conservatives endorse. He asks, "if our school children can recite the declaration, which acknowledges God as creator, why can they not lift up a prayer thanking him for the rights we enjoy?"

- Letter to the Editor, *Arkansas Democrat Gazette*, December 13, 1986. Holmes points out that the newspaper recently reported that a local television station had removed ads containing pictures of the aftermath of abortion because they were termed offensive and obscene. He made the point that nobody asserted that the pictures were inaccurate, and that in fact, some people after viewing such pictures are moved to "stop abortion."

- "Should We Protect the 'Unborn Child,'" *Arkansas Gazette*, October 18, 1984. Holmes defends the wording of the Unborn Child Amendment to the Arkansas Constitution, and argues that the ACLU wants to force taxpayers to fund abortion. He discusses an incident in Pine Bluff the previous year where "one abortionist sent an infant girl, who had survived the abortion, home with the mother in a garbage bag with the assurance that the bag would quit moving after awhile," and he advocated passing a law to protect children who survive abortions. Finally, Holmes labels as "silly" the argument that the term "unborn child" is misleading.

- "Lincoln-Douglas Debates: The Jury is Not Yet In," *Arkansas Gazette*, February 12, 1984, p. 15B. Holmes argues that fetuses have a right to life that must be recognized, just as slaves had a right to be free. Although, as Lincoln recognized, "freedom of choice in most matters is and must be the rule in the American order," when it comes to

fundamental life and liberty as it does in the cases of slavery and abortion, choice must be restricted. According to Holmes, the right to life of the unborn must be respected and slavery prohibited, because one person may not choose to take the life or liberty of another.

- "The Scary New Argument for Abortion," *Arkansas Gazette*, September 28, 1982, p. 9A. Holmes laments a trend in recent pro-choice articles toward admitting that abortion is murder, but endorsing it anyway. He says that the trend clears away a pseudo issue, but that it frightens him with its low regard for life. He discusses recent cases of abortion and infanticide of Down's Syndrome babies as further signs of the low regard for life. He takes particular issue with the argument that abortion prevents child abuse: "It is a strange argument to say that child abuse can be prevented by killing children. By like reasoning, we could prevent rape by killing women." The article ends with an unflattering comparison to Nazi Germany: "The proabortionists counsel us to respond to [great social] problems by abandoning what little morality our society still recognizes. This was attempted by one highly sophisticated, historically Christian nation in our century—Nazi Germany. Unlike Nero, who fiddled while Rome burned, the proabortionists rush to throw gasoline on the flames."

- Letter to Editor, *Daily Dispatch*, Dec. 24, 1980. Holmes writes that the Human Life Amendment would not affect contraception and that pro-life opponents of it should offer an alternative to it rather than merely criticize it, which smacks of dishonestly "perpetuat[ing] the status quo." He calls the concern for denying abortions to rape victims a red herring, "because conceptions from rape occur with approximately the same frequency as snowfall in Miami." He concludes by saying that "the abortion issue is the simplest issue this country has faced since slavery was made unconstitutional. And it deserves the same response."

- Letter to Editor, *Christian Science Monitor*, December 23, 1980, p. 22. Holmes writes in response to a Nina Totenberg piece entitled "Did America vote for this, too?" Totenberg apparently assailed cultural changes in store in the wake of Reagan's election as not being democratically chosen. Holmes takes issue with Supreme Court rulings for abortion and forced busing, and against prayer in school, and he notes that an unelected Supreme Court brought about each.

- Letter to Editor, *Daily Dispatch*, Dec. 4, 1980, p. 4. Holmes writes as (at that date) a non-Catholic and non-member of the New Right, but as one "committed to terminating the slaughter of unborn children." He argues that the morality of abortion does not turn on who supports or opposes it, and that those who rail against the Catholic Church and the New Right sidetrack the public discussion of abortion from the merits of the dispute. He terms opposition to abortion coupled with opposition to a Constitutional Amendment against abortion "a dishonest copout," because the only reason to oppose abortion is if one views the unborn child as human and an Amendment would simply extend Constitutional protection to such humans. He also argues that the New Right's support for voluntary prayer in schools and capital punishment, and its opposition to abortion and

forced busing, "need not be feared as a step towards fascism" because they were the existing public policy in a non-fascist U.S. a very short time ago.

- "Abortion Without Natural Affection," TV Program on local Arkansas station, 1990. Mr. Holmes appears at a couple of places in the program. He notes that the unelected Supreme Court made the *Roe* decision. He predicts that the votes are there to overturn *Roe* in the right case. He also predicts that if the decision were returned to the states Arkansas would permit abortion in cases of rape, incest, and jeopardy to the physical health of the mother. He characterizes those exceptions as not being a consistent pro-life position, because they still deny the sanctity of life. He refers to an Indiana case where a court permitted the parents of a Down's Syndrome child to withhold food and water as a case of infanticide.

- "Challenge," TV program on Newscenter 4, Little Rock, 1986. Mr. Holmes debated a local doctor about the effects of Amendment 65, which proposed to eliminate state funding of abortion and protect the unborn child to the maximum extent permissible under federal law. At one point in the program, after the doctor says fetuses look like fish, Holmes holds up a picture of a several week old fetus to make the point that even young fetuses are fully human.

Leon Holmes: Gender Equality and Gay Rights

Allegation: Leon Holmes's "views on gender equality and gay rights cast into doubt his ability to provide equal justice to women and gays and lesbians who would appear before him."
Alliance for Justice, Letter to Chairman Hatch and Senator Leahy, March 25, 2003.

Facts:

- Leon Holmes and his wife Susan co-authored an article in an effort to explain the "historic Catholic teaching regarding the relation between male and female." The article was written in a Catholic magazine, for other Catholics, and it should be understood in the full context of explicating Catholic theology. *See* "Gender Neutral Language," *Arkansas Catholic*, April 12, 1997, p. 10.

- The article fully supports the equality of men and women:

  - ✓ "All of us, male and female, are equally sons of God and therefore brothers of one another."
  - ✓ "[T]he distinction between male and female in ordination ... has nothing to do with the dignity or worth of male compared to female."
  - ✓ [M]en and women are equal in their dignity and value."

- Leon and Susan Holmes share an orthodox view of marriage in the Catholic Church. The statements that "the wife is to subordinate herself to the husband" and that "the woman is to place herself under the authority of the man" express the church's teachings, to which they, as Catholics, subscribe. That view of marriage does not mean that Mr. Holmes or his wife think that all women must subordinate themselves to all men.

- Leon Holmes is a member of the Roman Catholic Church. Support for male-only ordination and distinctions between the sexes, as well as opposition to gender-neutral language in the liturgy and homosexual marriage, are among the religious teachings of the Church. Membership in the Catholic Church, and faithful adherence to its traditional teachings in one's personal life, cannot be a disqualifying factor in the selection of a federal judge.

- Holmes and his wife discussed in the article gay marriage as a matter of Catholic theology. His point was that, as a matter of Catholic theology, male-only ordination and the refusal to recognize homosexual marriage are both consistent with maintaining distinctions between the sexes.

- Leon Holmes has spoken in favor of the separation of politics and religion. In a speech entitled "From Aristotle to Tocqueville on Church and State," Holmes endorsed Tocqueville's view that "Christianity and the political order are assigned separate

spheres, separate jurisdictions: to politics is assigned jurisdiction over the material interests of men; to religion is assigned concern for their spiritual well-being."

- Leon Holmes has practiced law at firms with a large percentage of female partners and associates. His female colleagues in the Arkansas bar support his nomination to this position.

  ✓ "I am a female attorney in Little Rock, Arkansas. I am a life-long democrat and am also pro-choice . . . I commend Mr. Holmes to you. He is a brilliant man, a great lawyer and a fine person."
  Eileen Woods Harrison, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I heartily recommend Mr. Holmes to you. He is an outstanding lawyer and a fine person. While he and I differ dramatically on the pro-choice/pro-life issue, I am fully confident he will do his duty as the law and facts of a given case require."
  Cathleen V. Compton, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I support Leon Holmes because he is not only a bright legal mind, but also because he is a good person who believes that our nation will be judged by the care it affords to the least and the littlest in our society. I am not troubled that he is personally opposed to abortion. Mr. Holmes is shot through with integrity. He will, I believe, uphold and apply the law with the utmost care and diligence."
  Beth M. Deere, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

- The editorial board of the *Arkansas Democrat-Gazette* supports Mr. Holmes's nomination: "What distinguishes Mr. Holmes is the rare blend of qualities he brings to the law—intellect, scholarship, conviction, and detachment. A reverence not just for the law but for ideas, for the life of the mind. All of that would shine through the clutter of argument that awaits any judge . . . . He would not only bring distinction to the bench but . . . a promise of greatness."

Leon Holmes: Abortion

Allegation: Leon Holmes, a past president of Arkansas Right-to-Life, holds extreme pro-life views, and he would not be able to judge fairly any cases touching on the abortion issue.

Facts:

- Leon Holmes enjoys support from a number of pro-choice attorneys throughout Arkansas, who strongly believe that he will fairly adjudicate any abortion cases that come before him. These supporters include Kent Rubens, who led the fight to strike down Arkansas's abortion laws in the wake of *Roe v. Wade*.

  ✓ "I cannot think of anyone who is better qualified to serve. . . . As someone who has represented the pro-choice view, I ask that you urge your members to support his confirmation."
  Kent Rubens, Letter to Chairman Hatch and Senator Leahy, March 21, 2003.

  ✓ "I am a female attorney in Little Rock, Arkansas. I am a life-long democrat and am also pro-choice . . . I commend Mr. Holmes to you. He is a brilliant man, a great lawyer and a fine person."
  Eileen Woods Harrison, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I heartily recommend Mr. Holmes to you. He is an outstanding lawyer and a fine person. While he and I differ dramatically on the pro-choice/pro-life issue, I am fully confident he will do his duty as the law and facts of a given case require."
  Cathleen V. Compton, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ " I am proud to be a Democrat. I am also proud to recommend Leon Holmes as a federal district judge for the Eastern District of Arkansas, even though he and I disagree on issues, including a woman's right to choose whether to bear a child . . . . I support Leon Holmes because he is not only a bright legal mind, but also because he is a good person who believes that our nation will be judged by the care it affords to the least and the littlest in our society. I am not troubled that he is personally opposed to abortion. Mr. Holmes is shot through with integrity. He will, I believe, uphold and apply the law with the utmost care and diligence."
  Beth M. Deere, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I heartily commend Mr. Holmes to you. He is an outstanding lawyer and a man of excellent character. Leon Holmes and I differ on political and personal issues such as pro-choice/anti-abortion. I am a past board member of our local Planned Parenthood chapter and have been a trial lawyer in Arkansas for over twenty-five years. Regardless of our personal differences on some issue[s], I am confident that Leon Holmes will do his duty as the law and facts of any given case require."
  Stephen Engstrom, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

- Both Senator Lincoln and Senator Pryor of Arkansas support the nomination of Mr. Holmes.

- Regardless of any personal views, Mr. Holmes will abide by the rule of law. He understands that his personal views play no role in his duty as a judge to honor *stare decisis* and faithfully follow the precedent of the Supreme Court and Eighth Circuit.

  ✓ Holmes has spoken in support of separating religion and politics. In a speech entitled "From Aristotle to Tocqueville on Church and State," Holmes argued that "Christianity and the political order are assigned separate spheres, separate jurisdictions: to politics is assigned jurisdiction over the material interests of men; to religion is assigned concern for their spiritual well-being."

- The *Arkansas Democrat-Gazette*, Holmes's hometown paper that knows his record best, strongly supports his candidacy. The paper, writing while his candidacy was being considered, indicated that Holmes was a well-qualified, mainstream nominee:

  ✓ "What distinguishes Mr. Holmes is the rare blend of qualities he brings to the law—intellect, scholarship, conviction, and detachment. A reverence not just for the law but for ideas, for the life of the mind. All of that would shine through the clutter of argument that awaits any judge . . . . He would not only bring distinction to the bench but promise. . . . In choosing Leon Holmes, [the President] could bequeath a promise of greatness." Editorial, *Name on a List in a Field of Seven, One Stands Out*, ARKANSAS DEMOCRAT GAZETTE, Dec. 1, 2002, at 86.

- Prominent liberal politicians, including recent presidential candidates and members of the Judiciary Committee, have supported measures to extend legal protections to unborn children. Under the litmus test currently applied by some Democrats, Al Gore and Dick Gephardt never could be confirmed to the federal bench.

  - Congressman Al Gore voted to amend the Civil Rights Act to define a "person" to include an "unborn child[] from the moment of conception." This would have statutorily prohibited abortion. *Vote 269, H. Amdt. 942 to H.R. 5490 (Civil Rights Act of 1984), 93d Cong., 2d Sess. (1984)*.

  - Congressman Dick Gephardt issued a press release that read as follows: "Mr. Gephardt pledged in a campaign position paper entitled, 'Justice, Your Congressman and the Abortion Issue' released September 5, 1976, that he would sponsor and work for a Constitutional Amendment to prohibit any abortion except to save the life of the mother."

  - Senator Ted Kennedy wrote a letter that stated: "I am opposed to abortion on demand. This opposition is based on my deep personal, moral and religious beliefs." *Letter of Oct. 5, 1979*. In an earlier letter, Kennedy further explained that "Wanted or unwanted, I believe that human life, even at its earliest stages, has certain rights which must be recognized—the right to be born, the right to

love, the right to grow old." "But once life has begun, no matter at what stage of growth, it is my belief that termination should not be decided merely by desire." *Letter of Aug. 3, 1971*

- Senator Dick Durbin argued that "the right to abortion is not guaranteed by the U.S. Constitution." He therefore supported a constitutional amendment to overrule *Roe v. Wade*. "The effect of this Amendment will be to return us to the legal environment which existed before *Roe v. Wade* in 1973. States would be allowed to regulate the practice of abortion under their power to legislate in areas of health and safety." *Letter of May 12, 1983.*

- Mr. Holmes is a member of the Roman Catholic Church. Opposition to abortion is among the religious teachings supported by the Church. Membership in the Catholic Church, and faithful adherence to its teachings, cannot be a disqualifying factor in the selection of a federal judge.

- Abortion-rights groups have a poor track record of predicting how judicial nominees will vote, particularly on matters involving abortion and sex-based discrimination, after they are confirmed.

  ✓ During Justice Souter's 1990 confirmation hearings, NOW's president testified that confirming him would mean "ending freedom for women in this country." *Washington Post* (Sept. 30, 1990). "I tremble for this country if you confirm David Souter." *Austin-American Statesman* (Sept. 26, 1990). She further described Souter as "almost Neanderthal," and warned that "women's lives are at stake." *U.S. News & World Report* (Sept. 24, 1990).

  - In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justice Souter co-authored the plurality opinion that reaffirmed the central holding of *Roe v. Wade*—that the Constitution protects a woman's right to procure an abortion.

  - In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), Justice Souter ruled that an employer was subject to vicarious liability under Title VII to an employee who suffered sexual harassment at the hands of her supervisor, since the employer had failed to exercise reasonable care to prevent the harassment.

  - In *United States v. Lanier*, 520 U.S. 259 (1997), Justice Souter held that a state judge who sexually assaulted five women in his chambers could be prosecuted under 18 U.S.C. § 242, which makes it a crime for persons acting under color of state law to deprive persons of their constitutional rights.

  ✓ When Justice Stevens was nominated to the Supreme Court in 1975, Nan Aron—then the president of the Women's Legal Defense Fund—testified in opposition to him on the ground that he had shown "blatant insensitivity to discrimination

against women." She further faulted him for having a "predisposition to rule adversely in cases which women bring under the Equal Protection Clause." 94th Cong. 227 (1975).

- In *Hill v. Colorado*, 530 U.S. 703 (2000), Justice Stevens held that a state law that prohibited any person from approaching another person near an abortion clinic, for the purposes of distributing literature or engaging in oral protest, was consistent with the First Amendment.

- In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), Justice Stevens ruled that a state law requiring that both parents be notified of their minor daughter's decision to procure an abortion was unconstitutional.

- In *Gannon v. University of Chicago*, 441 U.S. 667 (1979), Justice Stevens held that the plaintiff had a right under Title IX of the 1972 Education Amendments to pursue a private cause of action against medical schools at two private universities, which allegedly discriminated against her on account of her sex.

- In *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), Justice Stevens ruled that the department's requirement that female employees make larger contributions to its pension fund than male employees violated both the language and policy of Title VII.

Gender Neutral Language
by Leon and Susan Holmes

Our whole life as husband and wife, as father and mother to our children, and as Catholic Christians, is based the historic Catholic teaching regarding the relation between male and female, so when that teaching is rejected, the rejection pierces the heart of who we are as persons, as family, and as Catholic Christians. Nothing causes us greater grief than the fact that the historic and scriptural teaching on the relationship between male and female is widely unpopular in the Church today. We have studied these teachings, prayed about them, and struggled to live them for the largest part of the almost twenty-five years we have been married; and we ask your indulgence and patience as we attempt to share the fruits of our reflection and struggle with you.

The historic teachings of the Catholic Church are grand, elegant, and beautiful. When they are unpopular among Catholics, it us usually because they are not understood; and so it is, we think, with respect to the teaching of the Church regarding the relationship between male and female. The passages of Scripture that call Christians "sons of God" and "brothers" are offensive only if they are misunderstood. The teaching that only males can be ordained to the priesthood and the diaconate is offensive only if it is misunderstood. Far from being offensive, these teachings are elegant and beautiful; and true for this age, as for every age, because truth is eternal.

Catholic theology is essentially sacramental, which is to say that it's teaching is permeated by and flows from the notion that there is an unseen reality that is symbolized by visible, external signs. We believe, for instance, that Christ was incarnate as a male because His masculinity is the most fitting sign of the unseen reality of His place in the Holy Trinity, who is revealed to us as Father, Son, and Holy Spirit. Our relationship to God is a part of this unseen reality, and it is two-fold. In one aspect, we are related to God as individuals; in another aspect, we are related to God as a community. Individually, we are adopted into the same relationship to the God the Father as Christ enjoys, which is to say, we are all sons of God the Father and brothers of Christ. All of us, male and female, are equally sons of God and therefore brothers of one another. The equality of our relationship is destroyed when some of us are called sons but others are called daughters, some are called brothers but others are called sisters. Daughters have not the same relationship to their father as sons have. Daughters cannot be like their father to the same extent as can sons. Sisters have not the same relationship to brothers as brothers have to one another. Sisters cannot be like brothers to same extent as brothers can be like one another. Hence, Scripture refers to all Christians--Jew and Greek, male and female, slave and free--as sons of God (Gal. 3:26) and brothers of one another to signify the equality, the sameness of our spiritual relationship in its unseen reality to God.

As a community, as Church, we also have a relationship to God as the bride of Christ. This relationship is an unseen reality that is signified in the visible world by the relationship between male and female and especially by the relationship between husband and wife. Hence, the husband is to love his wife as Christ loves the Church; and as the Church subordinates herself to Christ, in that manner the wife is to subordinate herself to her husband. The verb used in Ephesians 5:24 is hupotassetai, which means to place one's self under. The Church is to place herself under the protection of Christ and ipso facto place herself under His authority. Likewise, the woman is to place herself

under the authority of the man and ipso facto place herself under his authority. Both the man and the woman are to live so that their relationship is a visible sign of an unseen reality, the relationship between Christ and the Church. Distorting the relationship between male and female is as sacrilegious as profaning any of the other sacraments that by which God symbolizes a divine, unseen reality through tangible symbols.

The use of male and female to symbolize the relationship between Christ and the Church is pervasive in Scripture. In Leviticus, for instance, whenever a sacrificial animal was to stand for Christ, a priest, or a leader, the animal was required to be male; whereas, whenever a sacrificial animal was to stand for the common man or for the community, the animal was required to be a female. In the Gospels, Christ always forgave and never condemned women, though he sometimes condemned men. Women were always forgiven because the Church will always be forgiven. Men could be condemned for their sins because Christ was condemned for our sins.

If we were to use "gender neutral" language to describe the relationship between Christ and the Church, we would destroy an essential element of our faith. To be true to the reality of the relationship, we must recognize Christ as the groom and the Church as the bride. Christ cannot be the bride; the Church cannot be the groom; nor can Christ and the Church both be groom or both be bride.

This unseen reality is signified once again by an outward sign within the Church, which ordains only males to those positions in the Church that represent Christ among us, the priesthood and the diaconate. Ignoring the distinction between male and female in ordination is like ignoring the distinction between male and female in marriage. It has nothing to do with the dignity or worth of male compared to female. When a woman chooses to marry a man, it is not because she thinks men have more dignity or value than women. The suggestion that male-only ordination implies a devaluation of women is as silly as the suggestion that a woman devalues women when she looks exclusively among men for a husband. The assertion that males and females both should be ordained without regard to their sex is akin to the assertion that same-sex relationships should be regarded as having equal legitimacy with heterosexual marriage.

The demand of some women to be ordained is pre-figured in the Old Testament when Korah and two hundred fifty "well-known men" claimed the right to offer sacrifice equally with Moses and Aaron because "all the congregation are holy, every one of them, and the Lord is among them." Numbers 16:3. It is true that all the congregation are holy and the Lord is among them; but it does not follow that all are entitled to offer sacrifice. By the same token, it is true that men and women are equal in their dignity and value; but it does not follow that all are entitled to be ordained. Ordination does not signify the intrinsic worth or holiness of the one ordained; it signifies that the one ordained is to be another Christ to the Church, which is to say another groom to the bride. A woman cannot be ordained, not because she is inferior in dignity to a man, but because she cannot be a husband to the Church, which is the bride of Christ.

In a way that we cannot understand, the relationship between the unseen reality and the visible signs is reciprocal. St. Paul says he was made a minister "to make all men see what is the plan of the mystery hidden for ages in God who created all things; that through the church the manifold wisdom of God might now be made known to the principalities and powers in the heavenly places." Eph. 3:10. He also says the apostles have been made a spectacle "to the world, to angels and to men." I Cor. 4:9. In the same vein, he says a woman should have a veil on her head [as a sign of authority] "because of the angels." It is an awesome thought that what we do somehow

signifies the reality of the unseen world; but it is even a more awesome thought that God calls us to make known the reality of the unseen world to the unseen world.

In the biological sphere, life depends on the relationship between male and female. In this respect, the biological sphere is a visible sign of the unseen reality of the spiritual realm in which life depends on the relationship of Christ and the Church. Sexuality is a "great mystery . . . in reference to Christ and the Church." Ephesians 5:32.

All of this is why denominations whose theology is not essentially sacramental have been quick to endorse artificial contraception, divorce, and the ordination of women; and it is why they are much more open to the legitimation of homosexual relationships. Churches whose theology is essentially sacramental, which is to say the Catholic Church and the Orthodox Churches, cannot accommodate the spirit of the age with respect to these matters no matter how overwhelming the social pressure because to do so would be to repudiate the essence (in the strictest Thomistic sense of the word) of our whole theology. Apart from sacramental theology, sexuality is just another physical function, and the distinction between the sexes is no more significant than the distinction between right-handed persons and left-handed ones. When we treat the distinction between the sexes as of no consequence, we are parting from sacramental theology, which is to say we are parting from Catholicism, which is to say we are parting from Christianity.

It is not coincidental that this culture of death in which we live is a culture that seeks to eliminate the distinctions between male and female. It is not coincidental that the feminist movement brought with it artificial contraception and abortion on demand, with recognition of homosexual liasons soon to follow. The project of eliminating the distinction between the sexes is inimical to the transmission of life, which is the raison d'etre of that distinction in both the biological and spiritual realms. No matter how often we condemn abortion, to the extent we adopt the feminist principle that the distinction between the sexes is of no consequence and should be disregarded in the organization of society and the Church, we are contributing to the culture of death.

As Church, we are the bride of Christ. We are to submit to Him. This means in part that we are to take on the mind of Christ rather than adopt whatever paradigm prevails in the age in which we live. As you said in January when talking about abortion, "I do not want a Church that is right when the world is right. I want a Church that is right when the whole world is wrong."

We write in a spirit of friendship, not of animosity. When we express concern about the use of "gender neutral" language in place of what the Word of the Lord actually says, or about the abandonment of a 4000 year old tradition that only males may serve at the altar, or about the other ways in which the practice of the Church seems more consistent with feminism than with Catholic tradition, we do so because we believe that a great deal is at stake; and we want our shepherds and fellow Catholics to appreciate our concerns. We have brought all five of our children into the Catholic Church. It is no exaggeration to say we have bet their eternal lives on the Church. At the same time, we have built our whole family life on the traditional and now unpopular teachings about the relationship between male and female. What are we to do when we see these two pillars of our life start to separate and pull apart? How do we stand on both? How can we stand on only one?

KAVANAUGH

BRETT M. KAVANAUGH

NOMINEE TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Biographical Information

- Mr. Kavanaugh has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.
- Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal
- Mr. Kanavaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.
- Prior to his Supreme Court clerkship, Mr. Kanavaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States.
- The ABA has rated Mr. Kavanaugh "Well Qualified."
- Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

Controversial Issues

- It has been stated that Brett Kavanaugh is too young to be a federal appellate judge as he's only 39 years old.
- While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233 which limits public access to presidential records. Such a start inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.
- In *Good News Club v. Milford Central School,* Mr. Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Responses

- Mr. Kavanaugh has a broad range of experience. His legal work ranges from service as associate counsel to the President to appellate lawyer in private practice, to experience as a prosecutor. All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. Justice Kennedy was 38 years old, Judge Kozinski was 35 years old and Judge Stapleton was 35 years old.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.
- The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

Brett Kavanaugh – Age

Allegation: Brett Kavanaugh is too young to be a federal appellate judge – he's only 39 years old.

Facts:

- Mr. Kavanaugh would bring a broad range of experience to the court.
  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.
  - ✓ Mr. Kavanaugh has clerked at two of the U.S. Courts of Appeal, the Third and Ninth Circuits, and at the Supreme Court. He would bring to the D.C. Circuit his experience with those courts.
  - ✓ In private practice and during his service as a prosecutor, Mr. Kavanaugh participated in appellate matters in a number of the federal courts of appeal.
- All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. All have been recognized as distinguished jurists.
  - ✓ Justice Kennedy was appointed to the 9th Circuit when he was 38 years old.
  - ✓ Judge Kozinski was appointed to the 9th Circuit when he was 35 years old.
  - ✓ Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.
- There are many examples of judges who were appointed to the bench at a young age and have had illustrious careers.

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Anthony Kennedy (later	9th	38

appointed to the Supreme Court)		
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

- Age should not be a measure of a person's experience. Many distinguished senators began their service at a young age.
  - ✓ Senators Biden and Kennedy were elected to the Senate at the age of 30, and Senator Leahy was elected at 34.

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

- Mr. Kavanaugh was asked to represent, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court.

- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he were returned.

  - ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States… may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

  - ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

  "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

  "The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate

human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

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

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

Facts:

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

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

➢ **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Brett Kavanaugh – Experience

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

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

  - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 11 years, to public service.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.

  - ✓ In private practice Mr. Kavanaugh focused on appellate matters and as part of his practice, he filed amicus briefs on behalf of clients with the U.S. Supreme Court.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- **Only 3 of the 19 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

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

- In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

  - ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

  - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

  - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

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

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

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

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

Brett Kavanaugh – *Georgetown Law Journal* Article

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

Facts:

- **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**

  - ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).

  ✓

- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**

  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.

  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.* at 2171.

  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.

- **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Brett Kavanaugh – *Good News Club v. Milford Central School*

Allegation: In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Facts:

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations**. It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Judicial Nominees

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

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

Setting the Facts Straight on Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

Brett Kavanaugh is a highly respected attorney with a broad background in both government service and private practice. His legal experience makes him uniquely suited to serve on the D.C. Circuit. Over the course of his career, Mr. Kavanaugh has served as a federal appellate law clerk, a federal prosecutor, an appellate lawyer representing both private clients and the United States, and a senior advisor to the President. While Mr. Kavanaugh's record has been mischaracterized by some, the facts point to a well-qualified nominee who deserves to be confirmed by the Senate.

Myth: Brett Kavanaugh does not have enough experience to be a judge on the D.C. Circuit – he's never tried a case.

Facts on Experience:

- The ABA rated Mr. Kavanaugh "Well Qualified" for a position on the U.S. Court of Appeals for the D.C. Circuit. A rating of Well Qualified means:

  "To merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

- Mr. Kavanaugh would bring a broad range of experience to the D.C. Circuit. He has substantial experience in the appellate courts, both as an attorney and clerk. From his work in the executive branch, he brings a wealth of knowledge about the inner workings of the federal government.

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit; Ninth Circuit Judge Alex Kozinski of the U.S. Court of Appeals; and, U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.

- Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.

- Mr. Kavanaugh's legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.

Myth: Mr. Kavanaugh's legal career has consisted largely of partisan activities, making him unsuited to the federal bench.

Facts on Suitability for the Bench:

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." Letter to Chairman Hatch, April 26, 2004.

- Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy

- As every lawyer is required to do, Mr. Kavanaugh has zealously represented his clients' positions and made the best arguments on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

Myth: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts on the Judicial Nominations Process:

- The President selects judicial nominees. Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats' "Gold Standard." One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

Myth: Mr. Kavanaugh is out of the mainstream because he publicly praised Miguel Estrada and Priscilla Owen, along with the rest of President Bush's first 11 nominees to the U.S. Courts of Appeal.

Facts about President Bush's Nominees:

- At the time of their nomination, Democrat senators had positive things to say about President Bush's first group of nominees.

  - ✓ Senator Leahy said that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work." *NPR: All Things Considered* (Radio Broadcast May 9, 2001).

  - ✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations." Amy Goldstein and Helen Dewar, *11 Judicial Nominees Named*, Wash. Post, May 10, 2001, at A2.

- Miguel Estrada and Priscilla Owen, both unanimously rated "Well Qualified" by the ABA, enjoyed widespread bipartisan support and would have been confirmed if given an up-or-down vote by the full Senate.

- Each of the first 11 nominees was rated "Well Qualified" or "Qualified" by the ABA – the Democrats' "Gold Standard."

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

Facts about the Starr Report:

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – grounds for impeachment – was required by law.

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- The Independent Counsel's report did not conclude that President Clinton should have been impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.

  - ✓ The House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- Democrat senators agreed with the Independent Counsel that President Clinton gave false or misleading testimony.

  - ✓ Senator Feinstein introduced a censure resolution that stated President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." Senators Durbin, Kennedy, Kohl, Schumer, Daschle, and Kerry co-sponsored the resolution. S.Res. 44, 106th Cong. (1999).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed judicial and executive branch nominees who worked for Independent Counsel Ken Starr. If the work these nominees performed for the Office of Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.

  - ✓ Individuals confirmed to judicial positions include: Steven Colloton – 8th Circuit; John Bates – D.C. District Court; Amy St. Eve – Northern District of Illinois.

Myth: Mr. Kavanaugh returned to the Office of Independent Counsel ("OIC") when the Monica Lewinsky scandal broke because he wanted to participate in the investigation.

Facts about Mr. Kavanaugh's Return to the OIC:

- Mr. Kavanaugh came back to the OIC to handle a Supreme Court argument regarding privilege, which he had worked on before returning to private practice.
  - ✓ From the May 8, 1998 Washington Post: Washington lawyer Brett M. Kavanaugh has left private practice at Kirkland & Ellis for another temporary stint at the office of Whitewater independent counsel Kenneth W. Starr, also a Kirkland & Ellis lawyer. Kavanaugh is working on the Vincent Foster attorney-client privilege case to be argued at the Supreme Court June 8.

Myth: Brett Kavanaugh has praised Independent Counsel Starr despite Starr's partisan tactics, including his release of the entire report on President Clinton with a description of wide array of questionable facts that were highly offensive.

Facts about the Release of the Report and Support of Judge Starr:

- The House of Representatives, not the OIC, publicly released the Independent Counsel's Report.
- Mr. Kavanaugh criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.
- Judge Starr was unfairly criticized for his work as independent counsel. Even the Washington Post editorial page acknowledged that much of the criticism was unwarranted:
  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

Myth: Mr. Kavanaugh is willing to twist legal theories to best serve his own partisan interests. The best example of this is his flip-flop on executive branch privilege from his arguments against the Clinton Administration's assertions of privilege to his drafting of the Bush Administration's Executive Order 13233, which gives both sitting and former presidents authority to claim privilege over records.

Facts about Mr. Kavanaugh's Work on Executive Branch Privilege:

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
  - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Myth: Mr. Kavanaugh has argued extreme right wing positions on behalf of clients. For instance, he submitted an amicus brief in a school prayer case.

Facts about Mr. Kavanaugh's Work on First Amendment Issues:

- In the amicus brief Mr. Kavanaugh filed on behalf of his clients in *Santa Fe Independent School District*, he acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.

- However, Mr. Kavanaugh argued that a school district's policy that permitted high school students to choose whether a statement would be delivered before football games and who would give that statement did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement.

- Mr. Kavanaugh's brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."

- Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

- As an attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.

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

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

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

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

- ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

- ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

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

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

Facts:

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

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District*. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Florida School Vouchers

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

Facts:

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

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Starr Report

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

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

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

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

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

  - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

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

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

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

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

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

  - ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.

- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

I. Background
   1. Experience

II. Office of Independent Counsel
   1. Starr Report
   2. Vince Foster Investigation
   3. Executive Privilege Article
   4. Executive Order 13233
   5. Defense of Ken Starr

III. Elian Gonzalez

IV. Separation of Church and State
   1. Good News Club
   2. Santa Fe Independent School District
   3. Florida School Vouchers

V. Race

VI. Product Liability Cases
   1. Lewis
   2. Geier
   3. Green

VII. Judicial Nominations

Brett Kavanaugh and Executive Privilege

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

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.

- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

  - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).

  - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.

- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.

  - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."

- ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

- With respect to the issuance of Executive Order 13233 concerning executive privilege, the President makes the decision on all matters regarding the scope and exercise of executive privilege. The decision is not made by his staff or anyone else in his Administration.

- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

1990

PRISCILLA R. OWEN

NOMINEE TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Biographical Information

- Unanimously rated "Well Qualified" by the ABA.
- Has served as a respected and distinguished Justice on the Supreme Court of Texas since 1995
- Before joining the Texas Supreme Court, Justice Owen was a partner with the well-respected law firm of Andrews & Kurth. She practiced commercial litigation for 17 years.
- Justice Owen is a member of the American Law Institute, the American Judicature Society, the American Bar Association, and a Fellow of the American and Houston Bar Associations.
- Justice Owen earned a B.A. *cum laude* from Baylor University and graduated *cum laude* from Baylor Law School in 1977. She was a member of the Baylor Law Review and has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna.
- Justice Owen earned the highest score in the state on the December 1977 Texas Bar Exam.

Controversial Issues

- Justice Owen has been an activist in cases involving interpretation of Texas' parental notice statute.
- Justice Owen has favored corporations over consumers.
- Justice Owen received campaign contributions from Enron and ruled on cases involving that corporation.

Responses

- Justice Owen has not questioned *Roe v. Wade* in her decisions, and she has testified that, as a lower-court judge, she would adhere to and strictly follow *Roe v. Wade.* Just last year she joined a majority of the Texas Supreme Court in rejecting the argument that the state statute barring wrongful death actions on behalf of unborn children violated the Equal Protection Clause, reasoning that unborn children do not enjoy the protections of that clause because the U.S. Supreme Court held in *Roe* that an unborn child is not a person under the Fourteenth Amendment.
- Justice Owen has joined or authored a number of opinions that advanced the interests of consumers. To take only a few examples, she has supported the right of medical malpractice victims to recover from physicians who injured them, upheld the right of policyholders to recover from insurance companies, held that manufacturers had a legal duty to make a product child resistant, and upheld a $5 million punitive damages verdict in a construction accident case.
- In the 1994 election cycle, Justice Owen's campaign committee received approximately $1.2 million in contributions from more than 3,000 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed less than 1% of the total contributions to her committee. In the 2000 election cycle, her campaign committee received no contributions from Enron affiliates or employees.

PRISCILLA R. OWEN

NOMINEE TO THE FIFTH CIRCUIT

PROVIDED BY THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS

TABLE OF CONTENTS: JUSTICE PRISCILLA OWEN

Summary and Biographical Points for Justice Owen 1

Statements by Select Supporters of Justice Owen 3

Responses to Allegations against Justice Owen 6

Select Editorials and Letters of Support for Justice Owen 10

Attorney General Alberto Gonzales op-ed
(Written during his time as Counsel to the President) 10
Dallas Morning News editorial (2/10/02) 11
Dallas Morning News editorial (7/11/02) 13
Dallas Morning News editorial (7/25/02) 14
Washington Post editorial (7/24/02) 15
Letter of Senator Kay Bailey Hutchison 16
Letter of John Hill, Former Democrat Justice on Texas Supreme Court 17
Letter of Jack Hightower, Former Democrat Justice on Texas Supreme Court 19
Letter of Raul Gonzalez, Former Democrat Justice on Texas Supreme Court 20
Letter of 15 Past Presidents of State Bar of Texas 23
Letter of Hector De Leon, Past President of Legal Aid of Central Texas 25
Letter of Florence Shapiro, chief author of Parental Notification Act 28
Press Release of Ann Stone, Chair of Republicans for Choice 30
Letter of Lori Ploeger, former law clerk 31
Letter of Herbert Reynolds, President of Baylor University 33
Letter of Mary O'Reilly re: work on Gender Neutral Task Force 34
Letter of Victor Schwartz, author of tort law casebook 36
Letter of Attorney General Alberto Gonzales re campaign contributions 40
(Written during his time as Counsel to the President)

JUSTICE PRISCILLA OWEN
Nominee to U.S. Court of Appeals for the Fifth Circuit (Texas)
Nominated May 9, 2001
Renominated January 7, 2003 & February 14, 2005

- Since 1995, Justice Priscilla Owen has served as a distinguished and respected Justice on the Supreme Court of Texas.
  - The American Bar Association *unanimously* rated Justice Owen "Well Qualified," its highest possible rating.
  - Justice Owen has significant bipartisan support, including three former *Democrat* judges on the Texas Supreme Court and a bipartisan group of 15 past Presidents of the State Bar of Texas.
  - The seat to which Justice Owen has been nominated has been designated a "judicial emergency" by the Judicial Conference of the United States. Nonetheless, she has been forced to wait since May 2001 for a Senate vote.
- In 1994, Justice Owen was first elected to the Texas Supreme Court. In 2000, she overwhelmingly won a second term, with 84% of the vote.
  - During Justice Owen's 2000 re-election bid, every major newspaper in Texas endorsed her.
- Before joining the Texas Supreme Court, Justice Owen was a partner with the well-respected Texas law firm of Andrews & Kurth. She practiced commercial litigation for 17 years.
- Justice Owen is a member of the American Law Institute, the American Judicature Society, the American Bar Association, and a Fellow of the American and Houston Bar Associations.
- Justice Owen has engaged in significant pro bono and community activity.
  - Justice Owen has served as the liaison to the Texas Supreme Court's Mediation Task Force and to statewide committees on providing legal services to the poor and *pro bono* legal services. She was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars per year in additional funds for providers of legal services to the poor. Justice Owen also serves as a member of the board of the A.A. White Dispute Resolution Institute.
  - Justice Owen was instrumental in organizing a group known as Family Law 2000, which seeks to find ways to educate parents about the effect that the dissolution of

a marriage can have on their children and to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

- Justice Owen serves on the board of Texas Hearing & Service Dogs. Additionally, she is a member of St. Barnabas Episcopal Mission in Austin, Texas, where she teaches Sunday School and serves as the head of the altar guild.

- Some interest groups have criticized Justice Owen's rulings in a small number of cases interpreting a Texas parental notice abortion statute. Importantly, by law, the Texas Supreme Court hears cases arising under this law only rarely – namely, when *both* lower courts have required parental notice and not granted an exception. In some of those cases, Justice Owen agreed with the lower courts and voted to require notice to a parent; on other occasions, she voted to grant an exception to the parental notice requirement or to remand based on the facts of the case. She thus has voted to grant a judicial bypass *more* readily than the lower-court judges in these cases. Justice Owen was in the majority in 11 of the 14 cases. Her decisions in all instances have been based on her interpretation of the requirements of the ambiguous Texas statute in light of governing U.S. Supreme Court precedent, as her decisions explain.

  - Justice Owen has not questioned *Roe v. Wade* in her decisions, and she has testified that, as a lower-court judge, she would adhere to and strictly follow *Roe v. Wade*. In fact, she recently joined her colleagues in faithfully applying *Roe*'s holding that an unborn child is not a "person" within the meaning of the Fourteenth Amendment.

- Justice Owen earned a B.A. *cum laude* from Baylor University and graduated *cum laude* from Baylor Law School in 1977. She was a member of the Baylor Law Review, and has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna.

- After graduating from law school, Justice Owen earned the highest score in the state on the December 1977 Texas Bar Exam.

STATEMENTS BY SELECT SUPPORTERS OF JUSTICE PRISCILLA OWEN

Raul Gonzalez, Former Democrat Justice on the Supreme Court of Texas

"I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation." (*Letter to Sen. Leahy*, July 19, 2002).

John L. Hill, Former Democrat Chief Justice on the Supreme Court of Texas

"After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. . . . I know personally just how impeccable Justice Owen's credentials are." (*Letter to Sen. Leahy*, July 19, 2002).

Jack Hightower, Former Democrat Justice on the Supreme Court of Texas

"I am a Democrat and my political philosophy is Democratic, but I have tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same." (*Letter to Sen. Feinstein*, August 20, 2002).

Bipartisan Group of 15 Former Presidents of the State Bar of Texas

"Although we profess different party affiliations and span the spectrum of views of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate for appointment to the Fifth Circuit. . . . The status of our profession in Texas has been significantly enhanced by Justice Owen's advocacy of pro bono service and leadership for the membership of the State Bar of Texas. Justice Owen has served on committees regarding legal services to the poor and diligently worked with others to obtain legislation that provides substantial resources for those delivering legal services to the poor. Justice Owen also has been a long-time advocate for an updated and reformed system of judicial retention in Texas." (*Letter to Sen. Leahy*, July 15, 2002).

Senator Kay Bailey Hutchison

"Priscilla Owen is an experienced jurist of integrity who embodies the qualities we seek in our federal judges. Despite an exemplary public record, Priscilla Owen has been targeted by special interest groups, her views mischaracterized and her opinions distorted. . . . She has endured baseless criticism and empty charges with poise, validating her even more as an outstanding, qualified nominee who should be confirmed by the United States Senate." (*Press Release*, March 27, 2003).

Attorney General Alberto Gonzales, Former Counsel to President Bush and Former Texas Supreme Court Justice

"As someone who had the privilege of serving with Priscilla Owen on the Texas Supreme Court, I can say without hesitation that she is extraordinarily well qualified to serve as a judge on the federal appeals court. Some have questioned Justice Owen's qualifications because she and I disagreed on the interpretation of a new Texas parental notification statute in 2000. As all judges know, cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous. The fact that Justice Owen and I disagreed in some cases is unremarkable. . . . She is an outstanding jurist and will perform superbly as a federal appeals court judge." (*Dallas Morning News*, July 16, 2002).

Hector De Leon, Past President of Legal Aid

"As the immediate past president of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit." (*Letter to Sen. Leahy*, June 26, 2002).

Senator Florence Shapiro, chief author of Senate bill, Texas Parental Notification Act

"I am shocked and saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth. Her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. . . . The Parental Notification Act is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. . . . Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench – an experienced jurist who follows the law and uses common sense." (*Letter to Sen. Leahy*, July 15, 2002).

Ann Stone, Republicans for Choice

"I worry that if we in the pro-choice movement attack even those judicial nominees who are responsible and acclaimed jurists that we will appear like the 'boy who cried wolf' when really bad nominees come forward." (*Press Release*, July 23, 2002).

Mary O'Reilly, Life-time Member of the NAACP and Democrat

"I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force. . . . I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. . . . In the almost eight years I have known Justice Owen, she has always been refined, approachable, even-tempered and intellectually honest." (*Letter to Sen. Feinstein*, August 14, 2002).

Lori Ploeger, Former Law Clerk to Justice Owen

"During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly. . . . Justice Owen is a role model for me and for other women attorneys in Texas." (*Letter to Sen. Leahy*, June 27, 2002).

Victor Schwartz, Tort Law Professor and Co-author of the most widely used torts textbook in United States

"This past weekend, I reviewed most of [Justice Owen's] principal opinions in tort law. My review of Justice Owen's opinions indicates that any characterization of Justice Owen as pro-plaintiff or pro-defendant is untrue. Those who have attacked her as being pro-defendant have engaged in selective review of her opinions, and have mischaracterized her fundamental approach to tort law. Justice Owen's fundamental approach to tort law is to make it stable. . . . My fundamental point is that in the area of tort law, Justice Owen is a moderate jurist; she is neither a trailblazer for plaintiffs nor a captive of corporate interests." (*Letter to Sen. Leahy*, July 18, 2002).

Editorial Board, Dallas Morning News

"Justice Owen's lifelong record is one of accomplishment and integrity. She is one of the few judicial nominees to receive a unanimous 'well qualified' rating from the American Bar Association." (February 10, 2002).

Editorial Board, Washington Post

"She should be confirmed. Justice Owen is indisputably well qualified. . . . Liberals will no doubt disagree with some opinions she would write on the 5th Circuit, but this is not the standard by which a president's lower-court nominees should be judged." (July 24, 2002).

Texas Supreme Court Chief Justice, Tom Phillips

"She's what Bush said (in nominating her): She tries to follow the legislative will in every case and apply the law, not invent it." (*Houston Chronicle*, May 10, 2001).

Herbert Reynolds, Baylor University President and Chancellor Emeritus; Former Chair, Texas Commission on Judicial Efficiency

"Justice Owen is a superlative individual in every way. She is extremely bright, she possesses great integrity and is equipped with the character and moral virtues necessary for the high office she holds as well as the high office for which she has been nominated. . . . Based on my knowledge of Justice Owen for the past 30 years, I believe that you simply cannot make a more solid choice for the 5th U.S. Circuit Court of Appeals." (*Letter to Senate Judiciary Committee*, March 25, 2002).

PRISCILLA OWEN
Responses to False Allegations

ALLEGATION: Justice Owen has been an activist in cases involving interpretation of Texas' parental notice statute.

RESPONSES:

- The cases in question involved the Texas parental notice statute. Justice Owen has not questioned *Roe v. Wade* in her decisions, and she has testified that, as a lower-court judge, she would adhere to and strictly follow *Roe v. Wade*. Indeed, just last year, she joined a majority of the Texas Supreme Court in rejecting the argument that the state statute barring wrongful death actions on behalf of unborn children violated the Equal Protection Clause, reasoning that unborn children do not enjoy the protections of that clause because the U.S. Supreme Court held in *Roe* that an unborn child is not a person under the Fourteenth Amendment.

- The Texas law enacted in 1999 requires notice to a parent when a minor woman seeks an abortion, but allows exceptions when the trial court judge concludes (i) that the minor is mature and sufficiently well informed to make the decision without notification to a parent, (ii) that notification would not be in the best interest of the minor, or (iii) that notification may lead to physical, sexual, or emotional abuse of the minor.

    - The Texas statute is a parental *notice* statute, not a parental consent statute. It does not prevent the minor from having an abortion or require the consent of a parent. The law requires notice to a parent absent one of the exceptions.

    - More than 40 States have laws requiring parental consent or notice when a minor woman seeks an abortion.

- Justice Owen has interpreted the exceptions in the Texas parental notice statute fairly and neutrally in accord with United States Supreme Court precedent. She has expressly relied on U.S. Supreme Court cases addressing similar laws to interpret the statutory exceptions.

    - The cases of 12 girls seeking an exception to the parental notice requirement have reached the Texas Supreme Court in 14 separate cases. (The cases of two girls reached the Supreme Court on more than one occasion after remands to the lower court.)

        - Under Texas law, the only parental notice cases that reach the Texas Supreme Court are those in which *both* lower courts (the trial court and the intermediate appeals court) have denied the claimed exception and thus required notice to a parent.

- Justice Owen agreed with the lower courts and voted to require parental notice in 10 of the 14 cases. She voted to reverse the lower court and grant the exception outright in 2 cases and voted to remand for further trial court proceedings in 2 cases. Her decisions therefore have allowed exceptions to the parental notice requirement *more readily* than the lower-court judges in these cases.
- Justice Owen was in the majority of the Texas Supreme Court in 11 of these 14 cases. The full Court voted to require parental notice in 7 cases, to grant the exception outright in 3 cases, and to remand in 4 cases.

- Florence Shapiro, the chief author of the Senate bill that led to the Texas Parental Notification Act, wrote to the U.S. Senate that "Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the governing U.S. Supreme Court precedent upon which the language of the statute was based, to determine what the Legislature intended the Act to do." She concluded that "Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench – an experienced jurist who follows the law and uses common sense."

ALLEGATION: Justice Owen was accused by her colleague, Justice Alberto Gonzales, of engaging in an "unconscionable act of judicial activism" in one parental notice case.

- The allegation is inaccurate, as Justice Owen explained at her hearing. Justice Gonzales' concurring opinion explained that it would be an unconscionable act of judicial activism for any judge to bend the statute to advance his or her own personal views even though "the ramifications of such a law and the results of the Court's decision here may be personally troubling to me as a parent." Justice Gonzales *expressly* stated that "*every member of this Court* agrees that the duty of a judge is to follow the law as written by the Legislature."

- Justice Gonzales' concurring opinion never cited Justice Owen's dissenting opinion. It did expressly refer twice, however, to the separate dissenting opinion of Justice Hecht. (Justice Owen did not join Justice Hecht's separate dissent).

  - As Justice Gonzales' opinion explained, Justice Hecht's dissenting opinion had claimed that "the Court's decisions [were] motivated by personal ideology." Justice Gonzales responded that this suggestion was "simply wrong." Justice Gonzales stated: "Justice Hecht charges that our decision demonstrates the Court's determination to construe the Parental Notification Act as the Court believes the Act should be construed and not as the Legislature intended. I respectfully disagree. This decision demonstrates the Court's determination to see to it that we discharge our responsibilities as judges, and that personal ideology is subordinated to the public will that is reflected in the words of the Parental Notification Act, including the provisions allowing a judicial bypass."

- Justice Gonzales, who is now the Attorney General of the United States and previously served as Counsel to the President, has made clear his strong support for Justice Owen's confirmation. His 2002 op-ed in the *Dallas Morning News* stated emphatically that

Justice Owen is "extraordinarily well qualified," is "an outstanding jurist," and will perform "superbly as a federal appeals court judge." He noted that "[t]he fact that Justice Owen and I disagreed in some cases is unremarkable" and that "cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous."

ALLEGATION: Justice Owen has favored corporations over consumers.

- Justice Owen has interpreted the law as a judge fairly and neutrally. She is supported by three former Democrat Justices who served with her on the Texas Supreme Court and by 15 past Presidents of the State Bar of Texas. She received a *unanimous* "well-qualified" rating from the American Bar Association, the highest possible rating.

- Justice Owen has joined or authored a number of opinions that advanced the interests of consumers. To take only a few examples, she has supported the right of medical malpractice victims to recover from physicians who injured them, upheld the right of policyholders to recover from insurance companies, held that manufacturers had a legal duty to make a product child resistant, and upheld a $5 million punitive damages verdict in a construction accident case. She has decided cases regardless of the parties to the case.

ALLEGATION: Justice Owen received campaign contributions from Enron and ruled on cases involving that corporation.

- Article 5 of the Texas Constitution provides that candidates for the state judiciary run in contested elections, and Canon 4D(1) of the Texas Code of Judicial Conduct provides that the candidates may solicit and accept campaign funds.

    - Justice Owen has long advocated reform and a system of appointed rather than elected state judges.

    - Some notable Fifth Circuit judges appointed by President Clinton were state judges who had run and been elected in contested elections – Judge Benavides and Judge Dennis, for example.

- In the 1994 election cycle, Justice Owen's campaign committee received approximately $1.2 million in contributions from more than 3,000 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed *less than* 1% of the total contributions to her committee. In the 2000 election cycle, her campaign committee received no contributions from Enron affiliates or employees.

- Judicial recusal is neither necessary nor appropriate in cases involving parties or counsel who contributed to that judge's campaign committee. Otherwise, parties could game the system by contributing to judges they did not like and thereby triggering future recusals.

- The decisions of the Texas Supreme Court since Justice Owen took her seat in proceedings involving Enron have been ordinary. Of the 14 proceedings in which Enron was a party, Justice Owen's vote can be characterized as favorable to Enron in six of the cases and adverse in five cases. With respect to the three remaining cases, one case cannot be characterized either way, one was dismissed by agreement of the parties, and in one she did not participate.

From my experience, I know she is a jurist of integrity

ALBERTO GONZALES

Both the president and the Senate have constitutionally assigned roles in the appointment of federal judges. President Bush has fulfilled his responsibility by submitting highly qualified nominees who will be common-sense federal judges, such as Priscilla Owen, my former colleague on the Texas Supreme Court who has been nominated to the 5th U.S. Circuit Court of Appeals.

Justice Owen will receive her Senate Judiciary Committee hearing on Thursday, which regrettably is more than 14 months after the president submitted her nomination to the Senate. Although the Senate has made progress in confirming federal trial court judges, it has failed to act promptly on the president's appeals court nominees, as illustrated by its delay in considering Justice Owen's nomination. Indeed, 23 of the president's 32 appeals court nominees still haven't received Senate votes, and 11 of the president's appeals court nominees, including Justice Owen, have been forced to wait more than a year just for hearings.

As a result of those delays, our courts of appeals are nearly 20 percent vacant, and many of the vacancies, including the 5th Circuit vacancy in Texas, have been classified as emergencies by the Judicial Conference of the United States. Chief Justice William Rehnquist recently labeled the situation "alarming" and echoed Mr. Bush's call for the Senate to grant prompt hearings and up-or-down votes for all judicial nominees.

Now that she finally is receiving her hearing, Justice Owen should be promptly confirmed by the Senate. She possesses exceptional integrity, character and intellect; extensive experience as a judge and lawyer in private practice; and the strong support of both senators from Texas. She has served with distinction on the Texas Supreme Court since 1995 (where I served with her).

Texas holds elections for judges: Priscilla Owen was re-elected in 2000 by an overwhelming majority, and every major newspaper in Texas endorsed her. Before becoming a judge, Justice Owen practiced law at a leading firm in Texas for 17 years. Her academic credentials are impeccable, having graduated with honors from Baylor Law School. She received the highest grade on the Texas Bar Exam. The American Bar Association unanimously rated her "well qualified," its highest possible rating.

Justice Owen also has used her talents to benefit others. She served as the Texas Supreme Court liaison to statewide committees regarding legal services to the poor and pro bono legal services. She worked on a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars in additional funds for providers of legal services to the poor. She helped organize a group that seeks to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As someone who had the privilege of serving with Priscilla Owen on the Texas Supreme Court, I can say without hesitation that she is extraordinarily well qualified to serve as a judge on the federal appeals court. Some have questioned Justice Owen's qualifications because she and I disagreed at times on the interpretation of a new Texas parental notification statute in 2000. As all judges know, cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous.

The fact that Justice Owen and I disagreed in some cases is unremarkable. My experience serving with Justice Owen squares with the combined judgment of the president, Sen. Phil Gramm, Sen. Kay Bailey Hutchison, the American Bar Association and many others: She is an outstanding jurist and will perform superbly as a federal appeals court judge.

The Senate should confirm Justice Owen promptly and then move quickly to schedule hearings and votes for all of the president's other long-pending nominees.

Alberto R. Gonzales is counsel to the president.

THE DALLAS MORNING NEWS, February 10, 2002

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The Dallas Morning News

February 10, 2002, Sunday SECOND EDITION

SECTION: EDITORIALS; Pg. 2J; EDITORIALS

LENGTH: 336 words

HEADLINE: Stop the Payback;
Senate needs to move on judicial nominees

BODY:
Same song, different verse.

Senate Republicans confirmed only 14 of President Bill Clinton's 34 appellate judge nominees in his last Congress. Now, with Democrats controlling the Senate, they have confirmed only six of President Bush's remaining 29 appellate judge nominees. (Nine appointees withdrew.) With an election year upon us, some believe Democratic feet will drag even slower.

What a shame. For both parties.

Politics always has surrounded presidential nominees. But the Senate seems to have increasingly moved away from the constitutional "advise and consent" role to outright power plays, especially with judicial nominees. If a court appointee doesn't fit one party's philosophy, then the traps come out. That's true for Republicans as well as Democrats.

One trap being laid now is for **Priscilla Owen,** a Texas Supreme Court justice whom Mr. Bush nominated for the Fifth Circuit Court of Appeals last year. Opponents raise questions about Justice Owen because she accepted a 1994 campaign contribution from Enron, today's leper colony of donors. Two years later, she authored a court opinion on an arcane tax matter that directly benefited Enron.

But here's the other part of the equation. Every Texas Supreme Court justice agreed with her about the constitutionality of the law. The Texas House and Senate also passed the measure with only one dissenting vote. The position she took was in concert with her colleagues and the Legislature.

Besides, Justice Owen's lifelong record is one of accomplishment and integrity. She is one of the few judicial nominees to receive a unanimous "well qualified" rating from the American Bar Association.

If the Senate wants to have a debate about Ms. Owen's conservative philosophy, then say so. But even there, a president deserves the edge in getting his judges appointed.

The gamesmanship could go on forever. But enough with the traps. The Senate needs to

move speedily in approving the president's judicial nominees. Stop the payback.

The Dallas Morning News

14 A Thursday, July 11, 2002

EDITORIALS

Justices Denied

Attacks on Judge Owen are unwarranted

There's a great saying about how everyone is entitled to one's own opinion, but not to one's own facts. Those intent on undermining President Bush's nominees to the federal judiciary need to remember that. In this free country, they are entitled to voice their concerns. And if they do so in a mature and constructive way, the nomination process and the country will be better off for it. Unfortunately, these days, that rarely happens.

It is not so surprising that the Senate confirmation process has, in the last two decades, gotten so destructive, hyper-partisan and downright nasty. It is terribly disconcerting.

Some say this whole trend started back in 1986 when Democrats savaged Robert Bork, President Reagan's nominee to the Supreme Court. Soon after, the word "Borking" made its way into the political lexicon. The shorthand definition: to do personal damage to the other guy's nominee for political gain. Both parties do it. Slander passing for political dissent.

It has to end, and now seems a good time to do it. After all, we have a popular chief executive halfway through his first four-year term and still the Democratic Senate continues to play childish games and hold up consideration of many of President Bush's nominees to the federal bench. They won't even give many a hearing, but their stalling tactics have served to give the left just enough time to devise the vile and shameful smear campaigns.

The latest target is Texas' Supreme Court Justice Priscilla Owen. A nominee to the 5th Circuit Court of Appeals, Ms. Owen is a well-liked and highly respected jurist. Her legal colleagues, in both parties, call her fair, reasonable and "smart as a whip."

A coalition of liberal groups reportedly planning a caravan to Washington say she is a judicial activist who is — in their words — anti-consumer, pro-business and hostile to civil rights. If any of that were true, one suspects Texans might have caught wind of it during Ms. Owen's eight years on the Texas Supreme Court. Those who know her record best say she is being unfairly subjected to partisan mudslinging and misinformation.

A typical example of distortion: Critics claim her opinion as a state high court justice in favor of Enron showed bias because of a campaign contribution from the Houston company. In truth, the ruling involved a technicality and the entire Texas Supreme Court concurred. The contribution had been made years before when she was a district judge.

For all this abuse, Ms. Owen has not even been given the courtesy of having a hearing date set. That is unacceptable. She should get a hearing at once. And her critics should hold their tongues until the president's nominee gets a chance to be heard.

The Dallas Morning News

July 25, 2002, 18A

Owen Nomination; Critics Are Distorting Texan's Record

After hearing U.S. Court of Appeals candidate Priscilla Owen vilified in recent weeks - called everything from racist to anti-abortion to (gasp!) pro-business - the members of the Senate Judiciary Committee got the chance Tuesday to see for themselves what all the fuss is about. And, after a year in the deep freeze, the 47-year-old Texas Supreme Court justice finally got he chance to defend herself against liberal critics who have distorted her record and character in a bare-knuckled attempt to keepher off the 5th Circuit Court of Appeals.

One of the biggest distortions is that Justice Owen is a "judicial activist" intent on bending and twisting statutes to fit a rigid political agenda. That is the view of Sen. Richard Durbin, a Democrat from Illinois, who tore into Justice Owen for what he said was a tendency to "expand and embellish" in her written opinions. Democratic Sen. Dianne Feinstein of California was more polite but just as direct when she asked Justice Owen point-blank if she was, in fact, a "judicial activist." Justice Owen's response suggests that the Baylor Law School graduate is absolutely clear on what position she is applying for. She has no desire to legislate from the bench, she told Sen. Feinstein. If confirmed, she said, she would do only what the job calls for: interpret the law as written.

Justice Owen can be trusted to do exactly that, say those in Texas legal circles who know her best. Her supporters include Republicans and Democrats alike, and their vote of confidence should count for something - especially when weighed against the smear campaign engaged by the lobbies of the left.

As for Justice Owen's personal views on abortion, or on any issue, they remain totally irrelevant. By all accounts, she has spent the last eight years on the Texas high court doing precisely what she this week promised the Judiciary Committee she would continue to do at the federal level.

Those who oppose a judicial nominee have every right to challenge the nominee. But they do not have the right to - in legal terms - "assume facts not in evidence." For all their political games, grandstanding and name-calling, the assembled critics of Priscilla Owen have presented nothing to discredit her.

The committee should do its best to rectify this situation by scheduling a vote without further delay and approving Justice Owen's nomination. ----------

The Washington Post

AN INDEPENDENT NEWSPAPER

The Owen Nomination

THE NOMINATION of Priscilla Owen to the 5th Circuit Court of Appeals creates understandable anxiety among many liberal activists and senators. The Texas Supreme Court justice, who had a hearing yesterday before the Senate Judiciary Committee, is part of the right flank of the conservative court on which she serves. Her opinions have a certain ideological consistency that might cause some senators to vote against her on those grounds. But our own sense is that the case against her is not strong enough to warrant her rejection by the Senate. Justice Owen's nomination may be a close call, but she should be confirmed.

Justice Owen is indisputably well qualified, having served on a state supreme court for seven years and, prior to her election, having had a well-regarded law practice. So rather than attacking her qualifications, opponents have sought to portray her as a conservative judicial activist—that is, to accuse her of substituting her own views for those of policymakers and legislators. In support of this charge, they cite cases in which other Texas justices, including then-Justice Alberto Gonzales—now President Bush's White House Counsel—appear to suggest as much. But the cases they cite, by and large, posed legitimately difficult questions. While some of Justice Owen's opinions—particularly on matters related to abortion—seem rather aggressive, none seems to us beyond the range of reasonable judicial disagreement. And Mr. Gonzales, whatever disagreements they might have had, supports her nomination enthusiastically. Liberals will no doubt disagree with some opinions she would write on the 5th Circuit, but this is not the standard by which a president's lower-court nominees should be judged.

Nor is it reasonable to reject her because of campaign contributions she accepted, including those from people associated with Enron Corp. Texas has a particularly ugly system of judicial elections that taints all who participate in it. State rules permit judges to sit on cases in which parties or lawyers have also been donors—as Justice Owen did with Enron. Judicial elections are a bad idea, and letting judges hear cases from people who have given them money is wrong. But Justice Owen didn't write the rules and has supported a more reasonable system.

Justice Owen was one of President Bush's initial crop of 11 appeals court nominees, sent to the Senate in May of last year. Of these, only three have been confirmed so far, and six have not even had the courtesy of a hearing. The fact that President Clinton's nominees were subjected to similar mistreatment does not excuse it. In Justice Owen's case, the long wait has produced no great surprise. She is still a conservative. And that is still not a good reason to vote her down.

KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510-4304

March 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am dismayed to see the Wall Street Journal report today that some members of the Senate may "target" the nomination of Justice Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. I urge that the Committee on the Judiciary take swift and positive action on her nomination, particularly in light of the fact that Judge Priscilla Owen was among the group of original 11 federal judicial nominees announced by President Bush on May 9, 2001.

Justice Owen's stellar academic achievements and professional experience are remarkable. She earned a cum laude bachelor of arts degree from Baylor University and graduated cum laude from Baylor Law School in 1977. Thereafter, she earned the highest score on the Texas Bar Exam. Prior to her election to the Supreme Court of Texas in 1994, she was a partner in the Texas law firm of Andrews & Kurth LLP where she practiced commercial litigation for seventeen years.

Justice Owen has delivered exemplary service on the Texas Supreme Court, as affirmed by her receiving positive endorsements from every major newspaper in Texas during her successful re-election bid in 2000. Justice Owen enjoys bipartisan support and, in connection with her nomination, the American Bar Association Standing Committee on the Federal Judiciary has *unanimously* voted Justice Owen "Well Qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

I thank you and look forward to continuing to work with you and the other members of the Committee to ensure that Justice Owen is carefully and efficiently considered for appointment to the federal bench.

Sincerely,

Kay

Kay Bailey Hutchison

I hope you will give her a fair hearing soon

kbh@hutchison.senate.gov

John L. Hill
JP Morgan Chase Tower
600 Travis Street, Suite 3400
Houston, Texas 77002
(713) 226-1230

July 19, 2002

Via Facsimile (202) 224-9516
and First Class Mail

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D. C. 20510

Dear Chairman:

President Bush honored impeccable integrity, character, and scholarship when he nominated to the U.S. Court of Appeals for the Fifth Circuit a leading voice for reform in the Texas judiciary: Priscilla Owen.

I came to know Justice Owen several years ago during her service on the Texas Supreme Court, where I had previously served as Chief Justice. Then and now, Justice Owen has distinguished herself as a forceful advocate for reforming Texas's system for selecting judges. Under the state Constitution, for more than 125 years, Texas has selected its judges through contested elections, and the law therefore permits judicial candidates to receive campaign contributions. The system has positive aspects, but one of the downsides is that it invites speculation about whether judges should preside in cases where their contributors appear as attorneys or parties. That's why Justice Owen tirelessly has fought to minimize the influence of campaign contributions in judicial elections.

Reflecting her early commitment to the integrity of the courts, Justice Owen signed a judicial reform pledge during her first campaign in 1994. She has championed several proposed constitutional amendments, including an option for judges to run in non-partisan retention elections. She has written to members of the bench and bar, urging them to back reform. She has argued that the judiciary should be above the influence of partisan politics. And in a unique combination of symbolism and substance, Justice Owen *returned* over a third of her campaign contributions after not drawing a Democrat or Republican opponent during her 2000 re-election campaign.

Justice Owen and I would be the first to admit that the Texas judicial-selection system is in need of reform. But some special interest groups confuse flaws in our system with flaws in our judges. These groups insist on denouncing individual members of the judiciary, when reform of the laws they dislike can only come from amending the Texas Constitution, which Justice Owen strongly supports.

Their attacks on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups make no effort to assess whether her decisions are legally sound, and instead are content to fall back on the canard of an "appearance of impropriety." Nor have they so much as acknowledged Justice Owen's unswerving leadership in seeking reform—reforms of which they presumably approve. The groups lack credibility when they attack Justice Owen for participating in a system that has been in place longer than a century, is mandated by the Texas Constitution, and is not within her ability to change by herself. I know Texas politics and can clearly say that these assaults on Justice Owen's record are false, misleading, and deliberate distortions.

After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. I echo the American Bar Association's *unanimous* conclusion that she is "well qualified" for the federal bench—the highest rating possible. United States Senators from both sides of the aisle have called the ABA's rating the "gold standard" of a nominee's fitness for the federal bench, and I agree with them. I know personally just how impeccable Justice Owen's credentials are.

After graduating in 1977 from Baylor Law School with honors at the top of her class, Justice Owen earned the highest score on the Texas bar exam. Her academic excellence foreshadowed the exceptional career to follow. Elected twice by the people of Texas, Justice Owen has served with distinction on the Texas Supreme Court for more than seven years. In 2000, every major Texas newspaper endorsed Justice Owen during her successful re-election bid.

President Bush and both Senators from Texas strongly support Justice Owen. I join them and many, many others – of all political stripes – in calling on the U.S. Senate to give this intelligent, ethical, and gifted woman a fair hearing and swift Senate confirmation.

Very truly yours,

John L. Hill

JLH:br

cc: ***Via Facsimile (202) 228-1698***
and First Class Mail
The Honorable Orrin Hatch
United States Senate
152 Dirksen, Senate Office Building
Washington, D. C. 20510

JACK HIGHTOWER

(b)(6)

August 20, 2002

Via Facsimile 202-228-3954

The Honorable Dianna Feinstein
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

It was my privilege to serve as a member of the Supreme Court of Texas with Justice Priscilla Owen for two years prior to my retirement from the bench January 1, 1996. I had not known her personally prior to that time. I knew that she had graduated from my alma mater with honor and was a valued member of the Andrews & Kurth law firm in Houston.

When Justice Owen joined the court she impressed me as being a very quick study because although she had no previous judicial experience she seemed to be able to quickly grasp the issues and frame them into judicial questions with great clarity.

In my opinion she was unbiased and wanted to find the core legal issue in each case.

When she joined the court I knew, of course, that Priscilla was a Republican. She ran and was elected on the Republican ticket. I am convinced that he political philosophy is honestly Republican. That is as it should be. I am a Democrat and my political philosophy is Democratic, but I tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same.

I am also of the opinion that the people are not well served by the partisan election of judges. I have not always been of this opinion, but after two statewide elections for the court, and after raising and spending millions of dollars, I believe that there must be a better way.

Yours truly,

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July 19, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Via Facsimile at 202-224-9516 and U.S. Mail

Dear Mr. Chairman:

Last Sunday, the Austin American-Statesman printed an article regarding Justice Priscilla Owen's nomination to the Fifth Circuit Court of Appeals (see attached). I found the article to be inaccurate, one-sided and unfair. I write to encourage you and the members of the Judiciary Committee to read the article with caution.

The case referenced in the article is *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998). A copy of the opinion is attached. The litigation arose out of an automobile accident that occurred in Dallas County, Texas in April, 1993. Willie Searcy was riding in a Ford pickup being driven by his step-father, Kenneth Miles, when the pickup collided head-on with another vehicle. Willie was severely injured. The pickup in which Willie was riding had been purchased from a Dallas Ford dealer.

Willie's mother and step-father sued Ford Motor Co. and the Ford dealer, alleging that a defective seat-belt mechanism caused Willie's injuries. The lawsuit was filed in Rusk County, Texas about a year after the accident. It is undisputed that Rusk County had *no relationship* to the accident or the pickup. The plaintiffs asserted that venue was proper in Rusk County because there were two Ford dealerships in the county and the plaintiffs alleged those dealerships were Ford's "agents" for purposes of the venue statute. Ford asserted that venue was not proper in Rusk County. Ford sought to move the lawsuit to Dallas County because the accident occurred in Dallas County, the pickup was purchased and serviced in Dallas County, and Ford's regional headquarters was located in Dallas County. The trial court overruled Ford's motion to transfer venue.

A trial on the merits resulted in a sizeable judgment in favor of the plaintiffs ($30 million in actual damages and $10 million in punitive damages). Both sides appealed. The court of appeals affirmed in part and reversed in part. *See Miles v. Ford Motor Co.*, 922 S.W.2d 572 (Tex. App.—Texarkana 1996), *reversed* 967 S.W.2d 377 (Tex. 1998). A copy of the court of appeals' opinion is attached. It is important to note that the first substantive issue addressed by the court of appeals was

Ford's assertion that the trial court erred in refusing to transfer the case to Dallas County. The court of appeals affirmed the trial court's refusal to transfer the case and affirmed the actual damages awarded by the judgment, but reversed the trial court's finding of gross negligence and malice as a basis for awarding punitive damages.

Ford then appealed to the Supreme Court of Texas. As you can see from the attached docket sheet, Ford filed its "application for writ of error" with the Texarkana Court of Appeals on July 22, 1996. The court of appeals forwarded the application for writ of error and the appellate record to the Supreme Court of Texas, where it was received on September 5, 1996. Thus, the papers necessary for an appeal to the Supreme Court of Texas actually reached the Court on September 5, 1996.

The Supreme Court of Texas, in an opinion authored by Justice Priscilla Owen and handed down on March 19, 1998, reversed the court of appeals' judgment on the ground that venue was not proper in Rusk County. Reversal was required by Texas law, which mandates a reversal of any case tried in an improper county. I concurred in the Court's opinion and judgment.

With this background, let me turn to the Austin American-Statesman article. There are several misstatements which should be pointed out. First, the article states that the case "sat undecided" in the Supreme Court of Texas for "more than two years." That is not true. The record and application for writ of error were received by the Supreme Court of Texas on September 5, 1996, and an opinion was handed down on March 19, 1998, about a year and a half later. While a year and a half is still too long, it does not give the American Statesman license to distort the facts.

Second, I take exception to the article's reliance on information gained from a former Supreme Court of Texas briefing attorney. In fact, I was disappointed to read the comments attributed to the former briefing attorney, Ms. Hays, regarding the internal operations of the court and conversations among staff about a case, given that these matters are strictly confidential. As Ms. Hays knows, there are *numerous* reasons why it may take a substantial amount of time to render a decision in a particular case. For example, once a proposed majority opinion garners five votes, those justices who are concurring or dissenting are given additional time to write their opinions. Thus, in my opinion, it was inappropriate for Ms. Hays to lay all the blame for the delay at the feet of Justice Owen. Finally, at the very least, the article should have disclosed that Ms. Hays is not just "a Dallas attorney," but is the chairperson of the Dallas County Democratic Party.

Third, the delay in the ultimate resolution of the lawsuit, at least in part, was attributable to the plaintiffs and their attorneys. The plaintiffs' attorneys made a strategic decision to pursue the lawsuit in a county that had no relationship to the case. That decision, consciously made by plaintiff's attorneys, resulted in a reversal by the Supreme Court of Texas. The American-Statesman's article should have pointed out that plaintiffs often shop for a favorable forum, knowing that they risk reversal if they guess wrong about the appropriateness of the chosen forum.

Fourth, according to the article, the court decided the case on "a question that was not among the issues the Supreme Court had agreed to hear when it accepted the case," implying that the court decided the case on an issue not presented. At best, the statement is misleading. As any experienced practitioner before the court knows, once a case is before the court, the whole case is before the court. The court has the right and ability to decide the case on any ground preserved for review and presented in the briefs. In this case, the venue issue was vigorously contested in the trial court, in the court of appeals, and in the briefs before the Supreme Court. It was an issue that was preserved for review and properly presented in the briefs. It, therefore, was appropriate for the court to decide the case on that issue.

Finally, it troubles me that the Austin American-Statesman would accuse a jurist of causing an individual's death under these circumstances. Frankly, I find it both offensive and beyond the bounds of appropriate journalism. Priscilla Owen no more caused the death of Willie Searcy than his attorneys who chose the wrong court to bring the lawsuit. His death was caused by an unfortunate accident. A judge of a court should not allow the bad facts such as these, to result in bad law. Justice Owen did her job as a member of the Supreme Court of Texas by writing a well-reasoned opinion that I believe reached the correct result in a heart-wrenching case. By any objective standard, this should not disqualify her from serving on the Fifth Circuit.

In closing, I served with Justice Owen for a number of years on the Supreme Court of Texas. I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation.

Cordially,

Raul A. Gonzalez
Justice, Supreme Court of Texas (retired)

RAG/glp

cc: The Honorable Orrin Hatch (*Via Facsimile at 202-228-1698 and U.S. Mail)*

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July 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

As past presidents of the State Bar of Texas, we join in this letter to strongly recommend an affirmative vote by the Judiciary Committee and confirmation by the full Senate for Justice Priscilla Owen, nominee to the United States Court of Appeals for the Fifth Circuit.

Although we profess different party affiliations and span the spectrum of views of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate for appointment to the Fifth Circuit. Based on her superb integrity, competence and judicial temperament, Justice Owen earned her *Well Qualified* rating unanimously from the American Bar Association Standing Committee on the Federal Judiciary – the highest rating possible. A fair and bipartisan review of Justice Owen's qualifications by the Judiciary Committee certainly would reach the same conclusion.

Justice Owen's stellar academic achievements include graduating *cum laude* from both Baylor University and Baylor Law School, thereafter earning the highest score on the Texas Bar Exam in November 1977. Her career accomplishments are also remarkable. Prior to her election to the Supreme Court of Texas in 1994, for 17 years she practiced law specializing in commercial litigation in both the federal and state courts. Since January 1995, Justice Owen has delivered exemplary service on the Texas Supreme Court, as reflected by her receiving endorsements from every major newspaper in Texas during her successful re-election bid in 2000.

The status of our profession in Texas has been significantly enhanced by Justice Owen's advocacy of *pro bono* service and leadership for the membership of the State Bar of Texas. Justice Owen has served on committees regarding legal services to the poor and diligently worked with others to obtain legislation that provides substantial resources for those delivering legal services to the poor.

Justice Owen also has been a long-time advocate for an updated and reformed system of judicial selection in Texas. Seeking to remove any perception of a threat to judicial impartiality, Justice Owen has encouraged the reform debate and suggested positive changes that would enhance and improve our state judicial branch of government.

While the Fifth Circuit has one of the highest per judge caseloads of any circuit in the country, there are presently two vacancies on the Fifth Circuit bench. Both vacancies have been declared "judicial emergencies" by the Administrative Office of the U. S. Courts. Justice Owen's service on the Fifth Circuit is critically important to the administration of justice.

Given her extraordinary legal skills and record of service in Texas, Justice Owen deserves prompt and favorable consideration by the Judiciary Committee. We thank you and look forward to Justice Owen's swift approval.

Sincerely,

Darrell E. Jordan

On behalf of former Presidents of the State Bar of Texas

Blake Tartt	Jim D. Bowmer
James B. Sales	Travis D. Shelton
Hon. Tom B. Ramey, Jr.	M. Colleen McHugh
Lonny D. Morrison	Lynne Liberato
Charles R. Dunn	Gibson Gayle, Jr.
Richard Pena	David J. Beck
Charles L. Smith	Cullen Smith

cc: The Honorable Orrin G. Hatch
Office of Legal Policy U. S. Justice Department

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TEXAS BOARD OF
LEGAL SPECIALIZATION

June 26, 2002

Via Fax 202/224-9516
And Regular Mail

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington D.C. 20510

RE: Nomination of the Honorable Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

This correspondence is sent to you in support of the nomination by President Bush of Texas Supreme Court Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

As the immediate past President of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

Additionally, Justice Owen played a major role in organizing a group known as Family Law 2000 which seeks to educate parents about the effect the dissolution of a marriage can have on their children. Family Law 2000 seeks to lessen the adversarial nature of legal proceedings surrounding marriage dissolution. The Fifth Circuit would be well served by having someone with a background in family law serving on the bench.

Justice Owen has also found time to involve herself in community service. Currently Justice Owen serves on the Board of Texas Hearing and Service Dogs. Justice Owen also teaches Sunday School at her Church, St. Barnabas Episcopal Mission in Austin, Texas. In addition to teaching Sunday School Justice Owen serves as head of the altar guild.

Justice Owen is recognized as a well rounded legal scholar. She is a member of the American Law Institute, the American Judicature Society, The American Bar Association, and a Fellow of the American and Houston Bar Foundations. Her stature as a member of the Texas Supreme Court was recognized in 2000 when every major newspaper in Texas endorsed Justice Owen in her bid for re-election to the Texas Supreme Court.

It has been my privilege to have been personally acquainted with various members of the U.S. Court of Appeals for the Fifth Circuit. The late Justice Jerry Williams was my administrative law professor in law school and later became a personal friend. Justice Reavley has been a friend over the years. Justice Johnson is also a friend. In my opinion, Justice Owen will bring to the Fifth Circuit the same intellectual ability and integrity that those gentlemen brought to the Court.

I earnestly solicit your favorable vote on the nomination of Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

Thank you for your attention to this correspondence.

Very truly yours,

Hector De Leon

cc: The Honorable Orrin Hatch — Via Fax 202/228-1698 and Regular Mail
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510
cc: The Honorable Alberto R. Gonzales — Via Fax 202-456-6279
cc: Viet D Dinh — Via Fax 202-514-2424

SENATOR FLORENCE SHAPIRO
DISTRICT 8

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July 15, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy,

I am writing to express, in the strongest possible terms, my unequivocal support for Justice Priscilla Owen's nomination to the U.S. Court of Appeals for the Fifth Circuit.

It is difficult to overstate Justice Owen's extraordinary academic and professional qualifications, as the American Bar Association recognized when it honored her with its highest possible rating: "unanimous well-qualified". I have known Justice Owen for several years and have always been impressed with her extraordinary intelligence and integrity. Her legal career has been marked by accomplishment. Not only has she worked to improve access to legal services for the poor and fought to increase the funding of such programs, she has also helped organize a group known as Family Law 2000, which seeks to educate parents about the effects of dissolving a marriage on children and to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As a Senator in the Texas Legislature, the manner in which the Texas courts review and interpret our laws is extremely important to me. Justice Owen's opinions consistently demonstrate that she faithfully interprets the law as it is written, and as the Legislature intended, not based on her subjective idea of what the law should be. I am shocked and saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth.

Her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. I was the chief author of the Senate bill, and followed very closely the Texas Supreme Court's opinions regarding the statute. Although some might try to hold up the Texas Parental Notification Act as a litmus test on abortion, they simply cannot make the case. The Parental Notification Act is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. The Act nowhere presents the question of whether the Constitution guarantees the right to abortion or the scope of such a right; in fact, it recognizes that a girl may have an abortion. Therefore, when the Texas Supreme Court heard the Jane Doe cases, it was merely interpreting a newly-enacted procedural statute – passed with overwhelming bipartisan support – that recognized the legitimate role of parents in such weighty decisions, not the underlying right to an abortion. I appreciated that Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the

governing U.S. Supreme Court precedent upon which the language of the statute was based, to determine what the Legislature intended the Act to do.

I, along with many of my colleagues -- Democrats and Republicans alike -- filed a bipartisan amicus curiae brief with the Texas Supreme Court explaining that the language of the Act was crafted in order to promote, except in very limited circumstances, parental involvement. We recognized that there should be exceptions under certain conditions, and allowed a girl three opportunities to demonstrate to a court that she fell within those exceptions. It is important to note that the Texas Supreme Court does not even have an opportunity to hear a case under the Act unless both a trial court and an intermediate appellate court have both already considered the evidence and ruled that a girl does not satisfy the exceptions and must notify one parent prior to having an abortion.

Prior to the passage of the Act, a child could go to a doctor and have an extremely invasive procedure without even notifying one of her parents. At the same time, school nurses were not even permitted to give aspirin to a child without parental consent. Like legislators in dozens of states across America, we realized that something needed to be done to respect the role of parents -- that at least one parent should be involved in a major medical decision impacting their minor daughter. Because this was not an "abortion" bill but a "parental involvement" bill supported by lawmakers on both sides of the abortion debate, we were able to pass a bipartisan law that promotes the relationship between parents and their minor daughters and is exceedingly popular with the people of Texas.

Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench - an experienced jurist who follows the law and uses common sense. I strongly urge the Committee to reject the politics of personal destruction pushed by Justice Owen's extremist critics and vote positively on her nomination. She merits immediate confirmation.

Very truly yours,

Florence Shapiro

Florence Shapiro

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

Republicans for Choice Press Release

For immediate release

July 23,2002

Contact: Ann Stone
703 960 9882

"Not the right fight", Chairman of Republicans for Choice endorses the nomination of Priscilla Owen

Washington, D.C.- Today Ann E.W.Stone, National Chairman of Republicans for Choice PAC stepped forward to ask her colleagues in the pro-choice movement to cease their attacks on Priscilla Owen and let her nomination go forward.

"*This nomination is not the right fight*" said Stone, "*Owen has not shown herself to be a judicial activist dedicated to the overturn of Roe. The cases cited in news reports appear to have been taken out of context and in no instance represent an attempt to deny abortion rights. In fact they are about parental notification by one parent only. Further,her rulings were in line with the intent set out by the legislature.*"

" *From the extensive documentation I have read and the people I have consulted who know her well, as well as pro-choice activist lawyers whom I trust and who have gone over her record, I have no problem departing from many of my friends in the movement to support her.*" Stone added. "*The last time I parted company with them on a judicial nomination was over David Souter. We were right about that appointment...they were not.*"

" *I know my pro-choice colleagues are alarmed as am I at the attempts by those who oppose a woman's right to choose to chip away and use stealth tactics to damage this right. But there is no evidence that convinces me that this is one of those cases. I worry that if we in the pro-choice movement attack even those judicial nominees who are responsible and acclaimed jurists that we will appear like the 'boy who cried wolf ' when the really bad nominees come forward. We need to pick our fights and this should not be one of them.*" Stone continued.

" *Judge Owen was endorsed by 15 previous Texas Bar Association Presidents and received the National Bar Association's highest rating. In looking at the complete record I can not see any reason to oppose her....*" concluded Stone. "*More of my reasons are set out in the letter that I sent to Senators Leahy and Hatch.*"

###30###

LORI R.E. PLOEGER

(b)(6)

JUNE 27, 2002

VIA FACSIMILE AND U.S. MAIL

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Re: Confirmation of the Honorable Priscilla R. Owen

Dear Mr. Chairman:

I am writing to express my unequivocal support for the nomination of the Honorable Priscilla R. Owen, Associate Justice of the Supreme Court of Texas, as a Judge for the United States Court of Appeals for the Fifth Circuit. It was my privilege to serve as Justice Owen's briefing attorney from January to August 1995.

As Justice Owen's briefing attorney, I had the opportunity to observe Justice Owen carrying out her responsibilities on a daily basis. During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly. Justice Owen works indefatigably, reading and analyzing the parties' briefs and the relevant legal authorities, often into the wee hours of the night. In addition to her impeccable work ethic, Justice Owen also brings to the bench a keen legal intellect, which is reflected in well-written opinions that are well-grounded in precedent.

Justice Owen is a role model for me and for other women attorneys in Texas. She attended law school in the mid-1970s, at a time when the ratio of women-to-men was still one in ten at best. She not only attended law school, she excelled, graduating third in her class and serving on the *Baylor Law Review*. Shortly thereafter, she again distinguished herself by obtaining the highest score on the Texas Bar Examination. Her stellar performance continued in her career as a practicing attorney. At age 30, she was made partner of a major Houston law firm when female partners were a rarity. During her 17 years at the firm, she earned the admiration, respect, and friendship of her colleagues. Now in her second term on the Texas Supreme Court, Justice Owen continues to demonstrate the outstanding qualities that have consistently distinguished her as a leader in the legal profession.

I know that she will bring the same intelligence, diligence, and strength of character to her position as a Circuit Judge for the Fifth Circuit. I strongly urge you and the other members of the Senate Judiciary Committee to support her confirmation.

Sincerely,

Lori R.E. Ploeger

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

Priority: Normal
Topic:
Sent: 3/25/02
From: Emeritus, President
To: dick@durbin.senate.gov; info@kyl.senate.gov; russell_feingold@feingold.s...; sam_brownback@brownback.sen...; senator@biden.senate.gov; senator@feinstein.senate.gov; senator@kennedy.senate.gov; senator@mcconnell.senate.gov; senator@sessions.senate.gov; senator@thurmond.senate.gov; senator_hatch@hatch.senate.gov; senator_kohl@kohl.senate.gov; senator_leahy@leahy.senate.gov
CC:

March 25, 2002

Dear Senators:

I write to support the nomination of the Honorable Priscilla Owen for the 5th U.S. Circuit Court of Appeals.

Justice Owen is well-known to me, both from her undergraduate and Law School days at Baylor University, where I served for 20 years as President and Chancellor, as well as during the two year period from 1995-1997 when I served as Chair, Texas State Commission on Judicial Efficiency.

Justice Owen is a superlative individual in every way. She is extremely bright, she possesses great integrity and is equipped with the character or moral virtues necessary for the high office she holds as well as the high office for which she has been nominated.

During the work of the Commission I had frequent contact with Chief Justice Thomas Phillips and most of the Associate Justices. I found that Chief Justice Phillips and Justice Owen were most supportive of the Commission's recommendation that judges in the State of Texas should not be elected and, therefore, subject to the possible conflicts that are perceived to be present. We recommended to the State Legislature, and Justice Owen concurred, that judges be appointed to their first term and then would have to run for office after the first term in retentive nonpartisan elections. This appoint/elect/retain system would reduce campaign contributions dramatically.

Based on my knowledge of Justice Owen for the past 30 years I believe that you simply cannot make a more solid choice for the 5th U.S. Circuit Court of Appeals.

Respectfully yours,

Herbert H. Reynolds
President and Chancellor Emeritus
Baylor University
Waco, Texas 76798

I give my name and position but under University guidelines I speak for myself only.

Copies faxed to: Senator Charles Schumer, Senator Charles Grassley, Senator John Edwards, Senator Arlen Specter, Senator Maria Cantwell and Senator Mike DeWine

Mary Sean O'Reilly

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August 14, 2002

Dear Senator Feinstein

As a devout and genetic Democrat since the age of twelve, and a participant in the Democratic Party for decades, I write to ask that you support the confirmation of Justice Priscilla Owen to the Fifth Circuit Court of Appeals.

I was a member of an order of Catholic Sisters, the Sisters of Saint Mary of Namur for sixteen years. I am still on the Financial Advisory Committee of our Sisters, and the Dominican Sisters of Texas. I work closely with the Sisters on domestic social justice issues and with our Sisters in Rwanda and Congo. I graduated from University of Houston School of Law in 1977, while in the Order, and worked with abused women and children as a Legal Service trial attorney in family law for six years before being appointed as an associate judge in the Tarrant County, Texas, family courts for seven years. I have subsequently served in various family courts in Texas, always as a Democrat.

From this perspective, I can credibly register my dismay at the attacks against Justice Priscilla Owen. Some news media and interest groups have portrayed her as cold and uncaring, out to help the powerful at the expense of the people. My experience with Justice Owen is the opposite. She is an extremely compassionate, caring woman, who time and again has used her influence on behalf of noble causes.

I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force, a working group dedicated to promoting equality for women involved in the Texas legal system. I had given written and oral testimony at the state-wide hearings in various Texas cities as the original Gender Bias Task Force was preparing the State's first comprehensive Gender Bias Report. Justice Owen was one of the three editors of the final Gender Neutral Handbook that is now available to all attorneys and judges in Texas.

Later, in the years 1996 through 1999, I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. Some of the main beneficiaries of this project were the children who are too often ensnared in the legal system. The committee was comprised of judges, lawyers and psychologist, working throughout the state, to

review and implement systemic change in family law and civil procedure regulations. The goal of Family Law 2000 was to make the court system practical, more helpful and affordable for Texas families. We achieved some important goals, including changes in our rules of Civil Procedure, in part due to the tireless efforts and collaboration of Justice Owen with other members of the Supreme Court of Texas.

On another occasion, Justice Owen worked in support of the *Amicus Curie* brief that went to the United States Supreme Court in support of IOLTA funds being available for legal services to indigents in Texas. There have been at least two occasions where Justice Owen and I have had long and comprehensive discussions about the need for quality legal services for families that live in poverty, and I am convinced of her dedication to ensuring that the poor have access to the courts.

Political affiliations and preferences have never gotten in the way of my professional collaborations with Justice Owen. I am a life-time member of the NAACP and have served on the national board of NETWORK, a well-respected Catholic social justice lobby in Washington, D.C. from 1978 through 1984. I have contributed to Emily's List, the Southern Poverty Law Center, The Carter Center, Habitat for Humanity, Democratic US Senate Committees and several Democratic Presidential, House of Representative, State and County Democratic elections for many years, including the presidential campaign of Al Gore and (through Emily's List) to your Senate campaign. I am a pro-choice Democrat.

Notwithstanding our political and philosophic differences in some important areas, I consider Justice Owen to be a long-standing professional colleague of the highest caliber. In the almost eight years I have known Justice Owen, she has always been refined, approachable, even-tempered and intellectually honest. Although we are not close personal friends, we have shared stories of our families, women's issues and some of the challenges that face jurists. She has demonstrated her compassion toward women, families, and the poor. She has used her extremely high level of legal ability and skill for the betterment of her community. I trust Justice Priscilla Owen's sense of the role of the judiciary in the federal and state systems implicitly. I believe Justice Owen to be highly qualified for the federal bench and I know that she will act with great care and independence if given the opportunity to serve our Nation in this capacity. I urge you to reject the absurd attacks that have been made against her and vote to confirm Justice Owen.

Very sincerely,

Mary Sean O'Reilly

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Victor E. Schwartz
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July 18, 2002

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

Re: Nomination of Texas Supreme Court Justice Priscilla Owen

Dear Mr. Chairman:

Throughout the past three decades, many members of your Committee have been kind enough to ask my views about tort law. I have taught in law school, and practiced on behalf of plaintiffs in the 1970s. I currently practice in the defense firm of Shook, Hardy & Bacon, L.L.P. and represent the American Tort Reform Association. You have appreciated that when I share my views with you, I try my utmost to be objective. Because almost anyone's views on judges are likely to be seen as having bias, I have refrained from commenting on any judicial nominee.

I am now writing you about Texas Supreme Court Justice Priscilla Owen because she has been attacked as being unfair in the very area of my expertise, tort or liability law. Since 1976, I have been co-author of the most widely used torts textbook in the United States, *Prosser, Wade & Schwartz's Cases and Materials on Torts*. I have also served on the three principal American Law Institute Advisory Committees on the new *Restatement of Torts (Third)*. The study of tort law has been the love of my professional life.

Because of my academic and practice obligations, I have had a very deep interest in opinions of law in the field of torts. Naturally, I am familiar with state supreme court judges or justices who are thought to be "pro-plaintiff" or "pro-defendant." In that regard, when I heard about controversies surrounding Justice Owen, I was somewhat puzzled because I had not placed her in either group.

This past weekend, I reviewed most of her principal opinions in tort law. My review of Justice Owen's opinions indicates that any characterization of Justice Owen as "pro-plaintiff" or

"pro-defendant" is untrue. Those who have attacked her as being "pro-defendant" have engaged in selective review of her opinions, and have mischaracterized her fundamental approach to tort law.

Justice Owen's fundamental approach to tort law is to make it stable. On the one hand, she is not a judge who would be likely to jump to the front of a plaintiffs' lawyers petition to expand the scope of tort law. Furthermore, she would be unlikely to allow claims for brand-new types of damages, such as hedonic damages, or create cutting-edge liability claims (*e.g.*, allowing a lawsuit against a fast food chain, where there was no showing that an individual plaintiff's health was actually harmed by eating at that chain). On the other hand, she would not and has not arbitrarily thwarted the rights of plaintiffs under existing tort law.

Let me give you just a few examples. In *Merrell-Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), a decision for which she was roundly criticized by a group called "Texans for Public Justice," Justice Owen held that the evidence was legally insufficient to establish that a birth defect was caused by exposure to the drug Bendectin.® Bendectin® is the only drug that helps alleviate the severe symptoms of morning sickness. It is still approved by the U.S. Food and Drug Administration and regulatory agencies throughout the world. As Justice Owen recognized, the attempts by plaintiff's counsel to tie the birth defects of the plaintiff's child to Bendectin® in the *Havner* case were insufficient. The Supreme Court of the United States itself recognized, in a case involving that very drug, that judges should act as gatekeepers, and not permit juries to make judgments based on bad science. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

I am not surprised that the Association of Trial Lawyers of America (ATLA), the organized plaintiffs' bar, and those who have empathy with that group criticized Justice Owen for her decision. They also criticized the United States Supreme Court when it rendered the *Daubert* decision. ATLA and its sympathizers believe that judges should not act as gatekeepers; rather, they believe that juries should be permitted to weigh scientific evidence as they choose.

Here is the rather interesting point. In a case decided almost simultaneously with *Havner*, not mentioned by "Texans for Public Justice" or other groups criticizing Justice Owen, she would have allowed an adult to pursue a sexual abuse claim against an alleged abuser who purportedly did the wrongful acts when the plaintiff was a child. In the case *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996), expert testimony indicated that the plaintiff had "repressed memories" that arose when the plaintiff was an adult. The majority held that expert testimony was insufficient to warrant the application of the "discovery rule," which would have tolled the statute of limitations. It required "objectively verifiable" evidence of abuse to apply the discovery rule and toll the statute. Justice Owen noted, however, that such evidence was often unavailable, and the unavailability of the evidence is frequently due to acts done by the alleged abuser. She would have held that the repressed

memory evidence was sufficient to toll the statute and allow the claim. I recommend that Members of this Committee read this case and note that Justice Owen wrote the sole dissenting opinion in the case.

In a later case, Justice Owen prevented another plaintiff from falling into a statute of limitations trap. A patient brought a malpractice case against a surgeon in his individual capacity. The patient later amended his complaint, and named the surgeon's professional association as a defendant. The association moved to dismiss the case because the statute of limitations had expired by the time the suit was brought against the association. Writing for the Texas Supreme Court, Justice Owen held that the cause of action brought against the surgeon in his individual capacity preserved the potential of the claim against the association. *See Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999).

Justice Owen's views about product liability law strike the same balance. For example, Justice Owen joined in a Supreme Court of Texas opinion that considered a question certified by a federal court as to whether a manufacturer of a product used by adults – a cigarette lighter – might have a duty, in some situations, to childproof the product. Justice Owen joined with the Court in holding that a manufacturer may have such an obligation. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999).

One finds the same sense of "balance" in Justice Owen's opinions in other areas of tort law. In a very interesting opinion, Justice Owen joined with the Texas Supreme Court to strip a defendant business of its defenses based on a plaintiff's fault when that defendant business had decided to opt out of the workers' compensation system. Justice Owen supported the sound public policy that would discourage businesses from opting out of workers' compensation and taking their chance on their vagaries of a tort lawsuit in the workplace. As you and Members of your Committee know, a fundamental reason why workers' compensation was adopted in the first place is so that a worker's fault does not preclude him or her from obtaining compensation for a workplace injury. *See Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000).

I wish to reiterate that I am not suggesting that Justice Owen is a plaintiffs' lawyer's "dream judge." She is not. For example, when the Texas Supreme Court addressed the issue of whether jurors should be told that if they find a plaintiff more than 50% responsible for his or her own injury, the plaintiff might lose, Justice Owen dissented from the majority. The majority found that such information was allowed to go to the jury. Justice Owen believed such action could cause jurors to look more at the effect of the 50% rule than the facts of the case. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998). While not everyone (including myself) would agree with Justice Owen's decision, it is anchored in logical judicial precedent and has a clear public policy basis. *See* Victor Schwartz, *Comparative Negligence*, §17-5(a) (3d Ed. 1994).

My fundamental point is that in the area of tort law, Justice Owen is a moderate jurist; she is neither a trailblazer for plaintiffs nor a captive of corporate interests.

I would be pleased to answer any questions or inquiries by Members of your Committee, and I value your taking the time to read this statement.

Sincerely,

Victor E. Schwartz

cc: The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary

85595.1

THE WHITE HOUSE

WASHINGTON

April 5, 2002

Dear Chairman Leahy:

In our recent conversations, you suggested that the White House should examine whether contributions Justice Owen received for her campaigns for the Texas Supreme Court raise any legitimate issue with respect to her fitness to serve on the Fifth Circuit. We have done as you have suggested, and I see no basis to question Justice Owen's fitness to serve on the Fifth Circuit. The record reflects that she has at all times acted properly and in complete compliance with both the letter and the spirit of the rules relating to judicial campaign finance.

I am certain you will agree that it was entirely proper for Justice Owen's campaign to receive contributions. Article 5 of the Texas Constitution provides that candidates for the state judiciary run in contested elections, which are partisan under Texas election law, and Canon 4D(1) of the Texas Code of Judicial Conduct provides that the candidates may solicit and accept campaign funds. Like Senators, therefore, candidates for the state judiciary in Texas may receive contributions to finance their campaigns.

To be sure, Justice Owen and many others would prefer a system of appointed rather than elected state judges. In fact, Justice Owen has long advocated appointment of judges (coupled with retention elections). She has written to fellow Texas attorneys on the issue, committed to a new system in League of Women Voters publications, and appeared as a pro-reform witness before the Texas Legislature. She has explained even to partisan groups why judges should be selected on merit. But the people in some states, including Texas, have chosen a system of contested elections for judges. Elected state judges certainly are not barred from future appointment to the federal judiciary; on the contrary, some notable federal appellate judges whom President Clinton nominated and you supported were state judges who had run and been elected in contested elections -- Fortunato Benevides and James Dennis, for example, from the Fifth Circuit.

I am also certain that you would find nothing inappropriate about the sources from which Justice Owen's campaign received contributions. In her 1994 and 2000 elections, Justice Owen's campaign quite properly received contributions from a large number of entities and individuals, with no single contributor predominating. In the 1994 election cycle, her campaign received approximately $1.2 million in contributions from 3,084 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed less than 1% of the total contributions to her campaign. And Justice Owen's campaign, of course, received no corporate contributions from Enron or any Enron-affiliated corporation, as such corporate contributions are not permissible under Texas law. Notably, in the 1994 election, not only did Justice Owen comply with all campaign laws, she went beyond what the law required and voluntarily limited contributions when many other judicial candidates did not do so.

In the 2000 election cycle, Justice Owen's campaign received approximately $300,000 in contributions from 273 different contributors. In that cycle, her campaign received no contributions from Enron or its affiliates, from employees of Enron, or from Enron's political action committee. In addition, Justice Owen ultimately had no Democratic or Republican opponent in the 2000 election

cycle, and she closed her campaign office and returned most of her unspent contributions, an act that I believe is unusual in Texas judicial history.

It was entirely proper for Justice Owen's campaign to receive campaign contributions, including the contributions from Enron employees. Indeed, *seven* of the nine current Texas Supreme Court Justices received Enron contributions, and several of them received more than Justice Owen's campaign received. As this record demonstrates, elected judges certainly did not act improperly in the past, before anyone knew about Enron's financial situation, by receiving contributions from employees of Enron – any more than it could be said that Members of Congress acted improperly in the past by receiving contributions from Enron.

If, as is evident from the foregoing discussion, there was nothing amiss with the fact that Justice Owen received donations or with the sources from which she received them, the only other possible area of concern with her conduct relating to campaign contributors would be her decisions from the bench. Texas Code of Judicial Conduct Canon 3(B)(1) provides that a judge "*shall* hear and decide matters assigned to the judges except those in which disqualification is required or recusal is appropriate." And it is well-established that judicial recusal is neither necessary nor appropriate in cases involving parties or counsel who contributed to that judge's campaign. *See Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 215 (5th Cir. 2001); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999), *rev'd on other grounds*, 41 S.W.3d 118 (Tex. 2001); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App. 1990). Indeed, in any state with elected judges, any other rule would be unworkable. The primary protections against inappropriate influence on judges from campaign contributions are disclosure of contributions and adherence to the tradition by which judges explain the reasons for their decisions. If the people of a state deem those protections insufficient, the people may choose a system of appointed judges rather than elected judges, as Justice Owen has advocated for Texas.

Surmising that the concerns you raised would likely focus on her sitting in cases in which Enron had an interest, we have undertaken a review of her decisions in such cases. We have reviewed Texas Supreme Court docket records and Enron's 1994-2000 SEC Form 10Ks to determine the cases in which Enron or affiliates of Enron were parties to proceedings before the Court since January 1995 (when Justice Owen took her seat). The decisions of the Texas Supreme Court since January 1995 in proceedings involving Enron have been ordinary and raise no questions whatsoever.

A judge's decisions are properly assessed by examining their legal reasoning, not by conducting any kind of numerical or statistical calculations. But even those who would attempt to draw conclusions based on such calculations would find nothing in connection with these Enron cases. To begin with, we are aware of no proceeding involving Enron in which Justice Owen cast the deciding vote. In six proceedings in which we know that Enron was a party, Justice Owen's vote can be characterized as favorable to Enron in two cases and adverse in two cases. With respect to the remaining two, one cannot be characterized either way, and she did not participate in the other case because it had been a matter at her law firm when she was a partner. Eight other matters came before the Court in which we know that Enron or an affiliate was a party, but the Court declined to hear them. In those matters, the Court's actions could be characterized as favorable to Enron in four cases, adverse in three cases, and one was dismissed by agreement of the parties. We will supply the Judiciary Committee copies of the cases on request.

There has been some media attention on one case involving Enron in which Justice Owen wrote the opinion for the Court. *See Enron Corp. v. Spring Creek Independent School District*, 922 S.W.2d 931 (Tex. 1996). The issue in that case concerned the constitutionality of an ad valorem tax statute that allowed market value of inventory to be set on one of two different dates. The Court held that the statute did not violate the state constitution -- and the decision was unanimous. I understand that two Democratic Justices who sat on the Court at that time (Justices Raul Gonzalez and Rose Spector) have written to you to explain the case, indicating that Justice Owen's participation in the case was entirely proper. Moreover, the lawyer who represented a party opposing Enron in this case (Robert Mott) recently was quoted as saying that criticism of Justice Owen for her role in this case is "nonsense." *Texas Lawyer* (April 1, 2002). In my judgment, this case raises no legitimate issue with respect to Justice Owen's confirmation.

Finally, I am informed that, if confirmed, Justice Owen will donate all of her unspent campaign contributions to qualifying tax-exempt charitable and educational institutions, as is contemplated under section 254.204(a)(5) of the Texas Election Code.

I trust that the foregoing will resolve all questions concerning the propriety of Justice Owen's activities in relation to financing her campaigns. As you know, I served with Justice Owen, and I am convinced from my work with her that she is a person of exceptional integrity, character, and intellect. Both Senators from Texas strongly support her nomination. The American Bar Association has *unanimously* rated Justice Owen "well qualified," and one factor in that rating process is the nominee's integrity.

Despite her superb qualifications and the "judicial emergency" in the Fifth Circuit declared by the Judicial Conference of the United States, Justice Owen has not received a hearing for nearly 11 months since her May 9, 2001, nomination. We respectfully request that the Committee afford this exceptional nominee a prompt hearing and vote.

Sincerely,

/s/ Gonzales

Alberto R. Gonzales
Counsel to the President

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

cc: The Honorable Orrin Hatch
The Honorable Phil Gramm
The Honorable Kay Bailey Hutchison

MCKEAGUE

JUDGE DAVID W. MCKEAGUE
NOMINEE TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Biographical Information

- Appointed to the U.S. District Court for the Western District of Michigan in 1992 after being confirmed by unanimous consent of the Senate.
- Rated "Well Qualified" by the ABA to sit on the U.S. Court of Appeals for the Sixth Circuit.
- Judge McKeague has been designated to sit on panels of the Sixth Circuit Court of Appeals on several occasions and has written almost twenty appellate opinions.
- Serves as an adjunct professor at Michigan State University, Detroit College of Law and the Thomas M. Cooley Law School.
- Judge McKeague is a life-long resident of the Lansing, Michigan community and would be the first appointee to the Sixth Circuit from the Lansing area.
- Judge McKeague was appointed by Chief Justice Rehnquist to serve on the Judicial Conference's Committee on Defender Services and is the chair of the Committee's funding subcommittee.
- Judge McKeague served six years in the United States Army Reserve.

Controversial Issues

- No real objections have been raised as to the qualifications of Judge McKeague who is a distinguished and experienced jurist.
- Opponents unreasonably seek to block the nominations of these judges because prior Congresses failed to confirm two of President Clinton's nominees. That grievance does not entitle them to block President Bush's Michigan nominees.
- In the past, both parties have left nominations pending at the end of presidents' terms. The effort to block President Bush's Michigan nominations from the outset of his term is extraordinary and threatens a complete breakdown of the confirmation process.

Judge David W. McKeague
Nominee to the U.S. Court of Appeals for the Sixth Circuit

➢ **Judge David McKeague is a highly regarded federal district court judge with over a decade of experience on the bench.**

- ✓ Judge McKeague was appointed to the United States District Court for the Western District of Michigan in 1992 after being confirmed by unanimous consent of the Senate.
- ✓ The American Bar Association has rated Judge McKeague "Well Qualified" to sit on the U.S. Court of Appeals for the Sixth Circuit.
- ✓ As a district court judge, McKeague has been designated to sit on panels of the Sixth Circuit Court of Appeals on several occasions and has written almost twenty appellate opinions.

➢ **Judge McKeague has had a distinguished career as a practicing attorney and law professor in addition to his service on the federal bench.**

- ✓ Judge McKeague serves as an adjunct professor at Michigan State University, Detroit College of Law and the Thomas M. Cooley Law School.
- ✓ Prior to his appointment to the federal bench, Judge McKeague practiced law as a partner at the Lansing, Michigan law firm of Foster, Swift, Collins & Smith. He had a diverse practice, handling a variety of matters involving financial transactions and mergers, regulation of public utilities, commercial litigation, and bankruptcy.
- ✓ Judge McKeague received his J.D. in 1971 and his bachelor's degree in Business Administration in 1968, both from the University of Michigan.
- ✓ Judge McKeague belongs to the State Bar of Michigan and the District of Columbia Bar Association and is a founding Master and President of the American Inns of Court, Michigan State University, Detroit College of Law.

➢ **Judge McKeague is a life-long resident of the Lansing, Michigan community. He would be the first appointee to the Sixth Circuit from the Lansing or Mid-Michigan area.**

➢ **Judge McKeague is dedicated to improving the law and the administration of justice.**

- ✓ Judge McKeague was appointed by Chief Justice Rehnquist to serve on the Judicial Conference's Committee on Defender Services and is the chair of the Committee's funding subcommittee.

- ✓ Judge McKeague was also appointed by Chief Justice Rehnquist to the District Judges Education Committee of the Federal Judicial Center, which Judge McKeague chairs.

- ✓ Judge McKeague has led his district to a national reputation for innovation in technology. As Chairman of the Automation Committee of the Western District of Michigan, Judge McKeague instituted a pilot civil electronic filing program, which allows attorneys in all civil cases in his district to file case documents electronically. It is the first such program in Michigan, and only the seventh nationwide. He also serves as Chairman of the ADR Committee of the Western District of Michigan.

- ✓ Judge McKeague is a Fellow of the Michigan State Bar Foundation.

➢ **Judge McKeague has served his state and local community in many voluntary capacities.**

- ✓ Judge McKeague served six years in the United States Army Reserve.

- ✓ Judge McKeague served as a member of the National Board of Directors and as Regional Chairman of the University of Michigan Law School Fund.

- ✓ Judge McKeague has served in the community as a member of the boards of directors of Junior Achievement of Mid-Michigan, of Camp Highfields, and of Impression 5 Science Museum. He also sits on the advisory council of Michigan State University's Wharton Center for the Performing Arts.

Statements by Select Supporters of Judge McKeague

Chief Judge Robert Holmes Bell, U.S. District Court for the Western District of Michigan

"He's an excellent choice. He wants to raise the reputation of the 6th Circuit intellectually, and I think he will. He's not a doctrinaire judge. You can't say he's an arch-conservative or he's a liberal. He's reasonably pragmatic in his approach to applying the law. He lets the law and the facts take him where they take him." *GRAND RAPIDS PRESS, Nov. 9, 2001.*

Lori M. Silsbury, Dykema Gossett

"When Judge McKeague has been assigned to one of our client's cases, I am always confident that the client will receive a fair, considered review of the relevant facts and law. In my opinion, Judge McKeague does not decide cases based on political views or with a predisposition toward a plaintiff or a defendant. He meticulously works through the briefs and arguments . . . and is one of the best prepared Judges that I have had the privilege of appearing before. That dedication to the law is but one demonstration of his professionalism and commitment to deliver justice to all that appear before him." *Excerpt from letter to Chairman Hatch, Sept. 26, 2003.*

Webb A. Smith, Foster, Swift, Collins & Smith

"Throughout the 31 years, I have known Judge McKeague to be honest, professional and fair. He demands high standards of performance from those who appear in his Court, without regard to the client one represents or the philosophy one espouses. At the same time, he blends wisdom and reality when making his rulings. He treats all litigants and litigators with courtesy and respect. His rulings are well reasoned with due regard for precedent and the law provided by the Legislative Branch of government." *Excerpt from letter to Chairman Hatch, Oct. 6, 2003.*

Frank Harrison Reynolds, The Reynolds Law Firm

"I am a practicing criminal defense attorney and have been for the majority of my career as an attorney. As I represent clients in the judicial system, I look for fairness, decisiveness, clear legal reasoning and good judicial temperament from the bench. I have been able to observe these qualities in Judge McKeague during jury trials as well as during motions and arguments over the years since his appointment as an Article III District Court Judge." *Excerpt from letter to Chairman Hatch, Oct. 8, 2003.*

John W. Allen, Varnum, Riddering, Schmidt, & Howlett

"I have practiced law in Michigan and in the Sixth Circuit for over thirty years and have known David McKeague all of that time. He is a person of unquestioned honor and integrity. By his example, all the rest of us may set our compasses, in both our professional and personal lives. . . . Most importantly, Judge McKeague's judgments are sound, impartial, and prompt. He has consistently demonstrated that he is a hard worker, and a very productive member of the federal judiciary. The United States Court of Appeals for the Sixth Circuit needs judges like David McKeague." *Excerpt from letter to Chairman Hatch, Oct. 14, 2003.*

James S. Brady, Miller, Johnson, Snell & Cummiskey

"I have been a practicing lawyer in the Federal and State Courts for 34 years. In 1977, President Jimmy Carter appointed me United States Attorney for the Western District of Michigan. . . . Judge McKeague would make an outstanding appellate judge. He would bring to the United States Court of Appeals for the Sixth Circuit the experience of a successful practitioner and trial judge. A judge that knows the law, the demands of the trial bench, the competence and professionalism required of the lawyers appearing before him and a passion for justice. In my opinion, Judge McKeague has all the necessary components to be a successful appellate judge." *Excerpt from letter to Chairman Hatch, Oct. 15, 2003.*

Richard A. Kay, Varnum, Riddering, Schmidt, & Howlett

"By way of background, I have been in practice for 30 years in the Western District of Michigan. . . . Based on my trial experience before Judge McKeague in complex litigation, I found him to be a skilled jurist with the very highest of legal skills. His understanding and application of the law has been superior. His ability to distill complicated matters to their core issues is likewise excellent." *Excerpt from letter to Chairman Hatch, Oct. 15, 2003.*

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Nominees - Supporting Materials [3]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Recommendation Letter - page 1] - To: Jeff Sessions - From: Lynda Woodall	1	05/10/2003	P6/b6;
002	Letter	[Recommendation Letter] - To: Jeff Sessions - From: Bill Taylor	1	03/26/2003	P6/b6;
003	Letter	Bill Pryor, Nominee to 11th Circuit of Alabama - To: Orrin Hatch - From: Herc Levine	1	06/05/2003	P6/b6;
004	Letter	[Recommendation Letter] - To: Jeff Sessions - From: Allan Wade	1	03/25/2003	P6/b6;

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PEYOR

JUDGE WILLIAM H. PRYOR JR.
NOMINEE TO U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Biographical Information

- Served as Attorney General of Alabama from 1997-2002.
- Clerked for Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit.
- Has served with distinction for over a year on the U.S. Court of Appeals for the Eleventh Circuit.
- Strongly supported by Democrats, including Joe Reed (Chairman, Alabama Democratic Conference), Chris McNair (former Alabama State Representative), William Baxley (former Attorney General of Alabama), The Honorable Sue Bell Cobb (Judge, Alabama Court of Criminal Appeals).

Controversial Issues

- Interest groups have claimed that Judge Pryor's personal pro-life views impact his ability to follow precedent as a judge.
- Interest groups have criticized Judge Pryor for relying on the Eleventh Amendment of the U.S. Constitution, under the doctrine of sovereign immunity to protect taxpayers in Alabama from huge money judgments.
- Some have charged that Judge Pryor called for modification of Section 5 of the Voting Rights Act and is therefore against civil rights.
- Some groups have criticized Judge Pryor for defending Alabama's law against sodomy in *Lawrence v. Texas.*

Responses

- After the Supreme Court's decision in *Stenberg v. Carhart,* Judge Pryor issued an Attorney General opinion to state prosecutors stating that Alabama's partial birth abortion law was unconstitutional and could not be enforced.
- Judge Pryor's Eleventh Amendment arguments were well within the mainstream of American law. As noted throughout his nomination hearing, his arguments have frequently been accepted by the U.S. Supreme Court and held to represent the correct interpretation of the U.S. Constitution. As well, numerous democratic Attorneys General have asserted the same position as Judge Pryor, including William Sorrell (VT) and Jim Doyle (WI).
- The modifications of Section 5 of the Voting Rights Acts were procedural in nature. Judge Pryor's record demonstrates his commitment to full and equal rights for all. He successfully defended several redistricting plans adopted by the Alabama Legislature that were challenged by white voters and members of his own political party. In 2000, he won a unanimous ruling from the Supreme Court of the United States that prevented white voters from challenging majority black legislative districts in which the white voters did not reside.
- As Attorney General, he had a duty to defend the laws of Alabama against constitutional attack. Judge Pryor filed a brief in the case because if the Supreme Court struck down the Texas law in a broad manner, Alabama's law would also be invalid. As Attorney General, he immediately acted to comply with the Court's decision in *Lawrence v. Texas.*

He issued a release stating that, "The Court today expressly overruled its 1986 decision in *Bowers v. Hardwick.* This new interpretation of the Constitution means that the law of Alabama…which prohibits consensual sodomy between unmarried persons, is now unenforceable."

TABLE OF CONTENTS: THE HONORABLE WILLIAM H. PRYOR JR.

Summary and Biographical Points for Judge Pryor 1

Statements by Select Supporters of Judge Pryor 4

Responses to Issues Raised by Opponents 9

Selected Letters and Statements of Support for Judge Pryor 18

Letter from Dr. Joe Reed, Chairman, Alabama Democratic Conference-Black Political Caucus of Alabama 18

Letter from Rep. Alvin Holmes, Alabama State Representative 19

Letter from Rep. Seth Hammett, Speaker of the Alabama House of Representatives 22

Letter from U.S. Rep. Artur Davis (D-AL) 23

Letter from The Honorable Thurbert E. Baker, Attorney General, State of Georgia 24

Letter from The Honorable Charlie Crist, Attorney General, State of Florida 26

Letter from The Honorable Henry McMaster, Attorney General, State of South Carolina 27

Letter from Chris McNair, Former Alabama State Representative 28

Letter from Judge Sue Bell Cobb, Alabama Court of Criminal Appeals 30

Letter from Terry L. Butts, Former Alabama Supreme Court Justice, former Democratic Alabama Attorney General, and Attorney at Cervera, Ralph, and Butts 32

Letter from William J. Baxley, Former Democratic Alabama Attorney General and Attorney at Baxley, Dillard, Dauphin, and McKnight 35

Letter from G. Douglas Jones, Former Northern District of Alabama U.S. Attorney 36

Letter from Dianne Mooney, The Women's Fund 38

Letter from Kathryn Coumanis, Executive Director, Penelope House Family Violence Center 39

Letter from David G. Wirtes, Jr., Attorney at Cunningham, Bounds, Yance, Crowder and Brown, L.L.C. 40

Letter from Jere L. Beasley, Attorney at Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. 42

Letter from Gerrilyn V. Grant, Assistant Attorney General, State of Alabama 43

Letter from Stephanie C. Billingslea, Assistant Attorney General, State of Alabama 44

Letter from Lynda K. Woodall, Former Assistant Attorney General, State of Alabama 46

Letter from William Taylor, Former employee in the Office of the Attorney General, State of Alabama 48
Letter from J. Michael Rediker, Attorney at Haskell Slaughter 49
Letter from Thomas L. Krebs, Attorney at Haskell Slaughter 51
Letter from Fred H. Cate, Professor, Indiana University School of Law -- Bloomington 53
Letter from Patrick C. Cooper, Attorney at Maynard, Cooper & Gale, P.C. 54
Letter from Barry W. Ashe, Partner at Stone Pigman Walther Wittman, L.L.C. 56
Letter from Anthony A. Joseph, Attorney at Johnston Barton Proctor & Powell, L.L.P. 58
Letter from Charles W. Colson, Founder of Prison Fellowship Ministries 60
Letter from Pat Nolan, President of Justice Fellowship 61
Statement on General Pryor from American Seniors for Pryor 62
Letter from Herc Levine, Birmingham, Alabama 64
Letter from Miriam Shehane, Executive Director of Victims of Crime and Leniency 65
Letter from Chuck Canterbury, National President of the Grand Lodge Fraternal Order of Police 66
Letter from Randall I. Hillman, Executive Director of the Alabama District Attorneys Association 67
Letter from Gregory O. Griffin Sr., Chief Counsel for the State of Alabama Board of Pardons and Paroles 69
Letter from Donald R. Scott, President of the Alabama Division of the Police Benevolent Association, Inc. 70
Letter from Arthur K. Bourne, President of the Alabama Association of Chiefs of Police 71
Letter from James W. "Herbie" Johnson, Sheriff of Autauga County, Alabama 73
Letter from Bryant Mixon, Sheriff of Dale County, Alabama 74
Letter from Bill Franklin, Sheriff of Elmore County, Alabama 75
Letter from Grover W. Smith, Sheriff of Escambia County, Alabama 76
Letter from James Hayes, Sheriff of Etowah County, Alabama 77
Letter from Jeff Manuel, Public Safety Director of Demopolis, Alabama 78
Letter from Rick L. Singleton, Chief of Police of Florence, Alabama 79
Letter from J. Scott Walls, Chief of Police of Guntersville, Alabama 80
Letter from Samuel M. Cochran, Chief of Police of Mobile, Alabama 81
Letter from John H. Wilson, Chief of Police of Montgomery, Alabama 82
Letter from Allan Wade, Chief of Police of Pelham, Alabama 83
Letter from Sammie Brown, Jr., Chief of Police of Prichard, Alabama 84

Selected Newspaper Articles, Editorials, and Opinion Columns **85**

D.C. draws caricature of Pryor, The Birmingham News (July 27, 2003) 85
Pryor under fire, The Birmingham News (July 27, 2003) 87
Pryor Restraint, The Birmingham News (June 11, 2003) 89
National Police Group Backs Alabama Attorney General Pryor for 11 Circuit Judicial Appointment (June 11, 2003) 91
Alabamans give Pryor rave reviews, Response to Atlanta Journal-Constitution Editorial, The Atlanta Journal-Constitution (May 6, 2003) 92
Another job for Pryor?, The Huntsville Times, (January 7, 2003) 94

JUDGE WILLIAM H. PRYOR JR.
Nominee to U.S. Court of Appeals for the Eleventh Circuit (Alabama)

- Judge Bill Pryor has earned a reputation as one of America's most experienced and distinguished public servants. His nomination has received overwhelming support from across the ideological and political spectrum. Judge Pryor has been nominated to the Eleventh Circuit, which covers the states of Alabama, Florida, and Georgia.

- Judge Pryor has had a distinguished career as a public servant, practicing attorney, and law professor.

    - Judge Pryor was recess appointed by the President on February 20, 2004 to the Eleventh Circuit to fill a vacancy that is designated a "judicial emergency" by the Judicial Conference of the United States. He has served with distinction for over a year.

    - Judge Pryor was appointed as Attorney General of Alabama on January 2, 1997. After being elected to a full four-year term in 1998, Alabamians overwhelmingly reelected Judge Pryor as Attorney General in 2002. He had previously served as Deputy Attorney General in charge of special civil and constitutional litigation.

    - Before joining the Attorney General's Office, Judge Pryor practiced law in Birmingham, Alabama at two of the state's finest law firms, specializing in commercial and complex federal litigation. He also taught several years as an adjunct professor at the Cumberland School of Law of Samford University.

- Judge Pryor is an outstanding and highly qualified candidate as evidenced by his professional and academic credentials and training.

    - Judge Pryor began his legal career as a law clerk for a civil rights legend, the late Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit. Judge Wisdom achieved renown for his landmark decisions ordering and implementing desegregation in the wake of the Supreme Court's historic ruling in *Brown v. Board of Education* and received the American Bar Association Medal, the ABA's highest honor, in 1996.

    - Judge Pryor attended Tulane University School of Law, where he graduated *magna cum laude* in 1987 and was editor-in-chief of the *Tulane Law Review*.

- Judge Pryor's impressive record demonstrates his belief in the rule of law and treating all people equally under the law. As Judge Pryor stated at his hearing, "I understand my obligation to follow the law, and I have a record of doing it. You don't just have to take my word that I will follow the law. You can look at my record as Attorney General and see where I have done it."

    - Judge Pryor ordered state prosecutors to interpret the Alabama Partial-Birth Abortion Ban Act narrowly and consistent with Supreme Court precedent even though the plain language of the statute permitted broader application.

    - Judge Pryor has done his duty as Attorney General to defend Alabama statutes from attack and defend Alabama taxpayers from huge money judgments.

    - Judge Pryor has been praised by a broad range of Alabama African-American leaders for his record of fighting for civil rights and equal treatment under law for all.

    - Judge Pryor has advocated for a variety of new laws to protect women from domestic violence and helped create innovative new programs to help women.

    - Judge Pryor helped start Mentor Alabama, a program helping at-risk children.

    - Judge Pryor, while Attorney General, represented the State and personally prosecuted charges against then-Chief Justice Roy Moore that ultimately led to Justice Moore's removal from office for defiance of federal court orders.

- Judge Pryor has served with distinction for over a year on the United States Court of Appeals for the Eleventh Circuit. He has authored numerous three-judge panel decisions joined by judges appointed by both Democratic and Republican Presidents. Senator Specter has noted that "several opinions . . . demonstrate Judge Pryor's willingness to protect the rights of individuals often overlooked in the legal system."

    - Judge Pryor reversed a district court decision and ruled that a prisoner suffering from HIV and hepatitis could pursue a constitutional claim alleging inappropriate medical treatment by prison officials. Judge Pryor also held that the Prison Litigation Reform Act did not preclude the prisoner from amending his complaint and proceeding *in forma pauperis*. *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004).

    - Judge Pryor reinstated a civil rights claim dismissed by a district court where the district court did not place appropriate weight on the discriminatory conduct alleged by a female employee. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004).

- Judge Pryor ruled that Congress did not exceed its power under the Spending Clause in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). This ruling permitted a prisoner to pursue a claim that prison officials did not permit him to practice his Jewish faith. *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004).

- Judge Pryor has widespread support from across the ideological and political spectrum.

  - Dr. Joe Reed, Chairman of the Alabama Democratic Conference and a member of the Democratic National Committee, calls Judge Pryor a "first-class public official" who "will be a credit to the [j]udiciary and will be a guardian for justice."

  - Thurbert Baker, the Democratic Attorney General of Georgia, says that Judge Pryor "has always done what he thought was best for the people of Alabama" and "know[s] that [Pryor's] work on the bench will continue to serve as an example of how the public trust should be upheld."

  - Democratic state legislator Rep. Alvin Holmes "request[s] [the Senate's] swift confirmation of [Judge] Pryor . . . because of his constant efforts to help the causes of blacks in Alabama."

  - U.S. Rep. Artur Davis (D-AL) stated "I have the utmost respect for my friend [Judge] Pryor and I believe if he is selected, Alabama will be proud of his service."

STATEMENTS BY SELECT SUPPORTERS OF JUDGE PRYOR

The Honorable Alvin Holmes, Alabama State Representative, Montgomery, AL

"I am a black member of the Alabama House of Representatives having served for 28 years. During my time of service in the Alabama House of Representatives I have led most of the fights for civil rights of blacks, women, lesbians and gays and other minorities. . . . [A]s one of the key civil rights leaders in Alabama who has participated in basically every major civil rights demonstration in America, who has been arrested for civil rights causes on many occasions, as one who was a field staff member of Dr. Martin Luther King's SCLC, as one who has been brutally beaten by vicious police officers for participating in civil rights marches and demonstrations, as one who has had crosses burned in his front yard by the KKK and other hate groups, as one who has lived under constant threats day in and day out because of his stand fighting for the rights of blacks and other minorities, I request your swift confirmation of Bill Pryor to the 11th Circuit because of his constant efforts to help the causes of blacks in Alabama." (June 5, 2003)

The Honorable Thurbert E. Baker, Attorney General of Georgia, Atlanta, GA

"I have had the great pleasure of knowing and working with Bill Pryor over the past five years. Through the National Association of Attorneys General, Bill and I have worked together on matters of mutual concern to Georgia and Alabama. . . . During his tenure as Attorney General, Bill has made combating white-collar crime and public corruption one of the centerpieces of his service to the people of Alabama. He joined the effort of Attorneys General around the country in fighting the rising tide of identity theft, pushing through legislation in the Alabama legislature making identity theft a felony in Alabama. . . . He has always done what he thought was best for the people of Alabama. Recognizing a wrong that had gone on far too long, he took the opportunity of his inaugural address to call on an end to the ban on inter-racial marriages in Alabama law. Concerned about at-risk kids in Alabama schools, he formed Mentor Alabama, a program designed to pair volunteer mentors with students who needed a role model and an attentive ear to the problems facing them on a daily basis." (March 31, 2003)

The Honorable Artur Davis, Representative, 7th District of Alabama, Birmingham, AL

"I understand that the President may be considering Attorney General Bill Pryor for a seat on the Eleventh Circuit. I have the utmost respect for my friend Attorney General Pryor and I believe if he is selected, Alabama will be proud of his service." (January 10, 2003)

The Honorable Charlie Crist, Attorney General of Florida, Tallahassee, FL

"General Pryor is well qualified for such a position as he has had a distinguished career as a public servant, practicing attorney, and law professor. . . . General Pryor began his legal career as a law clerk for the late Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit, who is renown for his landmark decision ordering and implementing desegregation. . . .

Attorney General Pryor's professional experience gives him the necessary qualification to meet the demands of the bench with honesty and uprightness, often resisting pressure from his own party in the process. He would be a valuable asset to the 11th Circuit, and I am pleased to strongly recommend him for your consideration." (April 15, 2003)

Chris McNair, Former Alabama State Representative, Birmingham, AL

"I am writing to voice my support of Alabama Attorney General Bill Pryor's nomination to the United States Court of Appeals for the Eleventh Circuit. . . . I should advise you that I am a life long Democrat [and] one of the first African-Americans elected to the Alabama House of Representatives . . . . My daughter Denise was one of the four young girls killed in the 1963 bombing of the 16th Street Baptist Church and the fulfillment of Dr. King's dream of equal rights and justice for all has been my personal crusade. . . . By designating the prosecutors [in the 16th St. bombing case] as Special Assistant Attorney Generals and by providing financial assistance through his office, he demonstrated a commitment to justice that had been long overdue. . . . I have always found [General Pryor] to be a man of honesty and integrity who attempts to follow all laws faithfully and fully. . . . In sum, I believe Bill Pryor to be a man who is committed to following the rule of law regardless of the outcome and that he is personally committed to insuring that all people receive equal justice." (June 9, 2003)

William J. Baxley, Baxley, Dillard, Dauphin, and McKnight, and Former Attorney General of Alabama, Birmingham, AL

"I too am a former Attorney General of our great state. I therefore feel comfortable assessing Bill Pryor's service in that elected office, as well as his fitness to serve the United States as a Circuit Judge. As a Democrat, I am certain I have a more unbiased frame of reference than many. As a lawyer with a diverse practice in Alabama – one which has seen me aligned with him on some occasions and against him on others – I have a better basis than most for gauging his character, fitness and ability. . . . In this regard, his willingness to be guided by pure interpretations of the law superbly qualifies him for the federal bench. He has never, to my knowledge, bowed to any pressure from constituents or special interest groups. In every difficult decision he has made, his actions were supported by his interpretation of the law, without race, gender, age, political power, wealth, community standing, or any other competing interest affecting his judgment. . . . I often disagree, politically, with Bill Pryor. This does not prevent me from making this recommendation because we need fair minded, intelligent, industrious men and women, possessed of impeccable integrity, on the Eleventh Circuit. Bill Pryor has these qualities in abundance. . . . There is no better choice for this vacancy." (April 8, 2003)

The Honorable Sue Bell Cobb, Judge, Ala. Court of Criminal Appeals, Montgomery, AL

"I write, not only as the only statewide Democrat to be elected in 2000, not only as a member of the Court which reviews the greatest portion of General Pryor's work, but also as a child advocate who has labored shoulder to shoulder with General Pryor in the political arena on behalf of Alabama's children. . . . Bill Pryor is an outstanding attorney general and is one of the most righteous elected officials in this state. He possesses two of the most important attributes of a judge: unquestionable integrity and a strong internal moral compass. . . . Bill Pryor is

exceedingly bright, and a lawyer's lawyer. He is as dedicated to the 'Rule of Law' as anyone I know. I have never known another attorney general who loved being the 'people's lawyer' more than Bill Pryor. Though we may disagree on an issue, I am always confident that his position is the product of complete intellectual honesty. He loves the mental challenge presented by a complex case, yet he never fails to remember that each case impacts people's lives." (January 21, 2003)

Dr. Joe Reed, Chairman, Alabama Democratic Conference, Montgomery, AL

"[Pryor] is a person, in my opinion, who will uphold the law without fear or favor. I believe all races and colors will get a fair shake when their cases come before him. As Attorney General for Alabama during the past six (6) years, he has been fair to all people. . . . For your information, I am a member of the Democratic National Committee and, of course, Mr. Pryor is Republican, but these are only party labels. I am persuaded that in Mr. Pryor's eyes, Justice has only one label – Justice!" (January 27, 2003)

G. Douglas Jones, Whatley Drake, Former U.S. Attorney, Northern District of Alabama, Birmingham, AL

"I am writing now, as a loyal Democrat, to support the nomination of Alabama Attorney General Bill Pryor to the 11th Circuit Court of Appeals. Bill Pryor became Alabama's Attorney General less than a year before I was sworn in as U.S. Attorney. In short order we not only formed a strong friendship, but a federal-state working partnership that I believe was second to none. . . . His personal involvement in our joint efforts was critical to he success that was realized, including the success in the [1963 16th Street Baptist] church bombing cases. . . . Despite our differences, . . . there is no question that Bill Pryor is [e]minently qualified for the federal bench. He is a brilliant lawyer whose career has been marked by fundamental fairness and an appreciation for the rule of law. He has a solid reputation for honesty and integrity that greatly contributed to his overwhelming re-election by the people [of] Alabama. I believe you will find that Bill Pryor is held in high regard by people on both sides of the political aisle and by people of all races and gender. He has provided outstanding public service to the people of Alabama and there is no doubt he will serve with even greater distinction as a federal jurist. . . . I have pledged to assist in Bill's nomination and confirmation process in any way I can." (January 31, 2003)

Kathryn Coumanis, Executive Director, Penelope House Family Violence Center, Mobile, AL

"I mentioned, to my Board at our regular meeting last Thursday, that I would be sending this letter. The entire Board of Directors of Penelope House Family Violence Center here in Mobile, AL, unanimously asked that I include them in support of this nomination. Attorney General Bill Pryor has been a long time supporter and advocate of Penelope House, and has worked tirelessly to protect women and children from the dangers of domestic violence. . . . When Bill Pryor raises his voice in support of our mission, it enables us to reach every member of our community. Attorney General Pryor not only joins us every October in celebration of domestic violence awareness month, but enables us to reach a State wide audience at every opportunity. Three

years ago he reached and touched the hearts of thousands of Alabamians when he placed a drawing by one of our shelter children on the cover of his Christmas card. Attorney General Pryor is ever vigilant regarding any funding which may become available to our programs and keeps us informed about these sources. He always supports our efforts to obtain grants, and follows and supports legislation which may be of concern to the domestic violence programs throughout our state. Bill Pryor will bring to the Federal Bench the qualities that all Americans cherish. He is loyal to his State and his Country, is a man of princip[le] and integrity, is highly intelligent, and most of all is a man who has immense compassion and respect for his fellow human beings." (March 17, 2003)

Dianne Mooney, Allocations Chair, The Women's Fund of Greater Birmingham, Birmingham, AL

"During his illustrious career General Pryor has demonstrated his compassion for the citizens of Alabama in countless ways. Of special importance to those of us who serve on the Board of Directors of The Women's Fund of Greater Birmingham has been his focus on the plight of victims of domestic violence. You may know that in 2001 General Pryor awarded Nine West Inc. settlement money to The Women's Fund to create and implement a meaningful program to combat domestic violence in Alabama. Those of us on the board went to work to maximize our AG's investment by creating CUT IT OUT Salons Against Domestic Violence that is now operating in its second year in Alabama and will be launched nationwide later this year through a professional business partnership. I sincerely hope that you will confirm General Pryor's nomination. He is more than fair and judicious and treats issues on women and minorities with great care and respect. And from a more personal standpoint, I celebrate his vision and personal courage to trust and empower others to positively impact our community and our state." (March 27, 2003)

Charles W. Colson, Founder, Prison Fellowship Ministries

"I have great admiration for Bill and support his nomination with enthusiasm. I observed Bill during his years as Attorney General of Alabama and was quite impressed. He has a firm grasp of the law, and is an articulate and forceful advocate. He used his office to speak out for reform in prison sentencing and was an ardent supporter of the Kennedy-Sessions Prison Rape Reduction Act. He also was instrumental in the passage of Alabama's Religious Freedom Restoration Act, which guarantees religious freedom for all, including prisoners. . . . While Bill is a forceful advocate, he also believes in the rule of law. When the debate ceases, Bill defends the law as it is written by the legislature or a higher court. Bill has a brilliant mind and the proper temperament for service on the Court of Appeals." (April 1, 2003)

Herc Levine, Birmingham, AL

"While I doubt that [certain] groups have taken the time to sit down and talk with Attorney General Pryor, I am proud to say that he has my support and the support of many in the Alabama Jewish Community because of his personal integrity and commitment to insure that all of our citizens are treated fairly and receive equal justice under the law. He has been a true friend to the Alabama Jewish Community on many important issues. . . . He has a well deserved reputation

for fairness and competency that cuts across party lines and which has resulted in overwhelming support from Alabamians of all political parties and segments of our society. His distinguished record as Attorney General affirms my belief that he will serve with great distinction as a Federal judge." (June 5, 2003)

Pat Nolan, President, Justice Fellowship

"Bill has shown knowledge of the law, brilliance, courage and compassion. In particular, he has forcefully spoken of the need to protect prisoners from rape, and has been effective in rallying support for the Kennedy-Sessions Prison Rape Reduction Act. . . . Bill speaks forcefully and with clarity on the important issues of the day. That is one of the things that make him such an exceptional leader. However, he reveres the rule of law, and has always subordinated his own opinions when the legislative or judicial authorities have ruled on the law." (April 1, 2003)

David G. Wirtes, Jr., Cunningham, Bounds, Yance, Crowder & Brown, L.L.C., Mobile, AL (for the firm)

"We [in the firm] are each lifelong Democrats who have substantially contributed to Democratic candidates and support Democratic principles and ideals. While we have some political differences with Attorney General Pryor, we believe that those political differences are far overshadowed by his excellent judicial qualifications and professional attributes. . . . We can confidently assure you and the members of the Judiciary Committee that Attorney General Pryor has always followed the law, whether it was to his liking or not. In other words, we have seen no evidence that Attorney General Pryor would use his position as an appellate jurist to legislate from the bench." (June 5, 2003)

Jere L. Beasley, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.

"I have known Bill since he worked for [Senator Sessions] in the Attorney General's office and I believe that he has all of the necessary qualifications to do an outstanding job on the federal bench. I am writing to support his nomination. The Attorney General and I come from different political parties and have disagreed on a number of issues. However, I have tremendous respect for him and sincerely believe that he has served the state well as Attorney General. I would have done some things differently, but that alone does not keep me from supporting him now. Bill Pryor is extremely bright and is a recognized student of the law. His character is beyond reproach and, in my opinion, he will be fair and judicious if he is nominated and confirmed by the Senate." (March 25, 2003)

JUDGE WILLIAM H. PRYOR JR.
Responses to Issues Raised by Opponents

ISSUE:

Some interest groups have claimed that Judge Pryor's personal pro-life views impact his ability to follow precedent as a judge.

RESPONSES:

That is wrong as demonstrated by his record. Indeed, as Attorney General, Judge Pryor took steps to ensure that Alabama law comported with Supreme Court precedent, without regard to his personal policy preferences.

- In 1997, the Alabama legislature passed the Alabama Partial-Birth Abortion Ban Act of 1997. The statute's plain language banned such abortions both before and after the fetus was viable, which was not consistent with Supreme Court precedent. *See* ALA. CODE §§ 26-23-1 to 26-23-6 (1997).

- Despite pressure from some to interpret and enforce the Act as broadly as possible, as Attorney General he ordered state prosecutors to read the Supreme Court's viability requirement into the Act so as to comport with Supreme Court precedent.

- As Attorney General he also made clear that he would punish those who make terrorist threats to frighten health workers, including those at abortion clinics.

- Judge Pryor testified at his hearing that his personal pro-life views would not prevent him from following Supreme Court precedent.

- After the Supreme Court's decision in *Stenberg v. Carhart,* he issued an Attorney General opinion to state prosecutors stating that Alabama's partial birth abortion law was unconstitutional and could not be enforced.

ISSUE:

Some groups have criticized Judge Pryor for relying, while Attorney General, on the Eleventh Amendment of the U.S. Constitution, under the doctrine of sovereign immunity or "federalism," to protect taxpayers in Alabama from huge money judgments.

RESPONSES:

- The Eleventh Amendment to the U.S. Constitution, under the doctrine of sovereign immunity, bars suits against a state for damages that must be paid from the public fisc absent a sufficient congressional showing under the Fourteenth Amendment. The Supreme Court's recent cases recognizing the sovereign immunity protection for state budgets began with the case of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in which Democratic Attorney General Bob Butterworth of Florida fought for and won protection for state treasuries against lawsuits.

- Keying off General Butterworth's victory, Judge Pryor, as Attorney General, asserted *Seminole Tribe*'s interpretation of sovereign immunity to protect Alabama's budget from lawsuits. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

- Numerous Democratic Attorneys General have asserted the same position as Judge Pryor, including William Sorrell (Vt.), and Jim Doyle (Wisc.). See *Powers v. Office of Child Support*, 795 A.2d 1259 (Vt. 2002); *EEOC v. Bd. of Regents of the Univ. of Wis. System*, 288 F.3d 296 (E.D. Wis. 2002).

- As Attorney General, Judge Pryor's arguments were well within the mainstream of American law. As noted throughout his nomination hearing, his arguments have frequently been accepted by the U.S. Supreme Court and held to represent the correct interpretation of the U.S. Constitution.

ISSUE:

Some have charged that Judge Pryor called for modification of Section 5 of the Voting Rights Act and is therefore against civil rights.

RESPONSES:

Judge Pryor has stated that "the Voting Rights Act is one of the greatest and most necessary laws in American history." The broad support for Judge Pryor by civil rights leaders who know his record demonstrates his full commitment to full and equal rights for all.

- As Attorney General, he has expressed some concern that Congress should consider minor changes to that vital law to end procedural and political abuses that do not affect minority voters and were never intended by Congress. At his nomination hearing, Judge Pryor noted that he has "watched in my own capacity as Attorney General as members of my own political party and white voters, who I don't think were designed by Congress to be protected by this law, have used Section 5 as a sword in litigation for their own political opportunity." He further stated that the fact some changes in Section 5 are appropriate "does not lessen in any way my commitment to the core of the Voting Rights Act, which is Section 2 . . . and I fully support Section 2 and believe it remains a necessary law in our country."

- In litigation, he has successfully defended several redistricting plans adopted by the Alabama Legislature when those plans fulfilled the Voting Rights Act but were challenged by white voters and members of his own political party. In 2000, he won a unanimous ruling from the Supreme Court of the United States that prevented white voters from challenging majority black legislative districts in which the white voters did not reside.

- Democratic Attorneys General have spoken of the need to improve Section 5 of the Act. In Georgia, the State appealed to the United States Supreme Court in order to have its recent redistricting plan approved. In his brief before the Supreme Court, Thurbert Baker, the African-American Democratic Attorney General of Georgia, called Section 5 an "extraordinary transgression of the normal prerogatives of the states" and "a grave intrusion into the authority of the states."

- Judge Pryor helped start the drive to rid the Alabama Constitution of its racist prohibition on interracial marriage, and ultimately was victorious in November 2000. As Attorney General and working with a coalition that included the NAACP, Judge Pryor persuaded the Alabama Legislature to allow a vote on repealing the ban, and the Legislature ultimately agreed.

- Judge Pryor has been praised by a broad range of Alabama African-American leaders for his civil rights record and fairness, including Congressman Artur

Davis, Dr. Joe Reed, chairman of the Alabama Democratic Conference, Alabama Rep. Alvin Holmes, and Cleo Thomas, Secretary of the Alabama Democratic Party.

- As Attorney General, he worked with and appointed former Democratic U.S. Attorney Doug Jones to successfully prosecute former Ku Klux Klansmen Bobby Frank Cherry and Thomas Blanton Jr. for the 1963 bombing of the 16th Street Baptist Church in Birmingham, Alabama. As Attorney General, Judge Pryor personally argued the appeal in the case.

ISSUE:

Some groups have criticized Judge Pryor for defending Alabama's law against sodomy in *Lawrence v. Texas.*

RESPONSES:

- As Attorney General, he had a duty to defend the laws of Alabama against constitutional attack, whether or not he agrees personally with such laws or would have voted for them. Judge Pryor filed a brief in the case because if the Supreme Court struck down the Texas law in a broad manner, Alabama's law would also be invalid.

- Judge Pryor advanced an argument based squarely on Supreme Court precedent upholding such laws. Much of Alabama's brief, including passages most often cited by Pryor opponents, was drawn directly from Justice White's majority opinion in the Supreme Court case *Bowers v. Hardwick.*

- As Attorney General, he immediately acted to comply with the Court's decision in the Texas sodomy case . He issued a release stating that "The Court today expressly overruled its 1986 decision in *Bowers v. Hardwick.* This new interpretation of the Constitution means that the law of Alabama, specifically Section 13A-6-65 (a)(3), which prohibits consensual sodomy between unmarried persons, is now unenforceable."

ISSUE:

Judge Pryor defended prison guards who handcuffed prisoners, who fought with other prisoners or refused to work, to a restraining bar. There have been various statements made that the prisoners were denied food, bathroom breaks, and left in the hot sun for many hours.

RESPONSES:

- At any point in time a prisoner could agree to work and be released from the restraining bar. The prisoner in the case never alleged that the guards he sued for money damages failed to provide him with food, water, bathroom breaks, or anything else required by the regulation.

- Pursuant to his duty as Attorney General, Judge Pryor defended state employees against personal monetary liability because state officials are protected by qualified immunity unless their conduct violates clearly established statutory or constitutional rights which a reasonable person would have known. Federal courts, including the Eleventh Circuit in 2001, agreed with Judge Pryor that there was no clear violation of law. The U.S. Supreme Court heard the case on appeal from the Eleventh Circuit and Judge Pryor had a duty to defend the state officials before the Court.

ISSUE:

Some groups have charged that Judge Pryor does not believe in the separation of church and state.

RESPONSES:

- Judge Pryor's record demonstrates his commitment to religious freedom and the separation of church and state. He advocated in court against the position of the Governor who appointed him concerning religious expression in public schools. The Governor argued, among other things, that teachers should be able to lead prayers. As Attorney General, Judge Pryor took the position that there could be no school-sponsored, government-sponsored religious activity, but that genuinely student-initiated religious expression was protected by the First Amendment. His position was upheld twice by the Eleventh Circuit.

- Judge Pryor worked tirelessly to promote the passage of the Alabama Religious Freedom Amendment ("ARFA") to the Alabama Constitution, which helps protect the religious freedom of political and religious minorities such as Native Americans and prisoners.

- In recognition for his efforts to promote the passage of ARFA and include protections for prisoners within its ambit, Judge Pryor was honored with the 1999 Guardian of Religious Freedom Award by Prison Fellowship Ministries, the Justice Fellowship, and Neighbors Who Care.

- Judge Pryor has used ARFA to try to protect the religious liberties of a Jewish congregation, Temple B'nai Sholom in Huntsville, AL. Members of the congregation have worshiped at the temple since 1899. The congregation wanted to demolish a dilapidated house on nearby property for future expansion of its sanctuary. The city's preservation commission refused permission. The congregation, which did not have enough money to restore the house, sued in federal court. As Attorney General, Judge Pryor's office intervened in the case on the side of the temple, contending that the denial of permission constituted an infringement on religious liberty.

- Alabama Supreme Court Chief Justice Roy Moore retained separate counsel to represent him in the litigation concerning Justice Moore's display of the Ten Commandments. As Attorney General, Judge Pryor did not join in certain arguments made by Justice Moore's counsel, including claims concerning the applicability of the Bill of Rights to the States. Judge Pryor's argument that the display was consistent with Supreme Court precedent is within the legal mainstream. In addition, as Attorney General, Judge Pryor supported Justice Moore's primary opponent in the election campaign.

- Judge Pryor, while Attorney General, represented the State and personally prosecuted charges against Justice Moore that ultimately led to Justice Moore's removal from office for defiance of federal court orders.

ISSUE:

Some groups have claimed that Judge Pryor's fundraising activities as part of the Republican Attorney Generals Association (RAGA) were improper or his testimony was inconsistent with RAGA documents.

RESPONSES:

- Judge Pryor has always stated that he helped to raise money for his party and his campaigns and that is a part of our electoral process. At his Judiciary Committee hearing, Judge Pryor stated: "[S]tate Attorneys General are already raising campaign funds in races in their own States, working with their own State political parties. . . . The system we have in America of elections requires candidates to raise funds to wage campaigns."

- Judge Pryor has never stated that Alabama companies did not contribute to RAGA or that he did not solicit companies for contributions. Instead, Judge Pryor testified he would make calls but he did not maintain membership or contribution lists of RAGA, which was handled by staff members, and did not have lists of who contributed or which companies became RAGA members.

- Indeed, despite claims of alleged inconsistencies, no one has pointed to a single instance in which Judge Pryor gave untruthful testimony, either at his hearing or in his answers to written questions.

- According to statements at Senate Judiciary Committee hearings, the Democratic staff of the Senate Judiciary Committee refused to ask a single question of Judge Pryor despite his being available to answer any question from them on at least two separate occasions. On neither occasion did Democratic staff ask a single question or request clarification from Judge Pryor regarding any RAGA-related issue.

- According to then-Chairman Hatch at a Judiciary Committee hearing, the baseless charges are "pure politics, pure delay."

Alabama Democratic Conference

P.O. Box 6233
MONTGOMERY, ALABAMA 36106

JOE L. REED
CHAIRMAN

January 27, 2003

The President
The White House
Washington, D. C. 20500

RE: Alabama Attorney General Bill Pryor

Dear Mr. President:

Through the news media, it has come to my attention that you now have under consideration Attorney General Bill Pryor for appointment as Circuit Judge to the United States 11th Circuit Court of Appeals, of which Alabama is a part. I take this unusual opportunity to urge you to appoint him.

Attorney General Pryor will make a first-class Judge because he is a first-class lawyer and is a first-class public official. He is a person, in my opinion, who will uphold the law without fear or favor. I believe all races and colors will get a fair shake when their cases come before him. As Attorney General for Alabama during the past six (6) years, he has been fair to all people.

For your information, I am a member of the Democratic National Committee and, of course, Mr. Pryor is Republican, but these are only party labels. I am persuaded that in Mr. Pryor's eyes, Justice has only one label – Justice!

I am satisfied that if you appoint Mr. Pryor to the Bench, and he is confirmed by the Senate, he will be a credit to the Judiciary and will be a guardian for justice. I urge you to appoint Mr. Pryor to this important court.

Sincerely,

Joe L. Reed
Chairman

cc: Attorney General John Ashcroft
Senator Richard Shelby
Senator Jeff Sessions
Senator Patrick J. Leahy

STATE OF ALABAMA
HOUSE OF REPRESENTATIVES
MONTGOMERY, ALABAMA 36130

ALVIN HOLMES
POST OFFICE BOX 6064
MONTGOMERY, ALABAMA 36106

DISTRICT NO. 78
CAPITOL OFFICE 334/242-7706
MONTGOMERY OFFICE 334/264-7807

June 5, 2003

Senator Orrin G. Hatch, Chairman
Committee on the Judiciary
United States Senate
104 Hart Office Building
Washington, D.C. 20510

Senator Patrick J. Leahy, Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Sirs:

Please accept this as my full support and endorsement of Alabama's Attorney General Bill Pryor to the United States Court of Appeals for the 11th Circuit.

I am a black member of the Alabama House of Representatives having served for 28 years. During my time of service in the Alabama House of Representatives I have led most of the fights for civil rights of blacks, women, lesbians and gays and other minorities. (See attachments)

I consider Bill Pryor as a moderate on the race issue:

1. From 1998 to 2000, Bill Pryor sided with the NAACP against a white Republican lawsuit that challenged the districts for the Legislature. Pryor fought the case all the way to the U. S. Supreme Court and won a unanimous ruling in *Sinkfield v. Kelley*, 531 U.S. 28 (2000). The lawsuit was filed by Attorney Mark Montiel, a white Republican, and the 3-judge district court ruled 2 to 1 in favor of Montiel. Two Republicans (Cox and Albritton) ruled in favor of Montiel while Judge Myron Thompson, (a black

Democrat) agreed with Pryor that Montiel's white clients had no standing to challenge black districts in which the whites did not live.

2. In 2001 and 2002, Bill Pryor sided with the Legislature when it redrew districts for Congress, the Legislature, and State Board of Education. Mark Montiel filed lawsuits in federal court (*Montiel v. Davis*) challenging the black districts as racial gerrymanders. Pryor won every lawsuit. Pryor came under heavy pressure from other white Republicans in Alabama for fighting to protect black Legislative seats.

3. Bill Pryor worked with U.S. Attorney Doug Jones to prosecute KKK murderers Blanton and Cherry for the September 15, 1963, bombing of the Sixteenth Street Baptist Church that Killed four little girls. Bill Pryor personally argued to uphold Blanton's conviction before the Alabama Court of Criminal Appeals on May 20, 2003.

4. Bill Pryor drafted the law (Ala. Code §12-25-2(a)(2)) that created the Alabama Sentencing Commission with the stated purpose of ending racial disparities in criminal punishments.

5. In 2000, Bill Pryor started Mentor Alabama – a program to recruit positive adult role models for thousands of at-risk youth which 99% were black. For the last three years, Bill Pryor has worked every week as a reading tutor for black children in a Montgomery public school.

6. In 2000, I introduced a bill in the Alabama Legislature to amend the Alabama Constitution repealing Alabama's racist ban on interracial marriage. Every prominent white political leader in Alabama (both Republican and Democrat) opposed my bill or remained silent except Bill Pryor who openly and publicly asked the white and black citizens of Alabama to vote and repeal such racist law. It was passed with a slim majority among the voters and Bill Pryor later successfully defended that repeal when the leader of a racist group called the "Confederate Heritage" sued the State to challenge it.

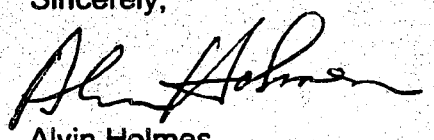
7. I sponsored HB534 this Legislative Session establishing cross burning as a felony. Said bill passed the Alabama House of Representatives on May 15th 2003. That bill was written by Bill Pryor and he was the only white leader in Alabama that openly and publicly supported it.

Finally, as one of the key civil rights leaders in Alabama who has participated in basically every major civil rights demonstration in America,

who has been arrested for civil rights causes on many occasions, as one who was a field staff member of Dr. Martin Luther King's SCLC, as one who has been brutally beaten by vicious police officers for participating in civil rights marches and demonstrations, as one who has had crosses burned in his front yard by the KKK and other hate groups, as one who has lived under constant threats day in and day out because of his stand fighting for the rights of blacks and other minorities, I request your swift confirmation of Bill Pryor to the 11th Circuit because of his constant efforts to help the causes of blacks in Alabama.

Thanks for your consideration.

Sincerely,



Alvin Holmes
State Representative

cc: Members of the Committee on the Judiciary
United States Senate

HOUSE OF REPRESENTATIVES

SETH HAMMETT
Speaker

11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
334-242-7668

July 14, 2003

The Honorable Orrin G. Hatch, Chair
United States Senate
Committee on the Judiciary
104 Hart Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am writing to convey my unwavering support for the nomination of William H. Pryor, Jr. to be United States Circuit Judge for the Eleventh Circuit.

Contrary to the perception that has been created in Washington, I know Bill Pryor to be a fair and balanced person. He follows the letter and spirit of the law.

He has a distinguished career working in the judicial system, in private practice and serving the citizens of Alabama as Attorney General since 1997.

I have served as a Democrat in the Alabama House of Representatives for 25 years and as Speaker of the House for five years. I have never worked with anyone more non-partisan than Bill Pryor.

I sincerely hope the U.S. Senate Committee on the Judiciary will confirm the nomination of Bill Pryor. I give him my highest recommendation.

Sincerely,

Seth Hammett

cc: Senator Richard Shelby
Senator Jeff Sessions
Attorney General Bill Pryor

ARTUR DAVIS
7TH DISTRICT, ALABAMA

208 CANNON
HOUSE OFFICE BUILDING
202-225-2665

Congress of the United States
House of Representatives
Washington, DC 20515–0107

January 10, 2003

Via Hand Delivery

Honorable Jeff Sessions
United States Senator
493 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

Thank you for all of your kindness during the transition period. You and the rest of the Alabama Delegation have made me feel very welcome.

As you know, several pending vacancies on the Alabama federal bench are attracting attention back home. I understand that the President may be considering Attorney General Bill Pryor for a seat on the Eleventh Circuit. I have the utmost respect for my friend Attorney General Pryor and I believe if he is selected, Alabama will be proud of his service.

In the near future, as openings occur on the District Court, I encourage you to view this as an opportunity to diversify the federal bench. Unfortunately only two African Americans have ever served as federal district judges in Alabama. I believe that a review of the most qualified judicial candidates will inevitably lead to the inclusion of black attorneys. I strongly encourage you to consider recommending for nomination several outstanding black attorneys who have distinguished themselves. I know you would agree that Alabama deserves a federal bench that looks like Alabama.

Thank you very much for your attention to this matter. I look forward to working together over the coming months and years.

Best wishes,

Artur Davis
Member of Congress

Department of Law
State of Georgia

THURBERT E. BAKER
ATTORNEY GENERAL

40 CAPITOL SQUARE SW
ATLANTA GA 30334-1300

March 31, 2003

The Honorable Richard Shelby
United States Senate
110 Hart Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators:

I have had the great pleasure of knowing and working with Bill Pryor over the past five years. Through the National Association of Attorneys General, Bill and I have worked together on matters of mutual concern to Georgia and Alabama. During that time, Bill has distinguished himself time and again with the legal acumen that he brings to issues of national or regional concern as well as with his commitment to furthering the prospects of good and responsive government.

During his tenure as Attorney General, Bill has made combating white-collar crime and public corruption one of the centerpieces of his service to the people of Alabama. He joined the efforts of Attorneys General around the country in fighting the rising tide of identity theft, pushing through legislation in the Alabama legislature making identity theft a felony in Alabama. Bill has fought to keep law enforcement in Alabama armed with appropriate laws to protect Alabama's citizens, pushing for tough money laundering provisions and stiff penalties for trafficking in date rape drugs.

Time and again as Attorney General, Bill has taken on public corruption cases in Alabama, regardless of how well-connected the defendant may be, to ensure that the public trust is upheld and the public's confidence in government is well-founded. He has worked with industry groups and the Better Business Bureau to crack down on unscrupulous contractors who victimized many of Alabama's more vulnerable citizens.

From the time that he clerked with the late Judge Wisdom of the 5th Circuit to the present, though, the most critical asset that Bill Pryor has brought to the practice of law is his zeal to do what he thinks is right. He has always done what he thought was best for the people of Alabama. Recognizing a wrong that had gone on far too long, he took the opportunity of his inaugural address to call on an end to the ban on inter-racial marriages in Alabama law. Concerned about

at-risk kids in Alabama schools, he formed Mentor Alabama, a program designed to pair volunteer mentors with students who needed a role model and an attentive ear to the problems facing them on a daily basis.

These are just a few of the qualities that I believe will make Bill Pryor an excellent candidate for a slot on the 11th Circuit Court of Appeals. My only regret is that I will no longer have Bill as a fellow Attorney General fighting for what is right, but I know that his work on the bench will continue to serve as an example of how the public trust should be upheld.

Sincerely,

Thurbert E. Baker

Thurbert E. Baker

STATE OF FLORIDA

CHARLIE CRIST
ATTORNEY GENERAL

April 15, 2003

The Honorable Bob Graham
United States Senate
524 Hart SOB
Washington, DC 20510

Re: Nomination of Attorney General Bill Pryor to the 11th Circuit, U.S. Court of Appeals Judgeship

Dear Senator Graham:

I would like to recommend to you the appointment of Alabama Attorney General Bill Pryor to the 11th Circuit, U.S. Court of Appeals.

General Pryor is well qualified for such a position as he has had a distinguished career as a public servant, practicing attorney, and law professor. He attended Tulane University School of Law, where he graduated *magna cum laude* in 1987 and was editor-in-chief of the *Tulane Law Review*. General Pryor began his legal career as a law clerk for the late Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit, who is renown for his landmark decisions ordering and implementing desegregation.

General Pryor practiced law from 1988 to 1995 at two well-established Birmingham law firms before being hired in 1995 by then Attorney General Sessions as Deputy Attorney General in charge of special civil and constitutional litigation. He was appointed in 1997 by Governor Fob James as Attorney General of Alabama. In 1998 he was elected by the citizens of Alabama to a four-year term and re-elected to a second four-year term in 2002.

Attorney General Pryor's professional experience gives him the necessary qualifications to meet the demands of the bench with honesty and uprightness, often resisting pressure from his own party in the process. He would be a valuable asset to the 11th Circuit, and I am pleased to strongly recommend him for your consideration.

Sincerely,

Charlie Crist

CC/jm

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 20, 2003

United States Senator Ernest F. Hollings
125 Russell Senate Office Building
Washington, DC 20510

Dear Senator Hollings,

I am writing in support of the nomination of my friend Alabama Attorney General William Pryor to the Eleventh Circuit Court of Appeals.

General Pryor was appointed Alabama's Attorney General in 1997 to the vacancy created by the election of your colleague Jeff Sessions to the United States Senate. General Pryor was then elected in his own right in 1998 and reelected in 2002. When he was first elected, General Pryor was the youngest Attorney General in the nation and was reelected last year with the largest margin of any candidate running statewide in Alabama.

Since his election, General Pryor has earned an outstanding reputation for his work in the area of juvenile justice reform and his relentless prosecution of public corruption, welfare and workers' compensation fraud, and white-collar crime.

In addition to his experience in the attorney general's office, General Pryor also served as a law clerk to the late distinguished jurist John Minor Wisdom of the Fifth Circuit Court of Appeals. I believe General Pryor's broad experience makes him uniquely qualified to serve as a member of the Eleventh Circuit Court of Appeals with fairness and impartiality.

I strongly urge you to support his nomination.

Yours very truly,

Henry McMaster

HMcM:gm

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June 9, 2003

Senator Orrin Hatch
Chairman
Judiciary Committee
U. S. Senate
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am writing to voice my support of Alabama Attorney General Bill Pryor's nomination to the United States Court of Appeals for the Eleventh Circuit. In my opinion he will make an outstanding federal jurist.

By way of background, I should advise you that I am a life long Democrat. I was one of the first African-Americans elected to the Alabama House of Representatives where I served from 1973 to 1986. In 1986 I was elected as one of the two African-American members of the Jefferson County Commission, where I remained until my retirement from public service in 2001. In addition, I have been active in numerous civil rights activities over the years. My daughter Denise was one of the four young girls killed in the 1963 bombing of the 16th Street Baptist Church and the fulfillment of Dr. King's dream of equal rights and justice for all has been my personal crusade.

Unfortunately, Bill Pryor's record on civil rights is being distorted. As Attorney General, he has enforced the Voting Rights Acts, which he has described as one of the greatest and most necessary laws in American history. Although he has expressed some concern with certain procedural aspects of the law, his support for the Voting Rights Act and what it stands for has not wavered. In fact, he has successfully defended redistricting plans that were challenged by white voters and members of his own political party.

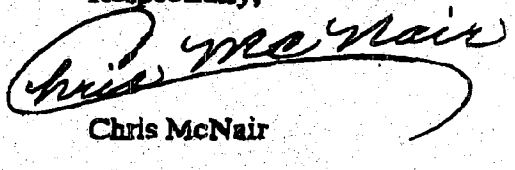
While Bill Pryor's tenure as Attorney General of Alabama has been marked by a number of cases in which he took stands that I do not personally agree with, I have always found him to be a man of honesty and integrity who attempts to follow all laws faithfully and fully. I firmly believe he will do the same as a court of appeals judge.

On a more personal note, Bill Pryor's personal support for the recent trials of the men convicted of bombing the 16th Street Baptist Church and the murder of my daughter has meant a lot to my family and this community. By designating the prosecutors as Special Assistant Attorney Generals and by providing financial assistance through his office, he demonstrated a commitment to justice that had been long overdue. I had numerous conversations with him about these cases and his desire to see that justice was done. His commitment to the cases was sincere and has been very much appreciated.

45 Sixth Avenue South ● Birmingham, Alabama 35205 ● Office 205.322.2685 ● Fax 205.322.2684
E-mail: mcnairstudios@bellsouth.net

In sum, I believe Bill Pryor to be a man who is committed to following the rule of law regardless of the outcome and that he is personally committed to insuring that all people receive equal justice. I hope that the Judiciary Committee will vote favorably on his nomination.

Respectfully,



Chris McNair

cc: Senator Jeff Sessions
Senator Richard Shelby

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
300 DEXTER AVENUE, P. O. BOX 301555
MONTGOMERY, ALABAMA 36130-1555

SUE BELL COBB
Judge

(334) 242-4615
(334) 242-4689 FAX

January 21, 2003

The Honorable George W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Nomination of Attorney General Bill Pryor

Dear Mr. President:

I have had the good fortune to recommend a variety of people for a variety of positions. Never have I been more honored or confident about a recommendation than I am as I write on behalf of my dear friend and Alabama Attorney General, Bill Pryor.

In November of 2000, both you and I were on the ballot. As I stood for reelection for my second term on the Alabama Court of Criminal Appeals, I became the only statewide Democrat to survive the 2000 election. Hence, I write, not only as the only statewide Democrat to be elected in 2000, not only as a member of the Court which reviews the greatest portion of General Pryor's work, but also as a child advocate who has labored shoulder to shoulder with General Pryor in the political arena on behalf of Alabama's children. It is for these reasons and more that I am indeed honored to recommend General Pryor for nomination to the 11th Circuit Court of Appeals.

Bill Pryor is an outstanding attorney general and is one of the most righteous elected officials in this state. He possesses two of the most important attributes of a judge: unquestionable integrity and a strong internal moral

Not printed or mailed at state expense.

compass. Whether he is reviewing hundreds of appellate briefs to ensure the quality of the work his assistants submit to this court, whether he is preparing to argue one of my cases to the United States Supreme Court,[1] whether he is using his considerable influence to encourage Alabama legislators to make children a top priority, or whether he is in his weekly tutoring session with an "at-risk" child, Bill Pryor is proving that he is a true public servant.

Bill Pryor is exceedingly bright, and a lawyer's lawyer. He is as dedicated to the "Rule of Law" as anyone I know. I have never known another attorney general who loved being the "people's lawyer" more than Bill Pryor. Though we may disagree on an issue, I am always confident that his position is the product of complete intellectual honesty. He loves the mental challenge presented by a complex case, yet he never fails to remember that each case impacts people's lives.

A sportscaster once said about a former Atlanta Braves player, Terry Pendleton, "[H]e does the right thing, because it is the right thing to do." That, Mr. President, perfectly describes Bill Pryor. Hence, it is my profound honor to urge you to nominate a great Alabamian, General Bill Pryor, to the 11th Circuit Court of Appeals.

I would be honored to assist you in any way in making General Pryor's nomination and confirmation a reality. With best regards, I remain,

Most Sincerely,

Sue Bell Cobb

Sue Bell Cobb
Judge

CC: Justice Alberta "Al" Gonzales
The Honorable John Ashcroft

[1] See, e.g., Alabama v. Shelton, 535 U.S. 654 (2002).

CERVERA, RALPH & BUTTS
ATTORNEYS AT LAW

N.J. CERVERA
FRANK P. RALPH
JUSTICE TERRY L. BUTTS
(Alabama Supreme Court, ret.)

MALCOLM W. MCSWEAN
GRADY A. REEVES
RUTH L. PAWLIK

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TROY, ALABAMA 36081

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TELECOPIER: (334) 566-4073
E-MAIL: troylaw@troycable.net

June 9, 2003

VIA FACSIMILE and US MAIL
Senator Richard C. Shelby
110 Hart Senate Office Building
Washington, DC 20510

Senator Jeff Sessions
493 Russell Building
Washington, DC 20510

RE: William H. Pryor, Jr.

Dear Sirs:

Please accept my whole-hearted endorsement of Alabama Attorney General William H. "Bill" Pryor, Jr. for confirmation on the United States 11th Circuit Court of Appeals. As much as anyone, perhaps I may be uniquely qualified to assess his qualifications and abilities as outlined hereinafter.

In 1998, I retired from the Alabama Supreme Court and was the democratic nominee for attorney general. My opponent was incumbent Attorney General Bill Pryor. As in all politics, the campaign did "opposition research" on Bill. Frankly, there were neither "skeletons," nor anything else of any merit to use against him. Bill Pryor won that election and I came to know him well.

While serving on the Alabama Supreme Court, I had ample opportunity not only to observe Bill Pryor both personally and professionally, but also to read the outstanding legal briefs he filed with the Court. I do not recall a single instance in any criminal case brief that he filed before the Court in which I did not vote for and agree with his legal position.

Since 1998, I have had the pleasure of working with Attorney General Bill Pryor in several cases. We have even traveled together from Montgomery, Alabama to Birmingham, Alabama while representing our respective clients. This gave me an even greater opportunity to observe and come to really know him. I have also visited with him many times in his office. Additionally, my wife and I have socialized with Bill and his

lovely wife, Chris, and their two adorable children, Victoria and Caroline.

If called upon to do so, I could speak or write voluminously about my respect for Attorney General Pryor. However, suffice it to say the following:

1. Attorney General Bill Pryor is extremely intelligent and articulate. He enjoys a quick grasp of legal issues, coupled with an excellent ability to state them , be it in legal briefs or oral arguments. There is simply no question about his ability to serve as a federal circuit judge.

2. While some single issue oriented individuals may oppose Bill's confirmation for whatever reason, I find that he has the courage of his convictions. As attorney general, he has steadfastly applied the law even-handedly and without favor to any individual, often to his political detriment. He has never let politics or self-advancement stand in the way of enforcing the law. So if you will forgive a little inelegant colloquialism, as I have said to Bill many times: "Bill, you've got more guts than a hog." (One of the ultimate compliments you could pay a man in rural Crenshaw County, Alabama where I grew up).

3. Aside from Bill's legal qualifications, he is a practicing Christian and a morally upright man. As mentioned above, he has a wonderful family with a gifted wife who works as a CPA. I also have had the opportunity of knowing Bill's parents. They too are fine people enjoying great reputations.

4. Attorney General Pryor enjoys widespread, across-the-board support in Alabama for a seat on the 11th Circuit. This support includes minority groups and their respective leaders, all aspects of the law enforcement community, judges, attorneys and a host of others. This in and of itself should reveal the respect Alabama citizens hold for Bill Pryor.

5. You may also be interested in the fact that when Attorney General Pryor ran for reelection in 2002, I broke ranks with the democrats and publicly endorsed and campaigned for his reelection. I also "put my money where my mouth was" by contributing to his campaign. This should show the appreciation I have for the job he has done as attorney general, as well as the friendship I bear him.

Finally, suffice it to say, I believe Bill Pryor possesses the temperament, the

ability, and the moral compass to serve our country as a judge on the 11th Circuit Court of Appeals. He is a very principled person. I urge his confirmation.

Thank you.

Yours very truly,

Terry L. Butts

PS: Because I believe so strongly that Bill should be confirmed, I would be more than willing to testify publicly on his behalf if that will help.

BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
ATTORNEYS AT LAW
2008 THIRD AVENUE SOUTH
BIRMINGHAM, ALABAMA 35233

WILLIAM J. BAXLEY
JOEL E. DILLARD
CHARLES A. DAUPHIN
DAVID McKNIGHT
WILLIAM C. BARCLIFT, III
RANDY JAMES
ELIZABETH W. McELROY
S. JOSHUA BRISKMAN

TELEPHONE
(205) 271-1100
TELECOPIER
(205) 271-1108

April 8, 2003

VIA FAX TO 202-224-3149 AND FIRST CLASS MAIL
The Honorable Jeff Sessions
493 Russell Senate Office Building
Washington, D. C. 20510

Re: Recommendation of Bill Pryor/Eleventh Circuit Court of Appeals

Dear Senator Sessions:

Media reports confirm that Alabama's Attorney General, Bill Pryor, has been nominated to fill the vacancy which now exists on the Eleventh Circuit.

As you well know, I too am a former Attorney General of our great state. I therefore feel comfortable assessing Bill Pryor's service in that elected office, as well as his fitness to serve the United States as a Circuit Judge. As a Democrat, I am certain I have a more unbiased frame of reference than many. As a lawyer with a diverse practice in Alabama – one which has seen me aligned with him on some occasions and against him on others – I have a better basis than most for gauging his character, fitness and ability.

Bill Pryor is a completely independent man of unwavering convictions. He courageously takes positions dictated by his conscience and does so based upon a truly intellectual sense of right and wrong. In this regard, his willingness to be guided by pure interpretations of the law superbly qualifies him for the federal bench. He has never, to my knowledge, bowed to any pressure from constituents or special interest groups. In every difficult decision he has made, his actions were supported by his interpretation of the law, without race, gender, age, political power, wealth, community standing, or any other competing interest affecting his judgment. This is a rare accomplishment, and the core reason for this, my highest and best recommendation.

I often disagree, politically, with Bill Pryor. This does not prevent me from making this recommendation because we need fair minded, intelligent, industrious men and women, possessed of impeccable integrity, on the Eleventh Circuit. Bill Pryor has these qualities in abundance. I am certain he will be guided completely by his conscience and afford a balanced analysis to every case before him, without unfair advantage to any litigant. There is no better choice for this vacancy.

Respectfully yours,

William J. Baxley

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G. Douglas Jones
writer's direct:
(205) 488-1215

writer's e-mail address: djones@whatleydrake.com

January 31, 2003

Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Alabama Attorney General Bill Pryor

Dear General Ashcroft:

I hope you will recall a brief telephone conversation we had in early May, 2001, when you called to congratulate me on the successful prosecution of a former member of the Ku Klux Klan for the murder of four young girls who died in September, 1963, when a bomb exploded at the 16 th Street Baptist Church in Birmingham. As the Democratic U. S. Attorney for the Northern District of Alabama, I was grateful for your administration's willingness to allow me to remain in office to complete that important case and truly appreciated your personal telephone call. I am writing now, as a loyal Democrat, to support the nomination of Alabama Attorney General Bill Pryor to the 11th Circuit Court of Appeals.

Bill Pryor became Alabama's Attorney General less than a year before I was sworn in as U. S. Attorney. In short order we not only formed a strong friendship, but a federal-state working partnership that I believe was second to none. As I am sure you are aware, the working relationships between federal and state law enforcement are often very fragile, especially when the law enforcement leadership is of different political parties. Our partnership, however, was built on mutual respect, trust and a shared desire to serve the citizens we represented. His personal involvement in our joint efforts was critical to the success that was realized, including the success in the church bombing cases.

Interestingly, while Bill and I found ourselves in agreement on so many criminal justice issues, including the manner in which law enforcement and prosecutorial functions should be carried out, we have many fundamental differences on civil and domestic issues. Despite our differences, however, there is no question that Bill Pryor is imminently qualified for the federal

bench. He is a brilliant lawyer whose career has been marked by fundamental fairness and an appreciation for the rule of law. He has a solid reputation for honesty and integrity that greatly contributed to his overwhelming re-election by the people Alabama.

I believe you will find that Bill Pryor is held in high regard by people on both sides of the political aisle and by people of all races and gender. He has provided outstanding public service to the people of Alabama and there is no doubt he will serve with even greater distinction as a federal jurist. I sincerely hope that he will receive a favorable recommendation from the Department of Justice and that his name will be forwarded by the President for confirmation by the Senate.

I have pledged to assist in Bill's nomination and confirmation process in any way I can. Please do not hesitate to call on me.

Cordially,

/G. Douglas Jones

GDJ:kwk
cc: Honorable Larry Thompson, Deputy Attorney General
Honorable Bill Pryor

THE WOMEN'S FUND

March 27, 2003

BOARD OF DIRECTORS

Senator Jeff Sessions
493 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

I'm writing today in support of the nomination of Attorney General Bill Pryor to the Eleventh Circuit Court of Appeals. During his illustrious career General Pryor has demonstrated his compassion for the citizens of Alabama in countless ways. Of special importance to those of us who serve on the Board of Directors of The Women's Fund of Greater Birmingham has been his focus on the plight of victims of domestic violence.

You may know that in 2001 General Pryor awarded Nine West Inc. settlement money to The Women's Fund to create and implement a meaningful program to combat domestic violence in Alabama. Those of us on the board went to work to maximize our AG's investment by creating *CUT IT OUT Salons Against Domestic Violence* that is now operating in its second year in Alabama and will be launched nationwide later this year through a professional business partnership.

I sincerely hope that you will confirm General Pryor's nomination. He is more than fair and judicious and treats issues on women and minorities with great care and respect. And from a more personal standpoint, I celebrate his vision and personal courage to trust and empower others to positively impact our community and our state.

Sincerely yours,

Dianne Mooney

Dianne Mooney
Allocations Chair
The Women's Fund of Greater Birmingham

THE WOMEN'S FUND OF GREATER BIRMINGHAM
A component fund of The Community Foundation of Greater Birmingham
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Penelope House
Family Violence Center

ADMINISTRATIVE OFFICE
(251) 342-2809
FAX: (251) 414-3581
SHELTER
(251) 342-3144
24-HOUR CRISIS LINE
(251) 342-8994
FAX: (251) 342-4174

March 17, 2003

Dear Senators Session and Shelby,

I understand that Attorney General Bill Pryor is being considered for an appointment to the Eleventh Circuit Court of Appeals. I would welcome such a nomination. I mentioned, to my Board at our regular meeting last Thursday, that I would be sending this letter. The entire Board of Directors of Penelope House Family Violence Center here in Mobile, AL, unanimously asked that I include them in support of this nomination.

Attorney General Bill Pryor has been a long time supporter and advocate of Penelope House, and has worked tirelessly to protect women and children from the dangers of domestic violence. To show his love and support for our efforts to assist victims of domestic violence, he has attended our Kiss A Cop celebration every October for the past five years. October is Domestic Violence Awareness month, and for the past 18 years Penelope House has held a luncheon, which we call Kiss A Cop, to honor and recognize the efforts of our local and state law enforcement officials with whom we partner in our efforts to protect and serve victims of domestic violence. When Bill Pryor raises his voice in support of our mission, it enables us to reach every member of our community. Attorney General Pryor not only joins us every October in celebration of domestic violence awareness month, but enables us to reach a State wide audience at every opportunity. Three years ago he reached and touched the hearts of thousands of Alabamians when he placed a drawing by one of our shelter children on the cover of his Christmas card.

Attorney General Pryor is ever vigilant regarding any funding which may become available to our programs and keeps us informed about these sources. He always supports our efforts to obtain grants, and follows and supports legislation which may be of concern to the domestic violence programs throughout our state.

Bill Pryor will bring to the Federal Bench the qualities that all Americans cherish. He is loyal to his State and his Country, is a man of principal and integrity, is highly intelligent, and most of all is a man who has immense compassion and respect for his fellow human beings.

Sincerely,

Kathryn Coumanis

Kathryn Coumanis, MSW, EdD
Executive Director

LAW OFFICES

Cunningham, Bounds, Yance, Crowder and Brown, L.L.C.

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* (also admitted in Georgia)
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June 5, 2003

VIA E-MAIL AND FACSIMILE

Senator Patrick J. Leahy
Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin
Senator John Edwards

Re: Nomination by Senator Jeff Sessions of Alabama Attorney General William Pryor to the United States Court of Appeals for the Eleventh Circuit

Dear Senators Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, Durbin and Edwards:

Please accept this letter as our law firm's united endorsement of Senator Jeff Sessions's nomination of Alabama Attorney General William Pryor to the United States Court of Appeals for the Eleventh Circuit.

We are each lifelong Democrats who have substantially contributed to Democratic candidates and supported Democratic principles and ideals. While we have some political differences with Attorney General Pryor, we believe that those political differences are far overshadowed by his excellent judicial qualifications and professional attributes.

We have come to know Attorney General Pryor quite well from working over the past three years with him on a close personal basis in complex litigation where the State of Alabama has sued a number of the major United States oil and gas companies for fraud in connection with allegations of underpayments of royalties owed to the State from production of offshore gas wells. Through that regular contact with Attorney General Pryor

and his staff, we have come to know him very well and can report that he is terrifically gifted in his knowledge and application of the law.

We can confidently assure you and the members of the Judiciary Committee that Attorney General Pryor has always *followed* the law, whether it was to his liking or not. In other words, we have seen no evidence that Attorney General Pryor would use his position as an appellate jurist to legislate from the bench.

Thank you for giving Attorney General Pryor every favorable consideration.

Sincerely yours,

BY: _____
DAVID G. WIRTES, JR.
FOR THE FIRM

DGWjr/sg

cc: Senator Jeff Sessions

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.

JERE BEASLEY
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THOMAS J. METHVIN
J. CHAD PORTIS*
W. DANIEL MILES, III
STEPHEN W. DRINKARD
A. GRAHAM EQUALS, JR
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KEVIN C. JONES
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ANDY D. BIRCHFIELD, JR.
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C. GIBSON VANCE
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LARRY A. GULSTON, JR.**
D. MICHAEL ANDREWS

RONALD AUSTIN CANTY
NELISSA A. PRICKETT
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JOHN B. TOMLINSON
KIMBERLY E. WARD
NAVAN WARD, JR

* ALSO ADMITTED IN ARIZONA
* ALSO ADMITTED IN ARKANSAS
* ALSO ADMITTED IN FLORIDA
* ALSO ADMITTED IN GEORGIA
* ALSO ADMITTED IN MINNESOTA
* ALSO ADMITTED IN MISSISSIPPI
* ALSO ADMITTED IN NEW YORK
* ALSO ADMITTED IN OHIO
* ALSO ADMITTED IN OKLAHOMA
* ALSO ADMITTED IN SOUTH CAROLINA
* ALSO ADMITTED IN TENNESSEE
* ALSO ADMITTED IN TEXAS
* ALSO ADMITTED IN WASHINGTON, D.C.

March 25, 2003

Senator Jeff Sessions
493 Russell Office Building
Washington, D.C. 20510

Dear Jeff:

I understand that Bill Pryor will be nominated for a vacancy on the Eleventh Circuit Court of Appeals. In my opinion, that will be a very good appointment for the President. I have known Bill since he worked for you in the Attorney General's office and I believe that he has all of the necessary qualifications to do an outstanding job on the federal bench. I am writing to support his nomination.

The Attorney General and I come from different political parties and have disagreed on a number of issues. However, I have tremendous respect for him and sincerely believe that he has served the state well as Attorney General. I would have done some things differently, but that alone does not keep me from supporting him now. Bill Pryor is extremely bright and is a recognized student of the law. His character is beyond reproach and, in my opinion, he will be fair and judicious if he is nominated and confirmed by the Senate.

Hopefully, the Senate confirmation will not be a problem. I recommend Bill Pryor to you and other members of the Senate without reservation.

Sincerely,

JERE L. BEASLEY

JLB/lr

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

BILL PRYOR
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
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WWW.AGO.STATE.AL.US

April 9, 2003

Senator Jeff Sessions
United States Senate
493 Russell Office Building
Washington, D. C. 20510

RE: Nomination of Attorney General Bill Pryor to U.S. Court of Appeals for the 11th Circuit

Dear Senator Sessions:

I write this letter in support of Attorney General Bill Pryor's nomination to the 11th Circuit Court of Appeals. As the senior staff attorney in the Violent Crimes Division and a 20 year veteran of the Alabama Attorney General's Office, I have had many occasions to work closely with General Pryor on many issues. I have also had the opportunity to spend time with General Pryor outside of the office environment and I consider him a friend. I have found General Pryor to be extremely bright and intelligent with an amazing knowledge and understanding of the legal issues facing our state and our country today. While I do not always agree with him of every issue, I respect Bill Pryor's opinions because I know that his positions on the issues are not based on what is popular or politically expedient. Bill does what he sincerely believes is right according to the law and the facts in every case.

In my opinion, Bill Pryor has been a great Attorney General and I have enjoyed working for him. While I hate to see him leave this office, I know that being a federal judge has been a life long dream of Bills and I know that he has the qualifications and temperament to be a great federal judge. I hope to see his dream become a reality.

Sincerely,

Gerrilyn V. Grant
Assistant Attorney General

Stephanie C. Billingslea
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130

April 24, 2003

Senator Richard Shelby
110 Hart Senate Office Building
Washington, DC 20510

Dear Senator Shelby:

I write this letter in support of Attorney General Bill Pryor's nomination to the Eleventh Circuit Court of Appeals. General Pryor has been my boss for over six years. I have truly enjoyed working for him. He has impeccable character and the judicial temperament necessary for such a high calling. He is a very competent and astute advocate for the state. He accepts nothing but outstanding representation of the state. As Attorney General, he has exuded a high standard of ethics and has always taken his oath of office and duty owed to the people of Alabama seriously.

I have tremendous respect for General Pryor because he has been one whose integrity for enforcing the law is above reproach. He has always taken legal positions that were necessary to preserve our state's rights even when the positions were contrary to popular opinion. As the state's top law enforcer, he has always rendered opinions on controversial issues based on the law rather than be influenced by his own personal views or politics. His notable record of applying the law is what makes him an excellent choice for the Eleventh Circuit Court of Appeals.

Shortly after his appointment in 1997, General Pryor created the Public Corruption and White-Collar Crime Division of the Attorney General's Office. This division was created to prosecute public corruption, complex economic crimes, election fraud, bid-rigging, and ethics code violations. The Public Corruption and White-Collar Crime Division quickly became the most visible division in the Attorney General's office and gained a reputation of respect. The Public Corruption and White-Collar Crime Division has been one of the most successful divisions in the Attorney General's Office. I applaud General Pryor not only for his foresight in determining that such a division was necessary but for his ability to bring integrity to public corruption and white-collar crime prosecutions. The public's perception that the Public Corruption and White-Collar Crime Division is not an instrument used to target political opponents is attributable to General Pryor's code of ethics and his ability to be evenhanded in the pursuit of justice.

As an African-American, I believe that General Pryor has been fair and sensitive to racial issues. Shortly after the creation of the Public Corruption and White-Collar Crime Division, I was appointed by General Pryor to prosecute cases in the division. General Pryor promoted me just after five months in office and presented me with a special merit raise for

outstanding work three years later. He awarded two African-American special agents the Attorney General's Award of Excellence in the area of investigations for 2001 and 2002. General Pryor created a state-wide mentoring program that has benefited African-American children as well as other minorities. He also supported the removal of the ban on interracial marriage from the Alabama State Constitution.

The State of Alabama has been very fortunate to have General Pryor as its top law enforcer. The citizens of Alabama, Georgia and Florida will also be fortunate to have General Pryor as one of its jurist on the Eleventh Circuit Court of Appeals.

I wholeheartedly support General Pryor's nomination to the Eleventh Circuit Court of Appeals and believe that he will interpret and apply the law with integrity and character.

Thank you for considering this letter of support. If additional information is needed, you may contact me at (334) 242-7470.

Sincerely,

Stephanie C. Billingslea
Assistant Attorney General

Lynda Woodall

(b)(6)

May 10, 2003

Honorable Jeff Sessions
United States Senator
493 Russell Bldg
Washington DC 20510

Dear Senator Sessions

I am writing in support of Bill Pryor, nominee for the judgeship on the United States Circuit Court of Appeals for the Eleventh Circuit.

Persons and groups supporting individuals with disabilities have questioned Mr. Pryor's fairness as a federal judge because of his legal position on the application of the Americans with Disabilities Act to the states. This legal position in no way reflects on Mr. Pryor's treatment or employment of persons with disabilities.

As you know, I have a speech problem resulting from mild cerebral palsy. I worked as an assistant attorney general in the Alabama Attorney General's Office for 25 years under six Attorneys General. Mr. Pryor, as Attorney General, treated me with a dignity and respect I had not experienced in that office. He valued me as a person and as an attorney. It gave me a belief in myself that I previously did not have.

During Mr. Pryor's tenure as Attorney General, several individuals with disabilities have been employed in the Attorney General's Office.

Regarding Mr. Pryor's position on enforcement of the Voting Rights Act, let me assure you and the members of your committee that he is adamant concerning compliance with that law. It was my duty in the Attorney General's Office to submit legislation affecting voting to the United States Attorney General for preclearance under the Voting Rights Act. Mr. Pryor insisted on full compliance with the Act and federal regulations governing submissions.

I know that Mr. Pryor will make an excellent federal judge.

Sincerely,

Lynda Knight Woodall

William Taylor

(b)(6)

March 26, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

It has been brought to my attention that Alabama Attorney General Bill Pryor is being considered for appointment as a Federal Circuit Court of Appeals Judge in the Eleventh Circuit.

I have worked with and for Bill Pryor for a period of seven years while employed by the State of Alabama Office of the Attorney General. When Attorney General Pryor was appointed to serve out your unexpired term as Attorney General, I was selected to serve as the Law Enforcement Liaison under his administration.

I can honestly say that Bill Pryor is one of the most honest, trustworthy and loyal people that I have ever had the pleasure to work for. Attorney General Pryor's commitment to fair and impartial justice will qualify him to serve in any court in our land. He is a highly intelligent person and he seems to have the ability to sort out the most complex problems in civil and criminal matters without any difficulty.

During my employment with Attorney General Bill Pryor, I had the opportunity to travel around the state with him, and he is highly respected by everyone that knows him. He is a God-fearing family man, and his ethical and moral values are above reproach.

I support this nomination with no reservations, and any consideration given to this appointment will be appreciated. I don't know of a more qualified person for this judgeship.

Sincerely,

Bill Taylor

Bill Taylor

Haskell | Slaughter
attorneys at law

Haskell Slaughter Young & Rediker, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
t. 205.251.1000 | f. 205.324.1133

J. MICHAEL REDIKER
DIRECT LINE: (205) 254-1428
JMR@HSY.COM

PLEASE REPLY TO: BIRMINGHAM

March 24, 2003

Senator Jeff Sessions
493 Russell Office Building
Washington D.C. 20510

Re: Bill Pryor – Eleventh Circuit Court of Appeals

Dear Senator Sessions:

I write to endorse and support wholeheartedly a nomination of Attorney General Bill Pryor to serve on the United States Court of Appeals for the Eleventh Circuit. My only "regret" would be that William Holcombe Pryor, Jr. could not serve in two positions at the same time, because he has been an outstanding Attorney General for this State, and we hate to "lose" him from that role. But Bill will make an outstanding jurist, as I'm about to explain.

My relationship to Bill Pryor is that he has been my legal "boss" in some securities enforcement litigation I have conducted for the State of Alabama's Securities Commission since 1999. In addition to that, he has over time responded promptly and very effectively whenever a member of our firm has needed guidance or assistance from him or his office.

All who know Bill Pryor will agree that for sheer brain power, and the capacity to absorb, evaluate and act prudently and very competently upon large amounts of information, he has few rivals in this State. The phrase, "quick study," would not do justice to him. He can and regularly does exhibit the ability to master difficult and complex issues, including constitutional, public interest, criminal law and procedural issues. He has an outstanding "mix" of experiences since finishing right at the top of his class at Tulane Law School, which will contribute making him a great judge: private law practice with two leading firms (including Cabaniss Johnston, where I started practice in 1967); public service as the State's litigation counsel in constitutional, voting rights, civil and criminal cases before becoming Attorney General, and then his outstanding service in succession to Senator Sessions in that post; scholar and writer in areas of state/federal relations and comity, constitutional law and public policy; teacher; and adviser to state and federal agencies and departments. Bill Pryor is a leader, and has exhibited throughout his career all the qualities of a "self-starter" who understands the value of hard work.

I recently had the pleasure of sitting with Bill to discuss issues of constitutional law, federalism and public policy on two different matters, and his easy mastery of difficult issues is daunting. He has demonstrated throughout his public life that he approaches legal and public policy matters in a judicious fashion, grasping each side of the issue and weighing competing considerations fairly. Bill Pryor is a conservative and a believer in our free enterprise system, but his career shows he did not just "adopt" that stance but arrived at it based on long study and due deliberation. He is regarded as ethical, compassionate and not "hide bound" in his views (for example, I was struck by his concept of flexible "cooperative Federalism" in last year's Senate consideration of Clean Air Act issues). There is no doubt that he is, and will be, scrupulously honest, fair and impartial as a judge, and will follow the law and the Constitution.

I ask that you take Bill Pryor to the President, and the Senate, as soon as practicable, to make it possible for him to serve in a position where, before very long, he will be one of the nation's most influential and respected jurists.

Sincerely,

J. Michael Rediker

JMR/lmr

Haskell | Slaughter
attorneys at law

Thomas L. Krebs, Esq.
Direct Dial: 205.254.1416
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March 28, 2003

Senator Jeff Sessions
493 Russell Office Building
Washington, DC 20510

Senator Richard C. Shelby
110 Hart Senate Office Bldg.
Washington, DC 20510

Re: Bill Pryor – Eleventh Circuit Court of Appeals

Dear Senators Sessions and Shelby:

I have heard that the Honorable William H. Pryor, Jr. may be considered for nominations to the Eleventh Circuit Court of Appeals, and I am both honored and pleased to share my thoughts about Bill Pryor and his suitability for consideration for such an appointment. At the outset I have to admit that while I endorse and support his nomination to serve on the Eleventh Circuit I do not wish Alabama to lose one of its best attorneys and most effective public servants. If the Eleventh Circuit is to be enhanced it will be at Alabama's loss.

I have been in and around state government for many years and have come to believe that General Pryor is one of the best, if not the best, Attorney General in recent times. Other attorneys whose opinions I have come to respect over the years share this view of Bill Pryor. Included in this list would be Bill Stephens, general counsel to the Retirement Systems of Alabama, Joe Borg, the Director of the Alabama Securities Commission and many others.

To be sure, other Attorneys General have been more bombastic and charismatic and that is what, in my mind at least, sets Bill Pryor apart from the pack. He is reserved and quiet, but he is also extraordinarily bright and thoughtful. More importantly, I think, Bill Pryor is one of the few persons I have known who possesses absolute integrity. I can think of no finer appointment to the Eleventh Circuit.

I believe General Pryor will prove to be one of our country's finest jurists. In my personal dealings with him he has manifested an easy mastery of complex and difficult legal

issues. In truth, in my most recent meeting with him, I was awed by his complete knowledge of the unique constitutional issue then in discussion. I have visited with several Attorneys General during my years of practice before the Bar, but I have to tell you, I was never so impressed as I was on that day. I have attached the letter I sent to Richard Allen after that meeting.

At the time I wrote to Richard I had not a clue that Senator Sessions would desire to know my position regarding Bill Pryor's nominations to the Eleventh Circuit. If what the President seeks is a bright, fair-minded, deliberate judge, he has found such a person in Bill Pryor. I wholeheartedly support his nomination to the Eleventh Circuit and indeed cannot think of a better nominee.

Sincerely,

Tom Krebs

Thomas L. Krebs

TLK/alb

FRED H. CATE

Distinguished Professor and Ira C. Batman Faculty Fellow
Director, Center for Applied Cybersecurity Research
Senior Policy Advisor, Hunton & Williams Center for Information Policy Leadership

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May 12, 2003

The Hon. Bill Pryor
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130

Dear Bill:

I was delighted to learn of your nomination to the U.S. Court of Appeals for the Eleventh Circuit. Your intelligence, judgment, and integrity are exceptional in my experience. I am confident you will be a superb jurist.

I am a registered Democrat and probably disagree with two-thirds or more of the substantive positions that at least the media attribute to you, but I cannot think of anyone whose fairness, judgment, and respect for people and the law I would trust more. In all honesty, I cannot think of anyone I know better qualified to be a federal judge.

So I write to offer not only heartfelt congratulations, but also any help I can provide during the confirmation process. If you need an academic witness, letter for the record, or anything else within my power, don't hesitate to let me know.

Again, congratulations!

Yours sincerely,

Fred H. Cate
Distinguished Professor and
Ira C. Batman Faculty Fellow

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Patrick C. Cooper

Direct Dial (205) 254-1086
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April 10, 2003

BY U.S. MAIL AND FACSIMILE

Richard C. Shelby
United States Senator
110 Hart Senate Office Bldg.
Washington, D.C. 20510

Jeff Sessions
United States Senator
493 Russell Bldg.
Washington, D.C 20510

Dear Senators Shelby and Sessions:

My name is Patrick Cooper. I am an African-American who is a partner at the law firm of Maynard, Cooper & Gale in Birmingham, Alabama. I write this letter in support of the nomination of Alabama Attorney General Bill Pryor to the United States Court of Appeals for the Eleventh Circuit.

I first met Mr. Pryor when he was in private practice before he became Attorney General. I have followed his career closely. I greatly respect his intelligence, hard work and integrity. I also admire Mr. Pryor's willingness to lead when others are unwilling to do so -- particularly on the issue of race.

For example, several years ago Mr. Pryor was instrumental in the passage of a constitutional amendment striking a provision in the Alabama Constitution that barred miscegenation. (Specifically, the provision barred interracial marriages between whites and blacks, but no other racial or ethnic group.) Mr. Pryor was the only white statewide elected official -- including both Democrats and Republicans -- who from the outset publicly and actively supported the proposed amendment. He appeared on radio talk shows, wrote editorial pieces and made

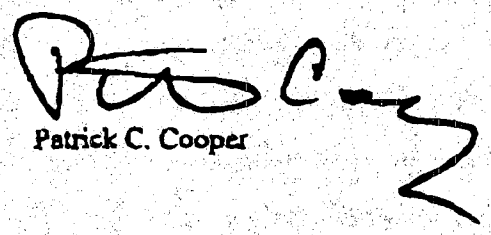
numerous speeches urging voters to rid the Alabama Constitution of this immoral relic of Alabama's Jim Crow days.

Mr. Pryor's support of the proposal was gutsy. As a Republican in Alabama, he had nothing politically to gain and much to lose. Indeed, on election day, several rural counties voted against the proposed amendment, which passed by a somewhat narrow margin.

Mr. Pryor's active support of the proposal was consistent with his effort throughout his tenure as Attorney General to reach out to the minority community in Alabama. On repeated occasions, Mr. Pryor accompanied me to political functions in the black community in an effort to demonstrate that the Alabama Attorney General serves *all* citizens in our state. Often, he was the only white elected official at these events. This speaks volumes in terms of his willingness to address the thorny issue of race in Alabama.

For the reasons expressed above (and others), I strongly support the nomination of Mr. Pryor to the United States Court of Appeals for the Eleventh Circuit.

Sincerely,



Patrick C. Cooper

PCC/dm

00876166.4

BARRY W. ASHE, ESQUIRE
546 CARONDELET STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE: (504) 593-0843
FAX: (504) 596-0843

July 3, 2003

Honorable John Breaux
Senator
503 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Breaux:

I write to urge that you support the nomination of my friend, Alabama Attorney General Bill Pryor, to the Eleventh Circuit Court of Appeals. You should do so both by opposing any filibuster of his nomination and by voting for his confirmation when his nomination comes to the Senate floor.

General Pryor has served his State and Nation well as Attorney General since 1998, having been reelected in 2002 with 59% of the vote. His record has earned him respect and support from all quarters in Alabama and across the Nation, cutting across party lines. Before becoming the then-youngest Attorney General in the Nation, Bill served as Deputy Attorney General in charge of special civil and constitutional litigation, he engaged in the private practice of law at two of Alabama's finest law firms, and he taught law on the adjunct faculty at the Cumberland School of Law at Samford University.

Of course, because I am a native Louisianian, a partner at Stone Pigman Walther Wittmann, LLC (a law firm founded by civil rights legend, Judge John Minor Wisdom), a former law clerk with the Fifth Circuit Court of Appeals, and a graduate of Tulane Law School, I am most proud to claim ties to General Pryor in each of these capacities. Bill graduated from Tulane Law School in 1986 at the top of his class, *magna cum laude* and Order of the Coif, having served as the Editor-in-Chief of the *Tulane Law Review*. While in school, he clerked with Stone Pigman as well as with Liskow & Lewis, another top-flight New Orleans law firm. Upon graduating from law school, General Pryor served as a law clerk for Judge Wisdom on the Fifth Circuit. However, Bill's connections with Louisiana do not end there. He received his undergraduate degree from Northeast Louisiana University (now the University of Louisiana at Monroe) in Monroe, the home of General Pryor's mother, wife, in-laws, and other ancestors. In addition, Bill's parents and siblings were educated in Louisiana.

685436/1

In short, it would be difficult to find a more qualified public servant to serve the Nation on the Eleventh Circuit Court of Appeals. General Pryor has distinguished himself in his education, his judicial clerkship, his career as a lawyer, and his service as Alabama Attorney General. It is also difficult to conceive of a prospective candidate for service on the Eleventh Circuit who has such deep and abiding ties to our own beloved State of Louisiana. Moreover, I've known Bill for over seventeen years and can attest to his impeccable character and integrity, as well as his devotion to his family, his State, and his Nation.

Accordingly, you would do service to your State and Nation by supporting the nomination of Attorney General Pryor to the Eleventh Circuit, and I heartily urge you to do so.

With warm regards, I remain

Respectfully,

Barry W. Ashe

BWA/ljs

LAW OFFICES
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Anthony A. Joseph
Direct Dial: (205) 458-9447
E-Mail Address: aioseph@ibpp.com

April 15, 2003

The Honorable Richard Shelby
The United States Senate
110 Hart Senate Office Building
Washington, D.C. 20510-0103

Re: Nomination of Bill Pryor to the Eleventh Circuit

Dear Senator Shelby:

It is with great honor and pleasure that I write in support of the nomination of Bill Pryor for a seat on the Eleventh Circuit Court of Appeals. Bill possesses all of the skills and attributes to be an outstanding jurist: solid credentials, sound intellect, practical experience, unblemished character and integrity, and a calm and balanced temperament. Accordingly, I would strongly urge his expeditious confirmation to the Court.

I have known Bill for over 12 years. I have worked for him as a specially appointed Attorney General, and against him in my representation of clients under investigation by the State of Alabama. In working for him, I have always been impressed with his ability to quickly grasp the operable facts, his willingness to listen to the opinions of others, and his sound judgment. In the cases where I have represented clients against the State of Alabama, I have always found Bill to be a strong advocate, but also a fair-minded prosecutor willing to engage in good faith discussions. I am convinced that Bill will bring these same essential qualities to the bench.

Throughout my experience with Bill, he has earned both my respect and my admiration for his commitment to public service, his equal and fair treatment of everyone associated with a particular matter, and his dedication to upholding the honor and integrity of the Attorney General's Office. I am convinced that his consistency and commitment to do the right thing will be continuing traits that he will possess as a judge.

I cannot think of a more worthy candidate for this position and, therefore, submit my strong support of him for a seat on the Eleventh Circuit Court of Appeals. Again, I would encourage your expeditious confirmation of him for this position.

If I can be of any further assistance in this regard, please let me know. Thank you for your consideration.

Best regards.

Sincerely,

Original Signed by Anthony A. Joseph

Anthony A. Joseph

AAJ/lc

PRISON FELLOWSHIP Ministries

Post Office Box 17500
Washington, DC 20041-7500
(703) 478-0100 Fax (703) 834-3658
www.prisonfellowship.org

April 1, 2003

The Honorable Richard Shelby
United States Senate
110 Hart Senate Office Building
Washington, DC 20510

Dear Senator Shelby,

I have been informed that President Bush is considering Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I have great admiration for Bill and support his nomination with enthusiasm.

I observed Bill during his years as Attorney General of Alabama and was quite impressed. He has a firm grasp of the law, and is an articulate and forceful advocate. He used his office to speak out for reform in prison sentencing and was an ardent supporter of the Kennedy-Sessions Prison Rape Reduction Act. He also was instrumental in the passage of Alabama's Religious Freedom Restoration Act, which guarantees religious freedom for all, including prisoners. In fact, our ministry was so impressed with Bill's energetic support of Alabama's RFRA that we awarded Bill our Guardian of Religious Liberty award.

While Bill is a forceful advocate, he also believes in the rule of law. When the debate ceases, Bill defends the law as it is written by the legislature or a higher court. Bill has a brilliant mind and the proper temperament for service on the Court of Appeals. I strongly urge you to support his nomination for that position.

Sincerely,

Chuck

Charles W. Colson

CWC:nn

JUSTICE FELLOWSHIP

Post Office Box 16069
Washington, DC 20041-6069
www.justicefellowship.org
pjnolan@justicefellowship.org

Phone: 703.904.7312
Fax: 703.475.9679

Pat Nolan
President

April 1, 2003

The Honorable Jeff Sessions
United States Senate
439 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Richard Shelby
United States Senate
110 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Sessions and Shelby:

I am told that Alabama's Attorney General, Bill Pryor, will likely be nominated by President Bush for the Eleventh Circuit Court of Appeals. I wholeheartedly support that nomination.

I have worked with General Pryor on many issues, and have found him to be one of the most capable and energetic leaders in the nation. Bill has shown knowledge of the law, brilliance, courage and compassion. In particular, he has forcefully spoken of the need to protect prisoners from rape, and has been effective in rallying support for the Kennedy-Sessions Prison Rape Reduction Act. He also was the leading proponent of Alabama's Religious Freedom Restoration Act. He criss-crossed the state speaking of the importance of religious freedom, and it is clear that the amendment would not have passed without Bill's leadership.

Bill speaks forcefully and with clarity on the important issues of the day. That is one of the things that make him such an exceptional leader. However, he reveres the rule of law, and has always subordinated his own opinions when the legislative or judicial authorities have ruled on the law.

I am delighted that a man of Bill's integrity and ability may be nominated to the Court of Appeals, and I urge you to support his nomination.

Sincerely,

Pat Nolan
President, Justice Fellowship

Contact: Martin Colman (703) 827.8616

AMERICAN SENIORS FOR PRYOR

1747 PENNSYLVANIA AVENUE, SUITE 1000
WASHINGTON, D.C. 20006

American Seniors is national seniors group has concerns about elder abuse. "Elder abuse" is a term that encompass a wide range of mistreatment visited upon senior members of our society, including physical and sexual assaults and deprivations, financial theft or misuse of money and property, telemarketing and internet fraud, home repair fraud and neglect.

American Seniors strongly supports Attorney General Bill Pryor's nomination to the Eleventh Circuit Court of Appeals. As Alabama's Attorney General, Bill Pryor has not neglected senior citizens of Alabama, rather, he strives to protect them from all of types of mistreatment. Through vigorously prosecuting their abusers and through increasing the awareness among senior citizens and their families, Attorney General Bill Pryor has seeks for the abused and has prevented many seniors from becoming victims. Attorney General Bill Pryor should be confirmed by the United States Senate.

1) **Physical Abuse and Neglect**

Bill Pryor has sought out physical mistreatment of senior citizens for prosecution and has and publicized prosecutions so that all nursing home workers and abusive family members are on notice that he will hold them criminally responsible abusing seniors.

- Bill Pryor takes physical abuse seriously. He convicted a nursing home aid and made sure that the aid received jail time for assaulting with abuse of a protected person when he found out that she had assaulted an 83-year old Alzheimer's resident of the nursing home.
- Bill Pryor convicted of a former nursing aide for slapping the face of an elderly resident of an Alabaster nursing home with abuse of a protected person.

2) **Financial Abuse and Theft**

Because senior citizens are increasingly the targets of financial scams, Bill Pryor has fought to protect their pocket books and lifesavings by prosecuting thefts, frauds and scams to the fullest extent. He has sought to make senior citizens aware of financial abuses of all types, ranging from telephone marketing fraud, internet scams, to blatant theft by their care givers.

- Bill Pryor convicted a former insurance agent of first-degree theft for his statewide scheme to defraud elderly victims by offering nursing home policies and pocketing their money.
- Bill Pryor prosecuted a couple that stole $400,000 from a 96-year-old woman and charged them with first-degree theft of property and abuse, neglect, or exploitation of a protected person.
- Bill Pryor created an educational outreach program to protect senior citizens against telemarketing fraud, including fraud over the Internet, which worked to improve senior citizens' ability to protect themselves against telemarketing fraud.

3) **Preserving Medicaid Resources**

- Bill Pryor convicted a bookeeper in a nursing home for stealing thousands of dollars from nursing home residents through medicaid fraud.
- Bill Pryor joined an antitrust lawsuit against a major pharmaceutical company which brought $80,000 back to the Alabama Medicaid Agency.
- Bill Pryor supports proposals to settle the current funding dispute between Alabama Medicaid and the federal Centers for Medicare and Medicaid Services "to eliminate the threat that federal officials will deny Alabama millions of dollars of federal funding."
- Bill Pryor reviewed the improper Medicaid cost reporting practices of an Alabama nursing home, resulting in a recovery of $100,467 in Medicaid funds for the State of Alabama.

4) **Defending Seniors Purchases**

- When a cemetery in Birmingham, Alabama refused to give a group of elderly African-American citizens who wanted dignified burials in the cemetery where they had purchased plots, Bill Pryor got involved. He took hundreds of complaints and worked to get the plots into the hands of the people that had purchased them.

HERC LEVINE

(b)(6)

June 5, 2003

VIA FACSIMILE (202-224-9102)

Senator Orrin Hatch, Chairman
Committee on the Judiciary
224 Dirksen Building
Washington, D.C. 20510

Re: Bill Pryor, Nominee to 11th Circuit of Alabama

Dear Chairman Hatch:

As an active and proud member of the Birmingham Jewish Community, I was disappointed by the decision of the National Council of Jewish Women and the Religious Action Center of Reform Judaism to oppose the nomination of Attorney General Bill Pryor to the 11th Circuit Court of Appeals bench. While I doubt that these groups have taken the time to sit down and talk with Attorney General Pryor, I am proud to say that he has my support and the support of many in the Alabama Jewish Community because of his personal integrity and commitment to insure that all of our citizens are treated fairly and receive equal justice under the law. He has been a true friend to the Alabama Jewish Community on many important issues.

Attorney General Pryor has a distinguished career as a public servant, practicing attorney and law professor, and is highly qualified to serve on the Federal bench. He has a well deserved reputation for fairness and competency that cuts across party lines and which has resulted in overwhelming support from Alabamians of all political parties and segments of our society. His distinguished record as Attorney General affirms my belief that he will serve with great distinction as a Federal judge.

Very truly yours,

Herc Levine

Herc Levine

/vk

cc: Senator Patrick J. Leahy, Ranking Member (FAX: 202-224-9516)
Senator Richard C. Shelby (FAX: 202-224-3416)
Senator Jeff Sessions (FAX: 202-228-0545)

VOCAL
Victims of Crime and Leniency
P.O. Box 4449
Montgomery, Alabama 36103

State Office

WATTS LINE: 1-800-239-3219

March 13, 2003

Senator Jeff Sessions
Senator Richard Shelby

Re: Attorney General Bill Pryor

Dear Senator Sessions and Shelby:

It is my understanding that Attorney General Bill Pryor is being considered for an appointment to the 11th Circuit Court of Criminal Appeals. Mr. Pryor is an excellent choice for this appointment.

I have worked in the victim's movement for over 20 years and have worked with Attorney General Pryor on numerous victims' issues the 6 years he has served as Attorney General. He has been most aggressive in victims' legislation and worked tirelessly to rectify the imbalance and disparity in the judicial process.

Attorney General Pryor is known as a man of integrity and one who will follow the law to the letter. Crime Victims only ask to be treated fairly and I am confident that will continue if Mr. Pryor gets this appointment.

Mr. Pryor has served Alabama well as Attorney General and will do likewise as Judge of the 11th Circuit. I highly recommend him for this appointment.

Sincerely,

Miriam

Miriam Shehane
Executive Director

GRAND LODGE
FRATERNAL ORDER OF POLICE®

309 Massachusetts Ave., N. E.
Washington, DC 20002
Phone 202-547-8189 • FAX 202-547-8190

CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

6 June 2003

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

The Honorable Patrick J. Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Sirs:

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of William H. Pryor to the United States Court of Appeals for the Eleventh Circuit.

Mr. Pryor currently serves as the Attorney General for the State of Alabama, and has had a distinguished career as a public servant, practicing attorney, and law professor. Before becoming Attorney General in 1997, Bill Pryor served as Deputy Attorney General in charge of special civil and constitutional litigation. In addition to his superb service in his current office, General Pryor graduated *magna cum laude* from the Tulane University School of Law, and began his law career as a clerk for the late Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit.

Two necessary qualifications for any nominee for a position within the Federal Judiciary should be a proven record of success as a practicing attorney, and to have the respect of the law enforcement community of which they will be an important part. General Pryor meets both of these important criteria. He has argued cases before the U.S. Supreme Court, the Supreme Court of Alabama, as well as the Eleventh Circuit Court of Appeals, and has earned the support of the Alabama Fraternal Order of Police.

General Pryor has demonstrated that he will be an outstanding addition to the Federal bench, and on behalf of the more than 306,000 members of the Fraternal Order of Police, I again offer our strong support for his nomination. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we may be of any assistance.

Sincerely,

Chuck Canterbury

Chuck Canterbury
National President

Alabama District Attorneys Association

Executive Committee
Officers

[illegible] D. Brooks
President
Cullman

Robert E. Owens, Jr.
Vice-President
Columbiana

Nick Abbett
Secretary-Treasurer
Opelika

Joseph D. Hubbard
NDAA Board Rep.
Anniston

Executive Committee
Members-At-Large

Tommy Chapman
Evergreen

Tim Morgan
Huntsville

Charles Rhodes
Scottsboro

Eugenia Loggins
Andalusia

Rex Clark
LaFayette

Mike O'Dell
Fort Payne

Steve Giddens
Talladega

Randall L. Hillman
Executive Director

April 1, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Richard Shelby
United States Senate
110 Hart Senate Office Building
Washington, D.C. 20510

COPY

Dear Senators Sessions and Shelby:

It is my understanding that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I am pleased and honored to write you today in support of that nomination.

As you both are aware, the duty of a prosecutor is to seek justice, not just secure a conviction. Unlike many others in the criminal justice system, he is duty-bound to find the truth. He must routinely make difficult choices to ensure that the rule of law is applied evenly and with compassion. Former United States Attorney General Robert H. Jackson once stated his thoughts on what it took to be a prosecutor. He said,

> *"The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizens' safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his job with humility."*

515 South Perry Street • Montgomery, Alabama 36104 • Post Office Box 4780 • Montgomery, Alabama 36103-4780
Telephone (334) 242-4191 or 1-800-423-7658 • Facsimile (334) 240-3186

Bill Pryor is such a man. He is absolute in his commitment to the pursuit of justice, not the popular way out of a situation. In my judgment, these are the very reasons he would make a great judge.

I have spent almost 14 years as a prosecutor and was named as Director of the Alabama District Attorneys Association in 2001. Since Bill became Attorney General, the relationship between himself, this Association, and all of the District Attorneys of this state has grown immensely. We have worked hand in hand in an effort to fight crime and prosecute those offenders who would threaten the welfare and safety of our citizens.

All of these qualities, taken together, are what make Bill an outstanding prosecutor, a good friend, and most importantly, an individual whom I am proud to recommend being a judge on the Eleventh Circuit Court of Appeals.

Sincerely,

Randall I. Hillman
Executive Director

STATE OF ALABAMA
BOARD OF PARDONS AND PAROLES
Lurleen B. Wallace Building
500 Monroe Street
P O Box 302405
Montgomery, Alabama 36130-2405
Central Office (334) 242-8700
Web Page: www.agencies.state.al.us/pardons

SIDNEY T. WILLIAMS
Chairman of the Board
GLADYS RIDDLE
Associate Member
NANCY CONN McCREARY
Associate Member

WILLIAM C. SEGREST
Executive Director

April 18, 2003

Senator Jeff Sessions
493 Russell Office Bldg.
Washington, D.C 20510

Dear Senator Sessions:

I am honored to write this letter in support of my friend, Attorney General Bill Pryor's confirmation to a judgeship on the U.S Court of Appeals for the Eleventh Circuit. My friendship with Bill Pryor over the years has afforded me the opportunity to view his conduct in the courtroom, behavior as a citizen, as a husband, and as a member of the community. In having the privilege to observe all facets of Bill's behavior, I have yet to find fault with any part of his character or humanity. He is as good as they come.

Bill Pryor sets a high standard by carrying himself with class, behaving with good taste, respect and doing all things in moderation. He will serve the judiciary well. He will not have his decisions corrupted by passion, partisanship, or partiality. He is truly endowed with the divine power of wisdom. I strongly urge the Senate to confirm Bill Pryor.

Sincerely,

Gregory O. Griffin, Sr.
Chief Counsel

ALABAMA
POLICE BENEVOLENT ASSOCIATION, INC.

125 South Ripley Street, Suite 1
Montgomery, Alabama 36104
(334) 834-8622 • 1-800-323-2095
FAX: (334) 834-9860

June 11, 2003

Senator Richard Shelby
United States Senate
110 Hart Office Building
Washington, DC 20510

Dear Senator Shelby:

The Alabama Division of Southern States Police Benevolent Association is a non-profit organization consisting of and representing approximately 4,000 sworn law enforcement personnel on the federal, state, county, and municipal levels in the State of Alabama. Alabama PBA is organized into local chapters, with 14 of these currently located throughout the state from Shoals, Madison County, and Northeast Alabama in the north all the way to the Wiregrass Chapter and Mobile County Chapter in the south of the state. One of PBA's goals is to improve the lives and working conditions of its members. The organization addresses several areas in order to accomplish its goal: 1) legal services for members; 2) death benefit (salary replacement for one year); and 3) political activity. PBA works through its local chapters up through the state or division level to accomplish its goal.

ALPBA, in an effort to more effectively meet its political activity goals, holds pre-election screenings for candidates seeking election to public offices at the federal, state, county, and city levels of our government. The screening committee asks the same law-enforcement-related questions of each candidate and then considers their answers along with any opinions and/or statements the candidates offer. ALPBA endorses one candidate in each race. In the 2002 general election, Alabama's attorney general Bill Pryor received an enthusiastic PBA endorsement.

The members of the Alabama PBA firmly believe that Mr. Bill Pryor's qualifications are without question among the finest any attorney of law could possess. Mr. Pryor's professionalism and dedication in ensuring that the law is equally applied to every citizen of Alabama are exactly what our federal appeals courts need to continue to ensure that the law is equally applied to all citizens of our great nation. Mr. Pryor has demonstrated throughout his tenure as Attorney General of Alabama that he upholds the principles of law to which he has sworn and which are mandated by the Constitution of Alabama, as well as the Constitution of the United States of America, without prejudice or bias as to race, sex, or religion. Mr. Pryor would review and render a judgment on the violation of law based solely on the law and the facts presented before his court. Mr. Pryor has continued to demonstrate a thorough understanding of the law and a compelling determination to uphold it.

For these reasons, the Alabama Police Benevolent Association offers its strongest endorsement of Mr. Pryor and on behalf of its membership requests that you support his confirmation as a federal judge in the 11th Circuit Court of Appeals. For further discussion or if you have any questions regarding this endorsement or the Alabama PBA, please feel free to contact me at 1-800-233-3506, extension 724. Thank you for your consideration.

Sincerely,

Donald R. Scott

Donald R. Scott, President
Alabama Division

DRS/pwc

ALABAMA ASSOCIATION OF CHIEFS OF POLICE

ARTHUR BOURNE
President
Gulf Shores Police Department

N. PRICE "TREY" OLIVER, III
Vice President
Saraland Police Department

MICHAEL R. NICHOLS
Secretary
Centreville Police Department

P.O. Box 538
Marion, Alabama 36756

JOHN W. ANDERSON
Executive Director
TELEPHONE (334) 683-6329
CELLULAR (334) 412-7733
FACSIMILE (334) 683-9592
EMAIL: jwa@bellsouth.net
WEB SITE www.aacop.com

April 25, 2003

BY FAX (202) 224-9102
The Honorable Orrin Hatch, Chairman
Committee on the Judiciary
Room 224 Dirksen Building
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

On behalf of the Alabama Association of Chiefs of Police, I am pleased to endorse President George W. Bush's nomination of Alabama Attorney General Bill Pryor to the United States Court of Appeals for the Eleventh Circuit.

Since General Pryor took office in 1997, the police chiefs of the State have seen him operate first-hand in dealing with law enforcement issues. He has always applied the law fairly, regardless of the politics involved. Whether the parties are black or white, men or women, Republicans or Democrats, General Pryor has followed the law even if he personally wished the law would produce a different result. Attorney General Pryor has demonstrated that he firmly believes that the even-handed rule of law is more important than the preferences of individual officials.

Moreover, Attorney General Pryor cares about people. As the State's chief law enforcement officer, he has to deal with victims, the general public, judges, and state, local and federal law enforcement agencies. By his deeds, Attorney General Pryor has shown that he truly cares about victims, police chiefs, and our line officers who risk their lives every day to protect businesses, schools, and families. Attorney General Pryor is a model public servant.

The Alabama Association of Chiefs of Police know that Attorney General Bill Pryor will make an outstanding federal judge. We fully support his nomination and urge his swift confirmation.

Sincerely,

Arthur K. Bourne

Arthur K. Bourne
President/ AACOP

Cc: Senator Richard Shelby
Senator Jeff Sessions

HERBIE JOHNSON, Sheriff
SHERIFF
AUTAUGA COUNTY

162 WEST 4TH STREET
PRATTVILLE, ALABAMA 36067
PHONE: 334-365-3211
FAX: 334-361-3723

March 28,2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions:

I understand that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I write in support of that nomination.

I have known Bill for a number of years, both in his capacity as Attorney General and as a citizen of Alabama. I have worked with him in his efforts to help law enforcement, and have seen first hand, his commitment to ensure that the people of Alabama are safe, and are well represented in the Courts. It is my experience that Bill is fair and judicious in carrying out the duties of his office.

I have worked for and supported Bill in each of his elections, and have served on several law enforcement committes with him.

I am excited that a person of such integrity is being considered for such an important position, and I support Bill's nomination without reservation.

Sincerely,
Sheriff Herbie Johnson
James W. "Herbie" Johnson

SHERIFF

BRYANT MIXON

P.O. BOX 279
DALE COUNTY • OZARK, ALABAMA 36361

TELEPHONES: 334-774-2335
FAX: 334-774-2909
E-mail: info@dalecountysheriff.com

March 25, 2003

Senator Jeff Sessions
453 Russell Senate Building
Washington, D.C. 20510

This letter is written in support of Bill Pryor for a Judgeship with the Eleventh Circuit Court of Appeals.

General Pryor is a leader in Alabama Law Enforcement. His tenacity and diligence has resulted in significant arrests and convictions of both blue and white-collar criminals.

General Pryor's keen intellect and clear understanding of legal issues has been of great benefit to the Alabama Criminal Justice System. He will perform admirably in the Federal Judiciary.

A personal note: Bill Pryor is a quality human being and one of the nicest guys I have met in this business. He serves as a great example of civility and decency.

Thank you for any consideration you give this most excellent candidate.

Sincerely,

Bryant Mixon
Sheriff, Dale County

Elmore County Sheriff's Dept.

8955 U.S. HIGHWAY 231
WETUMPKA, ALABAMA 36092

BILL FRANKLIN
Sheriff

Sheriff's Office
(334) 567-5546
County Jail
(334) 567-5441

March 25, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Richard Shelby
Untied States Senate
110 Hart Senate Office Building
Washington, D. C. 20510

Dear Senators Sessions and Shelby,

It is my understanding that nominations are being considered for the Eleventh Circuit Court of Appeals. I am very pleased that President Bush is considering Bill Pryor for this nomination.

During my tenure as Sheriff of Elmore County I have worked indirectly with different Attorney General's for Alabama. Bill Pryor has surrounded himself with extremely capable and professional people in his office to assist Law Enforcement whenever needed. Mr. Pryor has always gone that extra mile to ensure that things are handled properly.

It is good to know that a person such as Mr. Pryor is being considered for such an important position. Hopefully he will come out on top.

Respectfully,

Sheriff, Bill Franklin

GROVER W. SMITH,
SHERIFF
Escambia County, Alabama
316 Court Street - Brewton, Alabama 36426

Sheriff's Secretary
251-867-0229
Fax 251-809-2155

March 26, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions:

I understand that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I write in support of that nomination.

I have known Bill for a number of years, both in his capacity as Attorney General and as a citizen of Alabama. I have worked with him in his efforts to help law enforcement, and have seen first hand, his commitment to ensure that the people of Alabama are safe, and are well represented in the Courts. It is my experience that Bill is fair and judicious in carrying out the duties of his office

General Pryor began an annual training program that provides cost free training for law enforcement statewide. He had also obtained funding for every officer in the state to have a personal copy of the criminal code..

I am excited that a person of such integrity is being considered for such an important position, and I support Bill's nomination without reservation.

Sincerely,

Grover W. Smith

Grover W. Smith
Sheriff

GWS:sep

James Hayes
SHERIFF
Etowah County

827 FORREST AVENUE
GADSDEN, AL 35901

Enforce The Law - Protect & Promote Our Youth

(256) 546-2825
FAX: (256) 549-8137

March 27, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions:

I understand that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I write in support of that nomination.

I have known Bill for many years, both in his capacity as Attorney General and even before that when he worked in your office when you were the Attorney General. I have worked with him in his efforts to help law enforcement serving on both boards and committees associated with law enforcement and corrections needs. It is my experience that Bill is fair and judicious in carrying out the duties of his office.

Although General Pryor and I have different political views, we both have the well being and safety of the people of Alabama in mind in all that we do in our official capacity.

I am excited that a person of such integrity is being considered for such an important position, and I support Bill's nomination without reservation.

Sincerely,

James Hayes

James Hayes
Etowah County Sheriff

City of Demopolis
Department of Police
500 North Walnut Avenue
Demopolis, Alabama 36732
Phone (334) 289-3071

JEFF MANUEL
PUBLIC SAFETY DIRECTOR

CHARLES AVERY
CHIEF OF POLICE

March 25, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Richard Shelby
United States Senate
110 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Sessions and Shelby:

It is my understanding that President Bush may nominate Alabama Attorney General Bill Pryor for a seat on the Eleventh Circuit Court of Appeals. It is my pleasure and honor to write this letter in support of my Attorney General.

I first met Bill Pryor after he was appointed Attorney General. Since then, he has worked hard and devoted his energy to ensure the protection of Alabama citizens. His work has made an impact and improved conditions by helping law enforcement receive the tools necessary to effectively enforce the laws of the state.

I have personally worked with General Pryor, serving on his law enforcement advisory committee and other projects. I am from a small department and General Pryor has as much concern for my agency as he has for the largest agency in the state.

Again, it is my pleasure to support a man that I personally know to have the highest ethics and integrity, which is a necessary trait for this position. I fully support Alabama Attorney General Bill Pryor for this nomination.

Sincerely,

Jeff Manuel

Florence Police Department

"Serving With Pride"

Rick L. Singleton
Chief of Police
(256) 760-6551

Tony Logan
Deputy Chief
Field Operations
(256) 760-6576

Pete Williford
Deputy Chief
Support Services
(256) 760-6575

March 25, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

I am excited at the news that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I write this letter in support of his nomination without hesitation.

I have known General Pryor for approximately seven years, having made his acquaintance through his office as attorney general. During that time, I have also come to know him on a very personal basis, and feel strongly that he is the type person we need sitting on our federal courts. He has proven time and time again that he is fair, impartial, and unbiased in his application of the law. His character and ethics are beyond reproach. He is respected by members of both parties in Alabama. The best example of this respect is the fact that his Democratic opponent for the office of attorney general in 1998 endorsed and supported General Pryor's candidacy in 2002.

It is my opinion that Bill Pryor would be an outstanding member of the court, and apply the law in the same fair, impartial, and unbiased manner as he has done as attorney general.

Again, I am excited at the prospect of his nomination, and support that nomination without reservation.

Respectfully,

Rick L. Singleton
Chief of Police

RLS/dmj

Guntersville Police Department

340 Blount Ave.
Guntersville, Alabama 35976
Phone (256) 571-7571

March 24, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Sessions,

I understand that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I write in support of that nomination.

I have known General Pryor for a number of years, both in his capacity as Attorney General and as a citizen of Alabama. I have been a member of the Attorney General's Legislative Committee from the beginning of General Pryor's service to the State of Alabama and have worked with him in his efforts to help law enforcement, and have seen first hand, his commitment to ensure that the people of Alabama are safe, and well represented in the Courts. It is my experience that General Pryor is fair and judicious in carrying out the duties of his office.

I am excited that a person of such integrity is being considered for such an important position, and I support Bill Pryor's nomination without reservation.

Sincerely,

J Scott Walls

J Scott Walls
Chief of Police
Guntersville, Al.

MOBILE POLICE DEPARTMENT

SAMUEL M. COCHRAN
CHIEF OF POLICE

2460 GOVERNMENT BLVD.
MOBILE, AL 36606-1618
(251) 208-1701
(251) 208-1705 FAX

March 27, 2003

MPD file: CP13/032703/P
Re: Bill Pryor

Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, DC 20510-

SUBJECT: 11TH CIRCUIT COURT OF APPEALS APPOINTMENT

Dear Senator Sessions:

I am writing in support of your nomination of Attorney General Bill Pryor for appointment to the 11th Circuit Court of Appeals. I have known Mr. Pryor for several years. I think Mr. Pryor is an excellent choice for this position. I know him to be a very honest and ethical person whom all should be proud to serve on the federal bench. I believe he would be most fair and not swayed by any biases or prejudices which I've never known him to exhibit.

If there is anything I could do in further support of Mr. Pryor for this position, I will gladly do so.

With kindest regards, I am

Yours in service,

Samuel M Cochran

SAMUEL M. COCHRAN
Chief of Police
Mobile Police Department

SMC/fpb

c. file P

City of
Montgomery, Alabama

BOBBY N. BRIGHT
Mayor

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TRACY LARKIN
B. J. (BEN) MCNEILL
P. B. (PEP) PILGREEN
CHARLES W. SMITH

March 26, 2003

The Honorable Jeff Sessions
U.S. Senate
493 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

I was thrilled to receive the information that Attorney General William "Bill" Pryor was being considered for a seat on the 11th Circuit Court of Appeals. I have known Bill since he began his tenure as Attorney General and it has been a real pleasure to work with a public servant with his degree of commitment and professionalism.

Attorney General Pryor is without question one of the most honest and ethical law enforcement professionals I have ever had the pleasure of working with during my career. His appointment will be a tremendous asset to the Judicial System and will go a long way toward helping local law enforcement officers.

Please accept this as a letter of support and, if my personal testimony is needed I will be more than willing to appear, any time and anywhere, on Attorney General Bill Pryor's behalf.

Sincerely,

John H. Wilson
Chief of Police
Montgomery Police Department

/bmr

COL. JOHN H. WILSON
Chief of Police

P.O. Box 159, Montgomery, Alabama 36101-0159

(334) 241-2651
FAX (334) 241-2333

D. Allan Wade

(b)(6)

March 25, 2003

Honorable Jeff Sessions
Senator
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions:

It is my understanding that the name of Alabama Attorney General Bill Pryor has been offered as a candidate for appointment to the 11th Circuit Court of Appeals. As Chief of Police for the City of Pelham, Alabama, I would like to add my name to the list of police chiefs from around our great state who heartily support this nomination. I have been privileged to work with General Pryor and his staff on a number of occasions and have always found him to be professional, fair and above all ethical. He is a dedicated, caring public servant and, in my humble opinion, would be an absolute asset to the 11th Circuit Court of Appeals.

Thank you for your consideration in this matter.

Sincerely,

Allan Wade
Chief of Police
City of Pelham, Alabama

Charles E. Harden
Mayor

Sammie Brown, Jr.
Chief of Police

Captain Yvonne M. Baldwin
Administrative Services

Captain Frank Dees
Criminal Investigations
Community Policing Division

POLICE DEPARTMENT

March 26, 2003

The Honorable Jeff Sessions
United States Senate
493 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions,

I understand that President Bush is considering Alabama Attorney General Bill Pryor for nomination to the Eleventh Circuit Court of Appeals. I write in support of that nomination.

I have known Mr. Pryor for a number of years, both in his capacity as Attorney General and as a citizen of Alabama. I have worked with him in his efforts to help law enforcement, and have seen first hand, his commitment to ensure that the people of Alabama are safe, and are well represented in the Courts. When officers of the Prichard police Department were ambushed and a young child killed by drug dealers, Mr. Pryor contacted my office to lend assistance from his office as Attorney General. It is my experience that Mr. Pryor is fair and judicious in carrying out the duties of his office.

I am excited that a person of such integrity is being considered for such an important position, and I support Mr. Pryor nomination without reservation.

Sincerely,

Sammie Brown, Jr.
Chief of Police

SB/mk

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The Birmingham News

D.C. draws caricature of Pryor

07/27/03

We in Alabama thought we knew Bill Pryor pretty well. He has served as our attorney general since he was appointed to the job, at age 34, in 1997. He has since run, and won, two statewide campaigns for the post.

In the 2002 general election, he received the votes of more Alabamians than anyone on the ticket except Sen. Jeff Sessions. He outpolled both the winner in the governor's race, Republican Bob Riley, and the winner in the lieutenant governor's race, Democrat Lucy Baxley.

Pryor has been a high-profile attorney general, but not a particularly polarizing one. He has prosecuted corrupt public officials of both parties, sometimes to the dismay of his Republican friends. He has pushed for a sentencing reform commission to make the sentencing of criminals more consistent and more meaningful. He has supported Children First, an initiative to improve the juvenile justice system.

He has taken a conservative position in arguing for states' rights in several cases before the U.S. Supreme Court, and he has successfully defended student-led prayers in public schools. His arguments reflected the views of a large number of his fellow Alabamians. And serving with such outspoken officeholders as former Gov. Fob James and Chief Justice Roy Moore, he has gained a reputation for being restrained and reasonable.

As he told a senator who sought to label him, "In Alabama, I sometimes think I'm called a moderate."

We thought we knew him, but it is very difficult to recognize the Bill Pryor we know in the image that is projected through the partisan prisms of Washington politics.

Right-wing extremist. Shady fund-raiser. Catholic victim of religious persecution.

Those are the images surrounding the Senate debate of Pryor's nomination to the 11th U.S. Circuit Court of Appeals. He was approved by the Senate Judiciary Committee Wednesday in a bitter, party-line vote.

Democrats in the Senate appear ready to filibuster on the floor to stop Pryor from being confirmed by the full Senate. Meanwhile, Pryor supporter Sessions is struggling to paint this essentially political fight as some kind of sectional and religious misunderstanding.

As both parties practice for the Super Bowl of confirmation battles, a future opening on the Supreme Court, Alabama's attorney general is being used as a political football. Senate Democrats are looking for any opportunity to kick President Bush's judicial nominees, while Republicans are looking for ways to discredit that opposition.

Yes, Pryor is a conservative, and he has been an active participant in conservative legal and intellectual forums. He was nominated by a conservative president, and many Americans share his views.

Yes, Pryor is personally opposed to abortion. He was nominated by a president who opposes abortion, and many Americans share his views.

However, Pryor's record in Alabama and his promises to the Senate Judiciary Committee indicate he can put aside his personal views to stay true to the law.

It is a shame that the Senate is debating a caricature drawn by Washington's partisan interest groups, and not the Bill Pryor that Alabama knows.

Tom Scarritt is editor of The News. His e-mail address is tscarritt@bhamnews.com.

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The Birmingham News

Pryor under fire

Nomination in trouble, and so is the truth

07/27/03

The vote in the Senate Judiciary Committee last week on Attorney General Bill Pryor's nomination to the federal court wasn't surprising: The nomination was forwarded to the full Senate on a 10-9 vote along party lines.

What is surprising, and disappointing, is the level to which the debate has fallen.

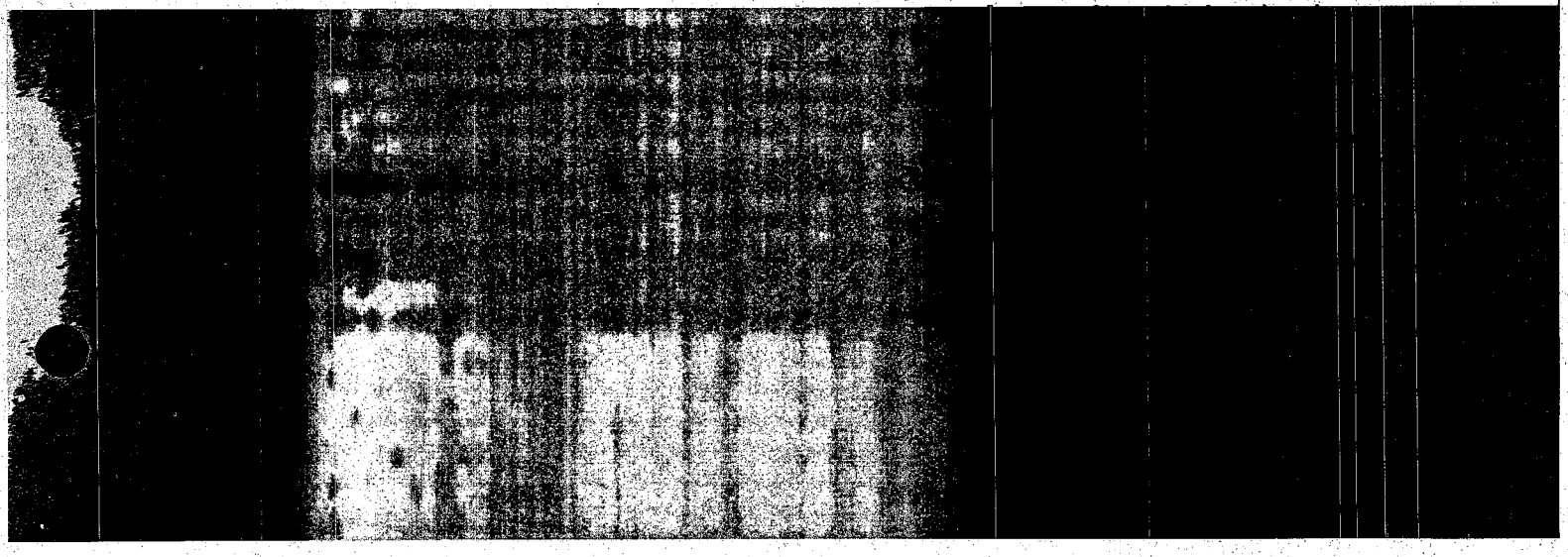
President Bush nominated Pryor to take a spot on the 11th U.S. Circuit Court of Appeals. As an unabashed conservative, opposition to Pryor was expected from a wide variety of liberal groups.

The picture of Pryor drawn by Democrats in the Judiciary Committee, though, is practically unrecognizable to those who know him and have followed his career. Everything Pryor's motivations, integrity, even religious faith has been subject to comment and questions.

Pryor fell into an even bigger mess last week concerning questions over his role as a fund-raiser for the Republican Attorneys General Association. Certainly, he could have helped himself had he been more open from the beginning about fund raising for the AG's group. This newspaper urged him to release information about the group's financial backers last year, but Pryor refused. Still, there's no evidence he ever did anything illegal.

In a characteristic overreaction, Sen. Edward Kennedy, D-Mass., called Pryor's nomination "a ticking ethical time bomb ready to go off at any moment."

Please. Give it a rest.



Bush chose Pryor for the federal bench, and Pryor deserves to be confirmed. But as we've seen throughout the hearings over his nomination, perception is far more important than reality.

Pryor's enemies appear willing to do anything to derail his nomination, even if it means ignoring the truth to smear a good man's reputation.

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The Birmingham News

Pryor Restraint

Hard to recognize Attorney General amid attacks

6/11/03

Bill Pryor has been a good attorney general for Alabama.

He has handled most of the state's legal business well. He has led initiatives that will make Alabama a better place to live, such as his own Mentor Alabama that finds volunteers to work with children. He has supported worthy programs such as Children First to upgrade the state's juvenile justice system. He has pushed the Legislature to establish a commission to study the state's outof-whack sentencing laws. He has been a voice for open government. It's easy to forget Pryor's solid record amid the torrent of liberal interest-group attacks on him leading up to today's hearing of the U.S. Senate Judiciary Committee. The committee will consider whether to recommend Pryor, nominated by President Bush for the 11th U.S. Circuit Court of Appeals, to the full Senate for confirmation.

According to his attackers, Pryor is unfit to be a federal judge. A sample:

"William Pryor's words and abysmal record in protecting civil, constitutional and human rights demonstrate that he is an avowed extremist and legal activist," said Nancy Zirkin, deputy director of the Leadership Conference on Civil Rights. "His ideological agenda of limiting Congress' ability to pass laws aimed at protecting against discrimination and inequalities should certainly disqualify him from a lifetime appointment to the federal judiciary."

Amid the caricature, it's hard to recognize the thoughtful, earnest attorney general of Alabama for the past six years. Yes, Pryor is conservative, but so is the president who nominated him. That said, Pryor is not blindly conservative, one who would rule the way Republicans want instead of based on what the law says. In fact, he has been criticized by some in his own party for not being Republican enough, even as he is now earning strong support for a seat on the federal bench from black Democrats such as U.S. Rep. Artur Davis and state Rep. Alvin Holmes.

Today's committee hearing could be long and bruising. With 10 Republicans and nine Democrats, the biggest threat to Pryor isn't the committee vote but on the floor on the Senate. If Democrats filibuster Pryor as they have two other Bush nominees, it prevents a vote.

Alabama's attorney general is a fit nominee for the appeals court. The Senate Judiciary

Committee should send his nomination to the full Senate, and the full Senate should confirm him.

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100 of 406 DOCUMENTS

Copyright 2003 U.S. Newswire, Inc.
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June 11, 2003 Wednesday

SECTION: National Desk

LENGTH: 433 words

HEADLINE: National Police Group Backs Alabama Attorney General **Pryor for 11th Circuit Judicial Appointment**

DATELINE: WASHINGTON, June 11

BODY:

Alabama Attorney General Bill **Pryor** today received the enthusiastic endorsement of Law Enforcement Alliance of America (LEAA), as the Senate Judiciary Committee holds hearings on his nomination by President Bush to the **11th Circuit** Court.

Attorney General **Pryor** -- who was the youngest Attorney General in America -- is a well-respected lawyer, having graduated magna cum laude in 1987 from Tulane University School of Law, where he was editor in chief of the Tulane Law Review. Respected by politicians from both the left and right, he is a well-regarded lawyer to whom the American Bar Association gave its highest rating.

Bill **Pryor** has a well-established record in support of common sense criminal justice principles from the death penalty to truth in sentencing. General **Pryor** has also been a leader in opposing the proliferation of judicial activism through government orchestrated litigation.

"Pryor is eminently well qualified for this nomination and I hope politics don't interfere. He should be speedily approved by the Senate," said Ted Deeds, LEAA's chief operating officer.

Pryor was a law clerk for the late Judge John Minor Wisdom of the U.S. Court of Appeals, Fifth Circuit; he is an experienced lawyer who was in the private practice of law in two of Alabama's finest law firms. Also, **Pryor** taught as an adjunct professor at the Cumberland School of Law of Samford University. And, finally, he is experienced before various courts, having argued cases before the Supreme Court of the United States, the Supreme Court of Alabama, and the U.S. Court of Appeals for the **11th Circuit.**

LEAA Executive Director James J. Fotis said, "I've known Bill **Pryor** for years and I know him to be well qualified and a defender of the Constitution. **Pryor** will be an honorable, ethical and impartial jurist who will not only serve the people of the **11th Circuit** well, but he will not be a judicial activist making up new law from the bench." Fotis also noted **Pryor's** strong base of support in Alabama and his service with the White House Office of Homeland Security as an advisory committee member. Fotis concluded, "The Members and supporters of the Law Enforcement Alliance of America and all Americans concerned about justice will be well served by **Pryor's** speedy confirmation to the court."

With more than 75,000 members and supporters, the Law Enforcement Alliance of America is the nation's largest coalition of law enforcement professionals, crime victims, and concerned citizens dedicated to making America safer. Visit http://www.LEAA.org.
http://www.usnewswire.com

CONTACT: Eunice Deeds of the Law Enforcement Alliance of America, 703-847-2677

ajc.com The Atlanta Journal-Constitution

Alabamans give Pryor rave reviews

EQUAL TIME opinion: Response to Atlanta Journal-Constitution Editorial about Pryor

May 6, 2003

By Quin Hillyer

Alabama Attorney General Bill Pryor, President Bush's nominee for a judgeship on the 11th U.S. Circuit Court of Appeals, is one of the most universally respected public figures in his home state. National interest groups of the left, ever in search of judicial nominees to victimize, have painted Pryor as an extremist bent on politicizing the courts --- but that portrait of Pryor would be unrecognizable here in Alabama.

Pryor has been attacked for supporting Alabama Chief Justice Roy Moore's action in placing a Ten Commandments monument in the state Supreme Court building. But Pryor actually has argued on much narrower (and firmer) legal grounds than the sweeping, theocratic claims Moore has advanced. Pryor cut a TV commercial backing Moore's Republican primary opponent in the last election.

Pryor is under fire for filing a brief against one tiny part of the federal Violence Against Women Act. That one provision would explicitly cite the Constitution's "Commerce Clause" to allow a rape victim to sue her attacker in federal court. Pryor argued, quite reasonably, that rape isn't commerce.

In the case, U.S. v. Morrison in 2000, the U.S. Supreme Court agreed with Pryor. How does one become disqualified for a judgeship for taking a legal position the Supreme Court ruled correct?

In Alabama, Pryor has been one of the nation's ablest and most active prosecutors of rapists and violent sex offenders. He also is the creator of a novel program to encourage victims of domestic violence to seek help, and has been honored by the Penelope House (a battered women's shelter) in its Hall of Fame.

On abortion, meanwhile, Pryor --- unlike his critics --- has shown he understands how to separate personal views from legal duties.

Pryor is indeed a strict Catholic who believes life begins at conception. Last anybody checked, that's his right. But when Alabama's Legislature passed a law that forbade "partial-birth" abortions even before the baby was "viable" outside the womb, Pryor ignored his personal preference and told state law officials not to enforce that provision because it contradicted Supreme Court precedent.

Finally, some of Pryor's opponents have accused him, in effect, of the sin of being Southern. One criticism inferred that Pryor opposes the federal Voting Rights Act. The truth is that Pryor

opposes only one provision, which requires certain Southern states to solicit "pre-clearance" from slow-moving bureaucrats at the U.S. Justice Department for virtually any change in election procedures, even ones as innocuous as moving a polling place from one street corner to the next.

Right now, Georgia Attorney General Thurbert Baker is arguing in favor of Pryor's basic position in a case before the U.S. Supreme Court.

Those of us in Alabama know our brilliant, 41-year-old attorney general to be utterly fair, highly principled and demonstrably nonpartisan. Bill Pryor will make a superb federal judge.

Quin Hillyer is an editorial writer for the Mobile Register.

The Huntsville Times

Opinion

Another job for Pryor?

If the attorney general becomes a federal judge, his party gains, but the state loses

01/07/03

Alabama Sen. Jeff Sessions thinks Alabama Attorney General Bill Pryor should be appointed to the 11th U.S. Circuit Court of Appeals. Is that good for Pryor? Sure. Is it good for Alabama? Probably not.

Pryor is popular among Republicans. His conservative credentials are intact; he is not reluctant to back certain causes, even though some of them carry a risk. His support for Chief Justice Roy Moore's Ten Commandments monument is one example.

But Pryor is no mere ideologue. He has worked to carry out the duties of his office even-handedly. He has earned the respect of state newspapers for starting investigations into violations of Alabama's open-meetings law.

As the state's chief law-enforcement officer, Pryor understands the difference between major crimes and minor ones. In one meeting with The Times' editorial board, Pryor stated bluntly that the state is releasing rapists so it can incarcerate drug addicts. He advocates sentencing reform.

In addition, Pryor has launched a statewide mentoring program. He believes society must prevent the creation of criminals as well as deal with those who commit crimes.

In short, in Pryor the Republican Party in Alabama has a strong gubernatorial candidate for the future. And the state has a strong and popular attorney general. Even people who disagree with him on some issues find him both likeable and principled.

That's what Alabama Republicans - and Alabama - would lose if Pryor is appointed to the federal bench. Such appointments are for life, and sitting federal judges rarely resign to run for political office.

And there's this: As a federal judge, Pryor, after a few years on the bench, could give an Alabamian a shot at the U.S. Supreme Court. If so, Pryor could be the first Alabamian on the court since Hugo Black. There are no guarantees, of course, but the possibility would exist.

For Alabama, where good news about elected officials can be scarce, the very fact that Pryor is being considered for the federal bench is something to be proud of.

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SAAD

JUDGE HENRY W. SAAD

NOMINEE TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Biographical Information

- Judge Saad has sat on the Michigan Court of Appeals since 1994, having been reelected twice with broad bi-partisan support.
- The ABA has rated Judge Saad "Qualified."
- Judge Saad would be the first Arab American appointee to the Court of Appeals for the Sixth Circuit.
- Judge Saad was a board member of the Greater Detroit Inter-Faith Roundtable of the National Conference of Christians and Jews and a member of the Executive Committee of the American Arabic and Jewish Friends.
- Judge Saad received the "Salute to Justice John O'Brien Award" for outstanding volunteer service to the People of Oakland County in 1997. He received the Arab-American and Chaldean Council civic and humanitarian award for outstanding dedication to serving the community with compassion and understanding in 1995.
- Judge Saad served for fifteen years as a Hearing Referee for the Michigan Department of Civil Rights.

Controversial Issues

- No real objections have been raised as to the qualifications of Judge Saad who is a distinguished and experienced jurist.
- Opponents unreasonably seek to block the nominations of these judges because prior Congresses failed to confirm two of President Clinton's nominees. That grievance does not entitle them to block President Bush's Michigan nominees.
- In the past, both parties have left nominations pending at the end of presidents' terms. The effort to block President Bush's Michigan nominations from the outset of his term is extraordinary and threatens a complete breakdown of the confirmation process.

Judge Henry W. Saad
Nominee to the U.S. Court of Appeals for the Sixth Circuit

➢ **Judge Henry Saad is an outstanding jurist with nearly a decade of experience on the state court of appeals.**

✓ Judge Saad has sat on the Michigan Court of Appeals since 1994, having been reelected twice with broad bi-partisan support. The American Bar Association rated Judge Saad "Qualified."

✓ Judge Saad has significant appellate experience in both civil and criminal matters, and has authored over 75 published majority opinions.

✓ President George H.W. Bush first nominated Judge Saad to the federal bench in 1992, but the Democratic Senate failed to act on his nomination (and one other in Michigan) prior to the end of President Bush's term. Judge Saad nevertheless urged the confirmation of nominees of President Clinton to the Michigan federal courts.

➢ **Judge Saad was born in Detroit and is a life-long resident of Michigan. He would be the first Arab American appointee to the Court of Appeals for the Sixth Circuit.**

✓ "[Bush's nomination of Saad in the wake of the September 11 attacks] conveys an important message to all the citizens and residents of this country that we embrace and welcome diversity and that we are extending the American dream to anyone who is prepared to work hard." U.S. District Judge George Steeh, III, an Arab-American Clinton appointee in Michigan. "Three Nominated by Bush to Appeals Court," *Detroit Free Press*, November 9, 2001.

➢ **Judge Saad teaches law and had a distinguished career as a practicing attorney before serving on the state bench.**

✓ Judge Saad serves as an adjunct law professor at both Wayne State University Law School and the University of Detroit Mercy School of Law.

✓ Prior to becoming a judge, Saad practiced law for twenty years at the prestigious Detroit firm of Dickinson, Wright, which he left as a partner in 1994. In private practice, he built a national practice and reputation in the areas of employment law, school law, libel law and First Amendment law.

✓ Judge Saad received his J.D., *magna cum laude,* in 1974 and his bachelor's degree in 1971, both from Wayne State University. In 2000, he received a special Order of the Coif award, which is bestowed by a vote of the faculty upon distinguished graduates who earned their degrees before the law school began inducting students into the Order of the Coif.

- **Judge Saad's nomination has broad bipartisan support, including endorsements from such disparate groups as the United Auto Workers and the Michigan Chamber of Commerce.**

  - ✓ In his state judicial campaigns, Judge Saad has received endorsements from the UAW, the Michigan Education Association, and the AFL-CIO.

- **Judge Saad is dedicated to improving the law and helping his state and local community through volunteer work.**

  - ✓ Judge Saad has been Chairman of the Board of the Oakland Community College Foundation and President of the Wayne State University Law School Alumni Association and is currently a member of the Board of Visitors of the Ave Maria Law School.

  - ✓ Judge Saad was a Board Member of the Greater Detroit Inter-Faith Roundtable of the National Conference of Christians and Jews and a member of the Executive Committee of the American Arabic and Jewish Friends. He also served on the Board of the American Heart Association and as a trustee of the WTVS Channel 56 Educational Television Foundation.

  - ✓ Judge Saad received the "Salute to Justice John O'Brien Award" for outstanding volunteer service to the People of Oakland County in 1997. He received the Arab-American and Chaldean Council civic and humanitarian award for outstanding dedication to serving the community with compassion and understanding in 1995.

- **Judge Saad has a long history of support for the protection of civil rights.**

  - ✓ Judge Saad served for fifteen years as a Hearing Referee for the Michigan Department of Civil Rights.

  - ✓ While in private practice, Judge Saad wrote an article defending the rights of employees afflicted with AIDS to be free from discrimination in the workplace. Mr. Saad wrote that an employer's erroneous view that an employee had tested positive for AIDS could not justify that employee's firing. A contrary result, he argued, would "eliminate any protection for AIDS victims and probably would mean wholesale discrimination against homosexuals by way of testing for AIDS." Henry Saad, "AIDS—Legal Implications for the Employer," 66 *Mich. Bar J.* 164 (Feb. 1987); *See also* Henry Saad, "AIDS and the Law," *Management Solutions* (Sept. 1986).

  - ✓ Judge Saad worked with the University of Michigan to craft a narrowly tailored policy to prohibit hate speech in campus classrooms, after the University's first policy was voided for vagueness and overbreadth. *Doe v. Univ. of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989); "The Case for Prohibitions of Racial Epithets in the University Classroom," 37 *Wayne L. Rev.* 1351 (1990).

Statements by Select Supporters of Judge Saad

E. Spencer Abraham, former Secretary of Energy and former U.S. Senator from Michigan

"I have known Henry for twenty years on a personal and professional level. He is a person of unimpeachable integrity and will serve our country and our justice system remarkably well."

John Engler, former Governor of Michigan

"The President selected individuals [including Henry Saad] who are experienced judges and whose reputations for intellect, knowledge of the law, diligence and temperament are well established. Judge Saad has established a distinguished reputation on Michigan's appellate court which he will take to the federal appeals court."

Stephen Yokich, President of the United Auto Workers

"I've known Judge Saad for twenty-five years: he is a man of the highest integrity and a judge who is fair, balanced and hard working. I strongly support President Bush's nomination of Judge Saad to the federal appellate bench."

Congressman Joseph Knollenberg, U.S. Representative from Michigan

"I have known Judge Saad for over twenty-five years. He was an outstanding lawyer and is a highly regarded appellate jurist known for his scholarly opinions, balance and fairness. I am confident he will be a great addition to the federal appellate bench."

Justice Stephen Markman, Michigan Supreme Court

"In his seven years on the Michigan Court of Appeals, Judge Saad has been one of its most thoughtful and fair-minded jurists. His opinions and his judicial integrity have earned him the respect of a remarkably broad range of his colleagues."

Judge Hilda Gage, Michigan Court of Appeals

"I have served with Judge Saad on the Michigan Court of Appeals for six years. I admire his judicial independence and his scholarly analysis of the law. I applaud the President's nomination of Judge Saad to the Sixth Circuit Court of Appeals."

Ted B. Wahby, Macomb County Treasurer and Democrat

"I have known Judge Saad for many years and believe him to be a fair and principled judge and a good public servant for Michigan. He would be an outstanding federal appeals judge and a credit to his state."

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Counsel's Office, White House

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002	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;

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BRETT M. KAVANAUGH

BRETT M. KAVANAUGH

NOMINEE TO THE D.C. CIRCUIT

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TABLE OF CONTENTS: BRETT M. KAVANAUGH

Summary and Biographical Points for Brett M. Kavanaugh 1

Statements by Select Supporters of Brett M. Kavanaugh 4

Responses to False Allegations against Brett M. Kavanaugh 9

Select Editorials and Letters of Support for Brett M. Kavanaugh 21

"A Tale of Two Judges," *The Washington Post*, May 9, 2006 21
"Girded for Battle," *The New York Sun*, April 27, 2006 22
"The Next Generation," *The Legal Times*, May 6, 2006 23
Letter from Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit 29
Letter from Judge Edward R. Becker, U.S. Court of Appeals for the Third Circuit 31
Letter from former Attorneys General of the United States 32
Letter from former Counsels and Deputy Counsels to the President 34
Letter from former Solicitors General of the United States 36
Letter from William P. Barr, former Attorney General 38
Letter from David G. Leitch, former Deputy Counsel to the President 39
Letter from Bradford A. Berenson, former Associate Counsel to the President 41
Letter from Helgi C. Walker, former Associate Counsel to the President 43
Letter from bipartisan group of former classmates at Yale Law School 45
Letter from Mark H. Tuohey, III, former President of the D.C. Bar 47
Letter from John F. McAuliffe, Retired Judge of the Court of Appeals of Maryland 48
Letter from Neal Katyal, Professor of Law at Georgetown University 50
Letter from Robert M. Chesney, Professor of Law at Wake Forest University 52
Letter from Eugene Volokh, Professor of Law at University of California, Los Angeles 53
Letter from Pamela Harris, Washington, D.C. attorney and Yale Law School classmate 54
Letter from Thomas D. Yannucci, Partner, Kirkland & Ellis LLP 55
Letter from Paul F. Kemp, Partner, Venable LLP 57
Letter from Carolyn H. Williams, Partner, Williams & Connolly LLP 59
Letter from Scott M. McCaleb, Partner, Wiley Rein & Fielding LLP 61
Letter from Kate Comerford Todd, Partner, Wiley Rein & Fielding LLP 63
Letter from Adam H. Charnes, Partner, Kilpatrick Stockton LLP 65
Letter from Robert H. Michel, Senior Advisor, Hogan & Hartson LLP 67

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

- Throughout his career as an appellate lawyer, a government lawyer, and a member of the senior staff of the White House, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the vast majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President and ensuring that all relevant views are presented. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appeals and trial courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh worked for one year in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh either "Well Qualified" or "Qualified" to serve on the D.C. Circuit. In three reviews by the ABA, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh has regularly offered his legal expertise and personal time to serving his community.

    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.

    - Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba. Mr. Kavanaugh filed briefs in the Eleventh Circuit and Supreme Court in this case.

- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.

    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. ... He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court."

    - A group of former Solicitors Generals of the United States wrote, "Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service."

    - A bi-partisan group of 25 of Mr. Kavanaugh's classmates from the Yale Law School Class of 1990, wrote that he is "extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests."

- According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."

STATEMENTS BY SELECT SUPPORTERS OF BRETT M. KAVANAUGH

Letter from a group of former Attorneys General (William P. Barr on behalf of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft)

"As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. ... Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. ... Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as [a] partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

Letter from a group of former Solicitors Generals of the United States (Theodore B. Olson on behalf of Kenneth W. Starr and Charles Fried)

"Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered. Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. ... Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service." (*Letter to Chairman Specter*, May 3, 2006)

Letter from a group of former Counsels and Deputy Counsels to the President (Fred Fielding on behalf of Arthur B. Culvahouse, Jr., Peter J. Wallison, Phillip D. Brady, Richard A. Hauser, Timothy E. Flanigan, David G. Leitch, John P. Schmitz, and Jay B. Stephens)

"In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. ... We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit. Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench." (*Letter to Chairman Specter*, May 5, 2006)

Professor Neal Katyal, Georgetown University Law Center and former National Security Advisor to the Deputy Attorney General

"Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment. ... It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good—he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General." (*Letter to Chairman Specter*, May 9, 2006)

Judge Walter Stapleton, U.S. Court of Appeals for the Third Circuit

"I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a 'judge's judge.' His personal confidence is matched by his humility and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predilections. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court." (*Letter to Chairman Specter*, May 3, 2006)

William P. Barr, Executive Vice President and General Counsel of Verizon and former Attorney General

"As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ...

In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor." (*Letter to Chairman Specter*, May 10, 2005)

Letter from a bi-partisan group of 25 classmates from Yale Law School Class of 1990

"Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench. Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leah*y, May 3, 2006)

Pamela Harris, Washington, D.C. attorney and Yale Class of 1990

"I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political issues we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say. ...

At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries." (*Letter to Chairman Hatch*, April 27, 2004)

Mark H. Tuohey III, Vinson & Elkins LLP and former President of the District of Columbia Bar

"[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the rule of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice.

In 1995, ... I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." (*Letter to Chairman Hatch*, April 26, 2004)

Professor Robert M. Chesney, Wake Forest University School of Law

"As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination." (*Letter to Chairman Hatch*, April 26, 2004)

Adam H. Charnes, Kilpatrick Stockton LLP

"Brett is obviously one of the most distinguished lawyers of his generation. ... Brett is also well within the legal mainstream. Everyone who has met Brett – Democrats and Republicans alike – knows that he is thoughtful, considerate, and fair. Brett is not an 'extremist' on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate court." (*Letter to Chairman Hatch*, April 23, 2004)

Bradford A. Berenson, Sidley Austin Brown & Wood LLP and former Associate Counsel to the President

"I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law. ...

That an individual has been allied with politicians or political causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters. In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government." (*Letter to Chairman Specter*, May 10, 2005)

Carolyn Williams, Williams & Connolly LLP

"Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. ... He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him. Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection." (*Letter to Chairman Specter*, May 11, 2005)

Thomas Yannucci, Kirkland & Ellis LLP

"I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.... My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities." (*Letter to Chairman Specter*, May 12, 2005)

BRETT M. KAVANAUGH
RESPONSES TO FALSE ALLEGATIONS

ALLEGATION: At 41 years old, Brett Kavanaugh is too young and lacks the necessary experience to be a federal appellate court judge.

RESPONSES:

- Mr. Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal courts, and a proven commitment to public service.

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.

    - Mr. Kavanaugh has served as Staff Secretary to the President, as Senior Associate Counsel to the President, and as an assistant special prosecutor.

    - Mr. Kavanaugh also practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

    - Mr. Kavanaugh has extensive experience in the appellate courts, both as a law clerk and as counsel. He was a law clerk to Justice Anthony Kennedy, and to U.S. Court of Appeals Judges Kozinski and Stapleton.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is not a requirement for appointment to the federal bench.

    - Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 had previously served as judges.

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

- Given his peerless credentials and extensive appellate experience, Mr. Kavanaugh's age should pose no impediment to his confirmation. Indeed, all three judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39.

    - Then-Judge (now Justice) Anthony Kennedy was appointed to the Ninth Circuit when he was 38 years old.

- Judge Alex Kozinski was appointed to the Ninth Circuit when he was 35 years old.
- Judge Stapleton was appointed to the district court at 35 and was later elevated to the Third Circuit.

- Some of the most highly-regarded federal appellate judges have been appointed at a young age. These are just a few examples:
  - Judge Frank Easterbrook, Seventh Circuit, appointed at age 36
  - Judge Harry Edwards, D.C. Circuit, appointed at age 39
  - Judge Douglas Ginsburg, D.C. Circuit, appointed at age 40
  - Judge J. Harvie Wilkinson III, Fourth Circuit, appointed at age 39

ALLEGATION: Brett Kavanaugh is not qualified to serve on the Court of Appeals because the American Bar Association (ABA) downgraded his rating.

RESPONSES:

- The ABA has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- On behalf of the ABA, Stephen Tober explained a "Qualified" rating means that "the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

- Mr. Tober also stated that Mr. Kavanaugh "enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." He explained to the Senate Judiciary Committee that "a lot of people refer to him as brilliant."

    - Mr. Tober stated: "Let me underscore ... that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that."

    - He added: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before ... he has those skills that will serve him well, certainly, on a Federal court."

- Mr. Kavanaugh has support from across the political spectrum.

    - *The Washington Post*: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale of Two Judges," May 9, 2006)

    - A bi-partisan group of former Attorneys General: "Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on

both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table – namely a warm personality, a strong work ethic, and a good character." (*Letter to Chairman Specter*, May 5, 2006)

- A bi-partisan group of 25 classmates from Yale Law School Class of 1990: "Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. ...[W]e firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach [his] decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated." (*Letter to Senators Specter and Leahy*, May 3, 2006)

ALLEGATION: Brett Kavanaugh is unsuitable for appointment to the federal bench because his legal career has included partisan activities.

RESPONSES:

- It is widely acknowledged that Mr. Kavanaugh is a professional who, as a judge, would address matters before him without regard to his personal views. *The Washington Post* wrote in an editorial: "Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue." (Editorial, "A Tale of Two Judges," May 9, 2006)

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan."

- Bradford Berenson, who worked with Mr. Kavanaugh in the White House Counsel's Office wrote, "In my observation, [Mr. Kavanaugh] has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government."

- Mr. Kavanaugh has served the public, not as a "partisan," but as a prosecutor, as Senior Associate Counsel to the President, and finally as Staff Secretary to the President.

- Mr. Kavanaugh has clerked for three federal judges, including Supreme Court Justice Anthony Kennedy. He has worked in the Solicitor General's office and has been a partner in a major law firm.

- Mr. Kavanaugh's government service has given him a wealth of experience in preparation for the federal bench. For example, prior to his appointment to the First Circuit Court of Appeals, now-Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service. Likewise, now-Chief Justice John G. Roberts, Jr., held several positions that could be considered political.

    - Justice Breyer served as a counsel for the Watergate Special Prosecution Force and as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

    - Chief Justice Roberts served as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Ronald Reagan, and as Principal Deputy Solicitor General – the "political deputy" in the office.

ALLEGATION: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees, which reflects upon his own suitability for the federal bench.

RESPONSES:

- The vast majority of President Bush's nominees have been confirmed by the Senate.
- The President selects judicial nominees, as advised primarily by the Counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
    - The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
    - The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A conclusion is reached on the best candidate for the position, and a recommendation is made to the President.
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- At his hearing, Mr. Kavanaugh clearly stated his own judicial philosophy and emphasized that he would adhere to the rule of law: "I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy."

ALLEGATION: Brett Kavanaugh was a co-author of a section of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there may be grounds for impeaching President Clinton. Mr. Kavanaugh's participation in the investigation of the Monica Lewinsky matter and his defense of Judge Starr demonstrate Mr. Kavanaugh's partisanship.

RESPONSES:

- Mr. Kavanaugh's involvement with the Office of the Independent Counsel (OIC) demonstrates his service as a prosecutor in accordance with the requirements of the law. The report formed the basis of the House of Representatives' decision to impeach President Clinton. Moreover, numerous Democratic senators as well as a federal judge concluded that President Clinton was not truthful in his testimony.

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – the "substantial and credible information" serving as grounds for impeachment – was required by federal law (28 U.S.C. 595(c)).

- The Independent Counsel's report did not conclude that President Clinton should be impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment.

    - In fact, the House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury; and by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

    - After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice. An additional 32 senators offered a resolution to censure President Clinton.

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones' sexual harassment lawsuit. Judge Wright ordered President Clinton to pay a fine of $90,000.

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

- The U.S. Senate already has confirmed 11 judicial and executive branch nominees who worked for Independent Counsel Ken Starr. The Senate has not disqualified other judicial nominees because of their service in the Office of the Independent Counsel; nor should it disqualify Mr. Kavanaugh because of his service.

- For example, the Senate confirmed as judges Steven Colloton (Eighth Circuit), John Bates (D.C. District Court), Amy St. Eve (Northern District of Illinois), and William Duffey (Northern District of Georgia), all of whom served in the OIC.

- Mr. Kavanaugh initially left the OIC in 1997. In April 1998, the OIC requested Mr. Kavanaugh to handle a Supreme Court argument regarding an attorney-client privilege case arising out of the Vince Foster investigation. Mr. Kavanaugh did not return to the OIC in order to work on the Lewinsky matter.

- Mr. Kavanaugh praised and supported Judge Starr when Judge Starr was unfairly criticized for his work. Even the *Washington Post* editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right."

ALLEGATION: Brett Kavanaugh took seven months to respond to written questions from Senators, which demonstrates that he does not respect the Senate confirmation process.

RESPONSES:

- This is a non-issue. After his first hearing in April 2004, Mr. Kavanaugh correctly understood that no further action would occur on his nomination that year. He further understood that he was required to submit answers to any written follow-up questions before the end of the Congressional session so that the record of his 2004 hearing would be complete were he to be re-nominated in 2005.

- Mr. Kavanaugh did, in fact, fully comply with that deadline and provided responses to all written questions prior to the end of the session.

- Mr. Kavanaugh participated in a second hearing before the Committee in 2006 and was available to respond to all additional questions from senators. Mr. Kavanaugh also made clear that he took responsibility if there had been any misunderstanding regarding the deadline in 2004.

- Mr. Kavanaugh has fully cooperated with the Senate. In fact, he has responded to more Senate hearing questions and more written and follow-up questions from Senators than any of the 56 D.C. Circuit judges appointed since that court's creation in 1893.

- Mr. Kavanaugh has also undergone three separate ABA investigations, in which all 42 individual reviews concluded that he was "Well-Qualified" or "Qualified."

ALLEGATION: Brett Kavanaugh has repeatedly demonstrated his hostility to the separation of church and state in several cases involving religion and education. For instance, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Mr. Kavanaugh argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria. Mr. Kavanaugh also showed his hostility to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools.

RESPONSES:

- In these cases, Mr. Kavanaugh argued on behalf of his clients that the U.S. Constitution required equal treatment of religious viewpoints, religious organizations, and religious schools.

- In *Good News Club*, the U.S. Supreme Court, in a 6-3 decision, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

    - In an amicus brief in that case, Mr. Kavanaugh simply argued on behalf of his client for the principle that religious perspectives should be given equal treatment in the public sphere.

    - The school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes; however, it specifically forbade school premises being used for "religious purposes."

    - Mr. Kavanaugh's brief on behalf of his client argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

    - Five Democratic State Attorneys General joined an amicus brief in *Good News Club*, taking the same position that Mr. Kavanaugh took on behalf of his client, arguing that the school district's discrimination against religious speech was unconstitutional.

- In the Florida school voucher litigation, Mr. Kavanaugh was part of a team of lawyers representing Florida state officials who were defending Florida's opportunity scholarship program. The program sought to provide children in failing public schools with access to higher quality private education and also to improve the quality of Florida's public schools through competition.

    - The opportunity scholarship program allowed students at failing public schools to transfer to a better public school or to a private school at public expense.

    - The program was limited and carefully tailored to provide choice to those parents with the greatest need, and to spur public school improvement through competition.

- Religious and non-religious private schools can participate in the program on an equal basis. Moreover, parents directed public funds to these private schools through their independent choices.

- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.

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

RESPONSES:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
    - Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to protect records regarding the pardons issued by President Clinton at the end of his presidency and to protect certain Justice Department documents related to the investigation of alleged campaign fundraising abuses by officials in the Clinton Administration.
- Mr. Kavanaugh's work on government privilege issues for the Office of the Independent Counsel (OIC) was consistent with Supreme Court precedent and prevailed in the courts.
    - On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke a government attorney-client privilege to block the production of information relevant to a federal criminal investigation.
    - Both federal courts of appeals to consider the question agreed with the Independent Counsel's position in those cases. In both cases, the Supreme Court denied review.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made or would be successful. Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
    - This article demonstrates Mr. Kavanaugh's impartiality and ability to analyze complex legal issues without respect to partisan concerns. It is not inconsistent with any of his other work on executive privilege.

      The President of the American Bar Association in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

A Tale of Two Judges

New skirmishes in the judicial nomination wars are brewing. But their merits aren't the same.

SENATE REPUBLICAN leaders have decided to reignite the judicial nomination wars. The reason is politics. Majority Leader Bill Frist's strategy, with elections coming, is to schedule votes on the most controversial of the president's remaining appeals court nominees, forcing Democrats to capitulate or filibuster — either of which works for him. The first will be Brett M. Kavanaugh, the president's staff secretary and long-standing nominee to the U.S. Court of Appeals for the D.C. Circuit. Next is Judge Terrence W. Boyle, whose nomination to the 4th Circuit has languished since the beginning of President Bush's tenure. Both nominations are provocative, but their merits are different. The Senate should confirm Mr. Kavanaugh but not Judge Boyle.

Judge Boyle has served as a district judge in North Carolina for many years; his elevation to the 4th Circuit was a particular goal of former senator Jesse Helms (R), who blocked a string of President Bill Clinton's nominees to the court to keep the seat open for his man. Judge Boyle has written some impressive environmental opinions. But he has a high rate of reversal, some of his work is surprisingly sloppy, and some of his civil rights opinions are terrible.

Moreover, in recent weeks it has emerged that Judge Boyle has been careless about ethics. The law forbids judges to rule in cases in which they own stock in one of the parties. Judge Boyle has done this repeatedly, even in the years since his nomination to the 4th Circuit. His pattern of disregard for clear legal obligations is exceptional. The Senate should not condone it.

Mr. Kavanaugh's nomination is more complicated. A wise president would have chosen someone utterly above partisan objection. Instead, Mr. Bush chose a young lawyer whose career has placed him at the vortex of numerous ideological controversies. During the Clinton administration, Mr. Kavanaugh worked for Whitewater independent counsel Kenneth W. Starr, whose impeachment report he helped write. He has also worked in the White House counsel's office on, among other controversial subjects, judicial nominations. Democrats can perhaps be forgiven for balking.

Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed.

The New York Sun
April 27, 2006

Girded for Battle
Editorial

If you thought the accession of Justice Alito to the Supreme Court marked the end of the judicial confirmation battles that roiled the Senate earlier in President Bush's tenure, you were wrong. After taking a breather, Senate Republicans are gearing up to enter the fray again, and hope to notch up their first victory of the new campaign before the Senate adjourns for its Memorial Day recess at the end of May.

In a recent conversation with reporters, an aide to Majority Leader Frist made clear that the senator intends to bring one high profile nominee to the floor before the holiday. That nominee will be Brett Kavanaugh, who has been named to served on the U.S. Court of Appeals for the District of Columbia, the circuit court responsible for many suits involving the federal government and its powers. Mr. Kavanaugh has spent much of his career in public service, including as an associate counsel in Kenneth Starr's Office of the Independent Counsel. He currently holds the post of staff secretary to the president, in which capacity he coordinates the flow of documents across Mr. Bush's desk. He has also served as an appellate lawyer in private practice at Kirkland & Ellis, where he was a partner. The American Bar Association has rated him "well qualified."

Yet the Democrats can't stand him. Although after only one low profile hearing it's hard to say exactly what ammunition they will fire his way as his confirmation gathers steam in the next few weeks, discontent is likely to focus on three areas. They will object to his youth (he turned 41 in February) and his service in Mr. Starr's office. Neither of these is likely to get far. In particular, his record from the Independent Counsel's office shows nothing so much as that he's an exemplary lawyer with a commitment to public service and experience at that hazy nexis where government officials meet accountability, terrain frequently tread by the circuit-riders whose ranks he has been appointed to join.

More damaging might be an attempt, already being ventured about in some circles, to tarnish him with the torture issue. In particular, the allegation would run that as the staff secretary to Mr. Bush's cabinet, he was somehow involved in the decision to employ some physical interrogation methods against terror suspects. But the Democrats are themselves treading perilous ground if they elect to take this path. The charges won't hold up - Mr. Kavanaugh's post, prestigious though it is, is an administrative one and he has not been responsible for making any decisions himself. But they will turn attention again on the Democrats and the avidity - or lack of it - with which they would prosecute the war on terror.

In this respect, the decision to focus on pushing Mr. Kavanaugh through the Senate could prove a particularly savvy one. Not only do Republicans think that judicial confirmation is a winning issue for them in 2006, but a debate over Mr. Kavanaugh's nomination, if the debate focuses on torture and the war on terror, will only focus the public on national security, a weak spot for Democrats.

However the debate ultimately plays out, however, one thing is for sure: Another judicial debate is coming. That news will hearten any American with an interest in constitutional principles. Already, more than 50% of judges on the bench today were appointed either by President Reagan or by the first or second President Bush, presidents who, by and large, have understood the importance of judicial restraint. If Mr. Frist has his way, that percentage will increase before the summer is out.

Legal Times
NATIONAL

March 6, 2006

The Next Generation

By Emma Schwartz, Legal Times

Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at Paul, Weiss, Rifkind, Wharton & Garrison.

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

THE LONG AND WINDING ROAD

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

MAKING A MODEL CONSERVATIVE

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the Cosmetic, Toiletry and Fragrance Association for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the Yale Law Journal analyzing the 1986 Supreme Court case Batson v. Kentucky, which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of Gibson, Dunn & Crutcher's D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases," he says. "I think in close cases he would offer the conservative-libertarian result."

From Kozinski's chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general's office under Starr. There he worked alongside conservative luminaries such as Roberts and

Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

PLUNGING INTO WHITEWATER

As Kavanaugh's Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary's at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh's investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining Kirkland & Ellis, Starr's old firm. But after less than a year, Starr asked him to return to the independent counsel's office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, Swidler & Berlin v. United States, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh's favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. "Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position."

According to Bob Woodward's book Shadow: Five Presidents and the Legacy of Watergate, Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress' decision to release the report to the public.

Even after he left Starr's office, Kavanaugh continued to express concerns over the power afforded the independent counsel, going so far as to write an article for the Georgetown Law

Journal arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for The Washington Post, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

THE PRESIDENT'S LAW FIRM

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case Santa Fe School District v. Jane Doe, in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Mincberg, legal director of the liberal People For the American Way. "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

WALTER K. STAPLETON
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
FEDERAL BUILDING, 844 KING STREET
WILMINGTON, DE 19801

May 3, 2006

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh

Dear Chairman Specter:

I write to share my assessment of the qualifications of Brett Kavanaugh for service as a United States Circuit Judge.

It has been my privilege to serve as a federal judge for thirty-five years. For the last twenty of those thirty-five years, I have served as a United States Circuit Judge and am intimately familiar with the demands of that position. Mr. Kavanaugh worked closely with me as my law clerk, and I am also intimately familiar with his talents, experience and character. In my opinion, Mr. Kavanaugh is superbly qualified to serve as a United States Circuit Judge, and I have no reservations whatever in predicting that he would make an extraordinary contribution to the administration of justice in any Court of Appeals.

Mr. Kavanaugh's legal skills are impressive. As evidenced by his academic record as well as his subsequent professional performance, he has a powerful and creative mind. Indeed, "brilliant," an adjective I rarely use, is entirely appropriate for use in describing Mr. Kavanaugh. In addition, when it comes to written expression, Mr. Kavanaugh has extraordinary talent. He writes clearly, concisely, and with precision. I have had over a hundred well qualified law clerks, and none were more gifted in the skills needed by a Circuit Judge.

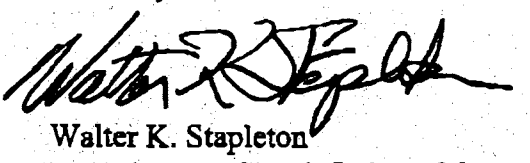
In addition to his impressive legal skills, Mr. Kavanaugh has the sophistication, insight and maturity that come from having served in a variety of professional positions noteworthy not only because of their diversity but also because of the grave responsibilities they imposed. While all of his professional experience will serve him well as a judge, a substantial portion of it renders Mr. Kavanaugh exceptionally well qualified in terms of experience. I refer, of course, to the fact that, in addition to his exposure to private practice and service to the President, Mr. Kavanaugh has had substantial litigation experience on

both sides of the bench. As you are aware, he has worked in a "one-to-one" relationship with two Court of Appeals judges, a Justice of the Supreme Court, and the Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearances before all levels of our federal courts.

Finally, I am confident that Mr. Kavanaugh's perspectives on both life and the law will result in his becoming what I regard as a "judge's judge." His personal confidence is matched by his humility, and his legal acuity by his good, common sense judgment. When he served as my clerk, no case was too small to deserve his rapt attention and, without exception, he initiated his evaluation of a case with no predelictions. His ultimate recommendation resulted from a careful case-by-case analysis of the facts and an objective application of the relevant precedents. He is firmly committed to the proposition that there must be equal justice for all and that this can be a reality only if all of our courts faithfully and objectively apply the statutory declarations of Congress and the teachings of the Supreme Court.

In short, my assessment is that Brett Kavanaugh is extraordinarily well qualified to be a United States Circuit Judge. I can commend him to you without reservation.

Sincerely,



Walter K. Stapleton
United States Circuit Judge - 3d

WKS:fw

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Circuit Judge

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May 2, 2006

Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

When in the course of a recent conversation I mentioned to you that I have known Brett Kavanaugh since his days as a law clerk to my colleague Judge Walter Stapleton, you inquired as to my views as to his suitability for appointment to the DC Circuit, and I am pleased to respond. I do so on the basis of my acquaintance with Brett during his clerkship days, my conversations about him with Judge Stapleton, my knowledge of his subsequent career, and my frequent dealings with him over the matter of Court of Appeals appointments when I was Chief Judge of this Court and he was employed in the Office of White House Counsel.

I consider Mr. Kavanaugh to be an extraordinarily able lawyer, based upon his stewardship as reported to me by Judge Stapleton, his clerkship with Justice Kennedy, and his record of achievement, including argument of important cases before the Supreme Court when he was in the Solicitor General's Office. During my discussions with him over the matter of appointments to the Third Circuit, I found him extraordinarily insightful and helpful. I can also report that the matter of ideology of putative nominees never entered into our discussion, which is consistent with what Judge Stapleton has told me – that Brett was not ideologically driven. I add as a postscript that a Judge is a very good arbiter of the ideological bent of his or her law clerks.

While my personal contact with Brett has been sporadic, my sense that he is enormously competent and highly professional impels me to the view that he would be an excellent appointee to the DC Circuit who would, in the model of his mentor, Judge Stapleton, always follow the law and not any personal agenda (if indeed he has one).

Sincerely,

/s/Edward R. Becker

May 5, 2006

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

Dear Chairman Specter:

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

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

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

Sincerely,

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

On behalf of:

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

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

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

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

cc: The Honorable Patrick J. Leahy

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May 5, 2006

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

Dear Chairman Specter:

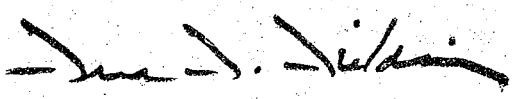
We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,



Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

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May 3, 2006

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Client No.

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

Dear Chairman Specter:

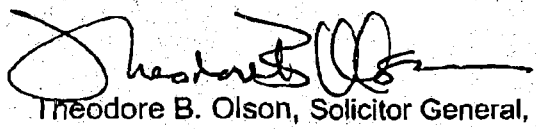
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

70348512_1.DOC

William P. Barr
Executive Vice President and General Counsel

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Phone 212.395.1689
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May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

David G. Leitch
Senior Vice President
General Counsel

World Headquarters
One American Road
Dearborn, MI 48126-2798 USA

May 25, 2005

Via Facsimile

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

Dear Mr. Chairman:

I am writing to offer my strong personal support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit.

During my service as Deputy Counsel to the President from 2002-2005, I had the privilege of working with Mr. Kavanaugh first when he was Senior Associate Counsel to the President and then when he became Staff Secretary. In all of his responsibilities at the White House, Mr. Kavanaugh acted with skill, dedication, integrity, and good humor. He treated everyone with respect and dignity, and was highly admired by staff and colleagues alike. His tenure in the White House preceded mine, and I was especially gratified by his tireless dedication to assisting me as I began my service in that new environment; it speaks volumes about the quality of the individual.

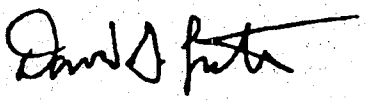
Of particular relevance to the Committee's consideration is the fact that Mr. Kavanaugh -- despite portrayals in the press and by partisan interest groups -- is not an ideologue but is first and foremost faithful to the law. There is of course no secret about Mr. Kavanaugh's political affiliation, but the fact that he has served his country in political posts should not differentiate him from many other distinguished members of the D.C. Circuit, such as Patricia Wald and Abner Mikva. Like these distinguished jurists, Mr. Kavanaugh would apply the law to the best of his ability without regard to his personal views. I can attest from personal knowledge and repeated observation that Mr. Kavanaugh's dedication to and respect for the rule of law is far too deep to permit political considerations to infect his rulings from the bench.

I am confident that, if confirmed, Mr. Kavanaugh will be an outstanding member of the D.C. Circuit, both as a judge and as a colleague, and that both the President who nominated him and Senators that supported him would look back with great pride at their role in placing another accomplished jurist on the D.C. Circuit. I urge you and the Committee to move swiftly to confirm Mr. Kavanaugh.

I am of course available to discuss Mr. Kavanaugh personally with you or others on the Committee if it would be helpful. Thank you for considering my views, and for your tireless leadership of the Judiciary Committee in its important work for our country.

With all best wishes,

Sincerely yours,



David G. Leitch

cc: The Honorable Patrick J. Leahy

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bberenson@sidley.com

May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

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May 9, 2006

Helgi C. Walker
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VIA FACSIMILE

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

Dear Mr. Chairman:

I would like to respectfully submit, for your consideration and that of the distinguished members of your Committee, my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I believe that Mr. Kavanaugh is exceptionally well-qualified to serve on the D.C. Circuit, and I hope that the Senate will confirm him expeditiously.

I have known Brett both personally and professionally for over a decade. Based on that experience, I can attest to his legal brilliance, strong personal character, and open-minded and intellectually honest approach to the law.

In particular, I worked with Brett in the White House Counsel's Office from 2001-2003, when I was fortunate to serve as Associate Counsel to the President. In our relatively small office, I was able to observe on a daily basis both the quality of his legal work and his professional demeanor. As you likely have heard from many others, Brett's work ethic and dedication to the task at hand, whatever it may be, are unparalleled. Moreover, his legal skills are among the finest I have ever seen, and I have been privileged to work with a great many talented attorneys over the years; Brett is truly a lawyer's lawyer. His impressive and diverse professional experiences and sheer ability surely place him in the top echelon of attorneys nationwide. I also know him to be unfailingly honest and forthright, striving always to do the right thing.

Finally, I would like to emphasize that in all the time that I have known Brett he was always deeply interested in understanding the many sides of an issue. In our office, he would spend hours hearing out others who might have a different view and analyzing a question until he was sure he got it right. If he and I happened to disagree on a matter, he was always respectful and courteous of my views, and any difference of opinion was always taken in the very best of humor.

In short, Brett's talent and experience as a truly first-rate lawyer make him exceedingly well-qualified to serve on the D.C. Circuit. And his temperament -- courteous, open to other viewpoints, considerate, intellectually honest, collegial, and good-humored -- make him even better suited to the federal appellate bench. We would all be fortunate, as lawyers and as citizens, to have a person of his ability and integrity on the D.C. Circuit.

Respectfully,

Helgi Walker

Helgi C. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

May 3, 2006

By Facsimile and U.S. Mail

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

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

JOHN F. McAULIFFE

(b)(6)

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240-777-9105 Courthouse

FAX: 301-972-9786
E-Mail: (b)(6)

May 31, 2005

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

Re: *Nomination of Brett M. Kavanaugh*

Dear Chairman Specter:

I write to wholeheartedly support the nomination of Brett M. Kavanaugh to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I have served in the Maryland State Judiciary for twenty-three years, as a Judge of the Circuit Court for Montgomery County, an Associate Judge of the Court of Appeals of Maryland and, since 1993 as an active-retired judge of the state. And, so that you will know, I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.

I have known Brett for more than twenty years, and I had the pleasure of working with him when he interned with me for a summer when I served on the Court of Appeals. I have stayed close to Brett and his family in the intervening years, and have followed his career with great interest. Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet. Like his Dad, Brett is fiercely competitive on the golf course or tennis court, but your best friend when the game is over.

Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor – two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the

epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.

I recognize the critical importance of the particular position for which Brett has been nominated, and I hope I have some idea of the significant demands of that position. It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law. Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.

As the President recognized by his nomination, we have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists. Please do not allow this opportunity to be lost.

Respectfully, and with kindest regards, I am,

Very truly yours,

John F. McAuliffe

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington DC 20510

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

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

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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SCHOOL OF LAW
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June 1, 2005

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

Dear Chairman Specter:

I'm writing to express my strong support for the confirmation of Brett Kavanaugh, who has been nominated to the U.S. Court of Appeals for the D.C. Circuit.

I had the honor of clerking at the Supreme Court the same Term that Brett clerked, and got to know Brett well, and admire him greatly. He is brilliant, careful, and thoughtful, a first-rate lawyer and legal thinker. His stellar academic record and his professional achievements reflect this clearly.

Brett also has a temperament that is perfectly suited to the federal bench. He listens well, considers all arguments seriously, and presents his views calmly and persuasively. I have disagreed with him on many occasions, but these occasions have only reinforced my admiration for him. He will both be a highly effective judge and a valuable example to the bar.

Finally, I am particularly impressed by Brett's commitment to public service, especially in a time when we could have made, and still can make, far more money in private practice than in a government job. Brett cares about his country, about people, and about the legal system more than he cares about money. (I have nothing against people who care about money, but someone who will at every oral argument be one of the lowest-paid lawyers in the room—sometimes by a factor of five or ten—had better have other priorities.)

In any event, I am positive that Brett will do an excellent job in this latest phase of his public service. I urge you to pass his name along to the floor, and to vote to confirm him.

Sincerely Yours,

Eugene Volokh

Eugene Volokh

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely

Pamela Harris

cc The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
202 879-5056
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May 12, 2005

Via Facsimile and Hand Delivery

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

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

VENABLE LLP

One Church Street, Fifth Floor
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Paul F. Kemp 301-217-5664 pfkemp@venable.com

May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

Paul F. Kemp

PFK:csl

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

Wiley Rein & Fielding LLP

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May 26, 2005

Scott M. McCaleb
202.719.3193
smccaleb@wrf.com

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

Re: Nomination of Brett M. Kavanaugh

Dear Mr. Chairman:

I write in enthusiastic and unqualified support of the nomination of Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit. Brett, whom I have known since high school, is precisely the type of person this country needs on the federal bench: he has been blessed with an extraordinary intellect; he enjoys a thoughtful and even-keeled temperament that is perfectly suited for the judiciary; and he is a man of tremendous integrity. The Senate should act in the nation's best interest and confirm Brett immediately.

Unlike many letters concerning Brett that you likely receive, I write from a unique perspective—I have known Brett since he was in his early teens and have personally witnessed his maturation. Though we began as rivals from opposing high schools, my admiration for Brett developed into a friendship that has endured high school, college, law school, clerkships, and D.C. legal careers. It is on this basis that I can speak with great (if not singular) conviction about the intellectual gifts that have been bestowed on Brett, his innately deliberate and reasoned manner, and his unimpeachable character.

Not even Brett's most ardent critics question his intellect. And, for good reason—his record (which I will not belabor) speaks for itself. Since he was a boy, Brett excelled academically. Yet, he never engendered the envy or scorn of his contemporaries because (while his superior intellect was readily apparent to all) he was never aloof, was always approachable, and he interacted with the least gifted students as easily as with the best students. Brett has brought that same ability to communicate at virtually any level to his legal career. He can address the most complex statutory or constitutional question to the satisfaction of the nation's finest jurists, while maintaining the ability to explain the same issue in its simplest terms to less learned folks. Brett's ability to dissect the most intricate legal question, find the correct answer, and explain his reasoning in a manner that is easily understandable is rare and will serve him and the nation well on the bench.

Brett likewise enjoys a thoughtful demeanor and deliberate logic that are well-suited to an appellate court. In the 25 years that I have known Brett, I cannot recall a single instance where he raised his voice in anger or demeaned a person who held views with which he may not have agreed. Instead, Brett is far more interested in understanding the logic underlying a particular position. This temperament, coupled with Brett's deep appreciation of the respective roles of our co-equal branches of government, will serve us all well. Just yesterday, I heard a Democratic senator on your committee say that he wants judges who will interpret the laws that Congress enacts, not make new laws by judicial fiat. There are few, if any, safer bets to fulfill that goal than Brett.

Finally, Brett has always comported himself with the highest integrity. Since our youth, he has done "the right thing," even when the majority chose a different route. This trait, too, will serve Brett well on the bench; indeed, he will not hesitate to dissent from majority opinions with which he disagrees, explaining the bases for his disagreement with great clarity. The Senate and American people can rest assured that Brett will adhere faithfully to the highest standards of the great jurists who preceded him on the D.C. Circuit.

In short, we are lucky that someone of Brett Kavanaugh's intellect, temperament, and integrity wants to serve the American people on the bench. Please act immediately to place him there; we will all be better for it.

Sincerely,

Scott M. McCaleb

Scott M. McCaleb

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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May 12, 2006

Kate Comerford Todd
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VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
Facsimile: (202) 228-1698

Dear Mr. Chairman:

I would like to respectfully submit my views regarding the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. I urge the Senate to confirm Mr. Kavanaugh as soon as possible.

I am confident that you have received myriad letters from Mr. Kavanaugh's colleagues and peers, as well as from a host of legal luminaries, speaking to his qualifications as a legal scholar, an advocate, and a counselor. As a young legal practitioner whose name does not carry any weight of its own, I am equally confident that my recommendation of Mr. Kavanaugh on these fronts would do very little to embellish this body of praise and support. I write to you, therefore, to focus on two other facets of Mr. Kavanaugh's legal and professional career—that of a role model and of a mentor. In the seven years I have known Mr. Kavanaugh, he has been, and continues to be, both a role model and mentor to me and to numerous other young attorneys who have had the good fortune to know him.

First, there can be no doubt that Mr. Kavanaugh is a role model in the legal profession. His resume reads like that of someone who is driven and pushes himself to excellence in any task he chooses—as he is clearly such a person—but his demeanor bespeaks a man who does not crave personal success at the expense of others' failures or shortcomings. He is unassuming, deliberative, and receptive to ideas and input from all corners. He takes criticism and welcomes advice easily, and he strives, at all times, to get to the right answer and to the truth, without presuming either. In short, he *listens* in a way that underscores that his commitment to public service is just that—a commitment to serve the public and not to serve himself or any particular agenda or ideology.

In a profession that does not always lend itself to positive role models, young attorneys often search for someone whom they can admire and look up to as a

vision of where they would like to be in a decade or beyond. Brett M. Kavanaugh meets this need by embodying the best of what the legal profession has to offer in a public servant who promotes the rule of law, without losing sight of the public that it serves or his place under it.

Second, Mr. Kavanaugh does not merely serve as a role model from afar; he actively takes an interest in and promotes the careers of those who compose the next generation of the legal profession. He is approachable, he is likeable, and he does not take himself too seriously—this is the perfect recipe for a man who acts as a mentor to those younger attorneys and professionals that cross his path. I have been fortunate enough to know Mr. Kavanaugh since I was a law student, and he has never, in the more than seven years that have followed, been too busy or too occupied to offer sound advice and encouraging thoughts. I am most certainly better off for having known Mr. Kavanaugh, and the country will be better off for having him in a position of the highest service for a lawyer—serving as an Article III judge on the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Kate Comerford Todd

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510
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April 23, 2004

VIA FACSIMILE

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

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

HOGAN & HARTSON
L.L.P.

ROBERT H. MICHEL
SENIOR ADVISOR FOR CORPORATE
AND GOVERNMENTAL AFFAIRS
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June 2, 2005

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The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen SOB
Washington, DC 20510

Dear Pat:

This is just a short note to let you know of my personal friendship with Brett Kavanaugh, whom the President has nominated for the Circuit Court of Appeals. I have known his mother and father for better than thirty years and his mother, Martha, has served on the bench in the Maryland court system. Yes, he is basically conservative, as you know I am, but I have spent enough time in his company to know that he will be exercising good sound judgment if confirmed for the bench.

He also happens to be a good friend of our sons and we were privileged to be invited to his wedding, so we don't speak lightly of our personal relationship with him over the years. I would surely hope when the time comes for the Committee to consider his appointment formally that you would take my assessment of his character into account.

I appreciate the opportunity to express my thoughts to you in this note.

Sincerely,

Bob.

RHM:sy

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Counsel's Office, White House

Rao, Neomi

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;
002	Information Sheet	Confidential	2	04/15/2004	P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh] [1]

FRC ID:
10166

RESTRICTION CODES

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

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

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

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

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

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh] [1]

FRC ID:
10166

OA Num.:
6323

NARA Num.:
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2018-0009-P

RESTRICTION CODES

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

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I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

Brett Michael Kavanaugh.

2. **Address: List current place of residence and office addresses.**

Residence: 3633 M Street, #3A, N.W., Washington, DC 20007.
Office: Staff Secretary's Office, White House West Wing, Washington, DC 20502.

3. **Date and place of birth.**

February 12, 1965. Washington, DC.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Single. I have never been married.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Yale Law School, 1987-90. J.D. 1990.
Yale College, 1983-87. B.A. 1987.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

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

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

Kirkland & Ellis, Washington, DC.
Partner, 1997-98, 1999-2001.

Office of Independent Counsel Kenneth W. Starr.
Associate Counsel, 1994-97, 1998.

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

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

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

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

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

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

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

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

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

Other:

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

Georgetown Prep Alumni Association (since 1990's).

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

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

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

None.

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

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

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

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

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

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

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

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

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

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

Articles:

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

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

Op-eds:

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

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

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

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

Letters to Editor:

Washington Post, August 31, 1999.
New York Times, August 1, 1999.
Washington Post, July 1, 1999.

Speeches:

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

Remarks to Log Cabin Republicans on judicial appointments, 2003.
Remarks to Yale Law School Association of Washington, DC, on judicial appointments, 2003.
Remarks to American Forest and Paper Association on variety of legal issues, 2003.
Remarks to Federalist Society Southern Leadership conference, 2003.
Remarks to groups of historians interested in Presidential records, 2001-03.
Remarks to Iowa State Bar Association on judicial appointments, 2002.
Remarks to National Conference of Women's Bar Associations on judicial appointments, 2002.
Remarks at American Judicature Society panel on judicial appointments, 2002.
Remarks at Republican National Lawyers Association on judges, 2002, 2003.
Participant in Yale Law School panel on judicial appointments, 2002.
Participant in panel on judicial appointments sponsored by Association of the Bar of the City of New York, 2002.
Participant in panel on judicial appointments sponsored by Washington Council of Lawyers, 2002.
Moderator of Federalist Society panel on originalism, 2001.
Remarks at Yale Club of Pittsburgh on independent counsel law and role of White House Counsel's office, 2001.
Moderator of Federalist Society panel on First Amendment, 2000.
Remarks at American Bar Association panel on Internet regulation, 2000.
Participant in symposium sponsored by Georgetown Journal of Legal Ethics, 2000.
Moderator of Federalist Society panel on charitable choice, 2000.
Remarks at Federal Bar Association symposium on Federal Sentencing Guidelines, 2000.
Remarks at Duke University Law School panel on independent counsel statute, 1999.
Remarks at [illegible] for Judge Kenneth Starr, 1999.
Remarks at Georgetown University Law Center panel on independent counsel law, 1998.

Television Appearances:

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

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

Excellent. June 2003.

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

None.

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

Not applicable.

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

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

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

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

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

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

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

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

17. **Legal Career:**

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

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

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

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

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

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

I have never been a sole practitioner.

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

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

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

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

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

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

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

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

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

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

Clerkships:

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

Office of the Solicitor General:

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

Office of Independent Counsel:

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

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

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

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

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

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

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

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

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

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

Kirkland & Ellis:

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

Office of Counsel to the President:

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

Assistant to the President and Staff Secretary:

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

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

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

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

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

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

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

3. **What percentage of these appearances was in:**
   (a) federal courts;
   approximately 90%
   (b) state courts of record;
   approximately 10%
   (c) other courts.

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

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

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

Not applicable.

18. Litigation: **Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

(a) **the date of representation;**
(b) **the name of the court and the name of the judge or judges before whom the case was litigated; and**
(c) **the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

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

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

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

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

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

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

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

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

America Online 5.0 Litigation (1999-2000).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The case involved a Free Speech Clause and Free Exercise Clause challenge to the community use policy of a school district in New York. The policy excluded religious organizations from using public school facilities after school hours. (Ms. Campbell had challenged a similar policy in Louisiana.) The question in the case was whether the exclusion of religious organizations was permitted under the Religion and Free Speech Clauses of the First Amendment. The amicus brief filed on behalf of Ms. Campbell argued that the policy was neither required nor permitted by the Constitution. The Supreme Court agreed in a 6-3 decision.

The counsel for the plaintiff/petitioner was Thomas Marcelle, 71 Fernbank Ave., Delmar, NY 12054, (518) 475-0806. The primary counsel for other amici were Paul Clement, now Deputy Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2206; and Viet Dinh, now at Georgetown University Law Center, 600 New Jersey Ave., N.W., Washington, DC 20001, (202) 662-2000. The primary counsel for the defendant/respondent was Frank W. Miller, 6296 Fly Road, East Syracuse, NY 13057, (315) 234-9900.

Rubin v. United States, 525 U.S. 990 (1998).

In this case, I represented the United States (Office of Independent Counsel) in the Supreme Court proceedings in which the Office of Independent Counsel opposed a petition for certiorari filed by the Secretary of the Treasury and Director of the Secret Service.

The question presented was whether the federal courts should recognize a new "protective function" privilege in federal criminal proceedings that would prevent Secret Service agents from testifying in the grand jury. The U.S. Court of Appeals for the D.C. Circuit ruled in favor of the Office of Independent Counsel (Judges Williams, D.H. Ginsburg, and Randolph). The Secretary of the Treasury filed a petition for certiorari and sought a stay of enforcement of the subpoena. The Supreme Court denied a stay and then denied the petition for certiorari (over the dissents of Justices Ginsburg and Breyer).

My co-counsel included Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130. The primary opposing counsel was Ed Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

General Motors v. Green, 709 A.2d 205 (N.J. Super. Ct. App. Div. 1998).

General Motors was a significant institutional client of my former firm, Kirkland & Ellis. In this particular case, I was asked to represent General Motors and conduct oral argument on its behalf in the Appellate Division of the New Jersey Superior Court before Judges Dreier, Levy, and Wecker. The case was a design defect products liability case involving an alleged roof design defect. At trial, the jury had found General Motors liable and awarded plaintiff $25 million. General Motors appealed on numerous grounds, challenging both the liability judgment and damages award. The Appellate Division affirmed the liability judgment and substantially reduced the damages award.

My primary co-counsel at Kirkland & Ellis was Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and another co-counsel was Thomas F. Tansey, 521 Green Street, Woodbridge, NJ 07095, (732) 634-7880. The primary opposing counsel was Maurice Donovan, 405 Northfield Ave., West Orange, NJ 07052, (973) 736-8050.

Lewis v. Brunswick, No. 97-288 (Supreme Court of the United States) (dismissed as moot because of settlement after oral argument).

In the Lewis case, I represented General Motors in filing an amicus brief in the Supreme Court. The question presented in the case was whether the Boat Safety Act preempted a state common-law requirement that recreational boats be equipped with propeller guards. Because of the similarity of the question to a question under the National Traffic and Motor Vehicle Safety Act, General Motors filed an amicus brief. The Supreme Court subsequently dismissed the case after oral argument because the parties settled.

My primary co-counsel were Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and Richard A. Cordray, of counsel at Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5000. The primary counsel for plaintiff/petitioner was David E. Hudson, 801 Broad Street, Suite 700, Augusta, GA 30901, (706) 722-4481. The primary counsel for defendant/respondent was Kenneth S. Geller, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

Clerkships:

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Office of Staff Secretary:

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   None. I have a government Thrift Savings Plan retirement fund.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   I will faithfully follow all applicable statutes, court decisions, and policies regarding recusal, including 28 U.S.C. 455.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   It is possible in the future that I would want to teach part-time at some point or write articles or books. If so, I would faithfully follow all applicable laws and policies.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   See attached financial disclosure report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

   See attached net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Lawyers for Bush Cheney, 2000. Regional Coordinator for Pennsylvania, Maryland, Delaware, and District of Columbia. I also went to Daland, Florida, in November 2000 to participate in legal activities related to the recount.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	10k		Notes payable to banks-secured		
U.S. Government securities-add schedule			Notes payable to banks-unsecured		
Listed securities-add schedule			Notes payable to relatives		
Unlisted securities--add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid income and interest		
Doubtful			Real estate mortgages payable-add schedule		
Real estate owned-add schedule			Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:		
Autos and other personal property	20k				
Cash value-life insurance					
Other assets itemize:					
TSP account	55k				
			Total liabilities	0	
			Net Worth	85k	
Total Assets	85k		Total liabilities and net worth	85k	
CONTINGENT LIABILITIES	No		GENERAL INFORMATION		
As endorser, comaker or guarantor			Are any assets pledged? (Add schedule)	No	

On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

I have devoted 10 of the 13 years of my legal career to public service for the United States Government in a variety of capacities. In private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez's American relatives. I have participated in community work on occasion, most recently by participating in an all-day playground build in Washington. I contribute to various charities and community organizations, including by way of the Combined Federal Campaign.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No, other than my college fraternity and senior society, which were all-male.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There was no commission process. In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit. In 2003, he discussed with me a vacancy on the U.S. Court of Appeals for the D.C. Circuit. Later in 2003, Judge Gonzales informed me of the President's intent to nominate me to the D.C. Circuit. I underwent an FBI background investigation and was then nominated.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

A court of appeals judge should interpret constitutional and statutory provisions without regard to personal or policy views on any issue. Our legal system must ensure equal justice under law for all, and a court of appeals judge should interpret the law as enacted and as subsequently interpreted by the Supreme Court where applicable. A judge should treat parties and colleagues with dignity and respect and should act at all times -- in and out of the courtroom -- with an appropriate judicial temperament. A judge should always remember that the court's decisions will have an enormous impact on the lives and liberties of the individuals involved in the cases, as well as the American people. And a judge should approach the task of judging with humility, recognizing that federal judges are entrusted with a sacred responsibility to the American people.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002

Report Required by the Ethics in Government Act of 1978, (5 U.S.C App §§101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
KAVANAUGH, BRETT M.	NOMINEE TO U.S. COURT OF APPEALS FOR D.C. CIRCUIT	7-29-03

4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type)	6. Reporting Period
CIRCUIT JUDGE - NOMINEE	✓ Nomination, Date 7-25-03 ___ Initial ___ Annual ___ Final	1-1-2002 7-25-2003

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.
STAFF SECRETARY THE WHITE HOUSE WASHINGTON, DC 20502	Reviewing Officer _____ Date _____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions.)	
1	ALUMNI BOARD OF GOVERNORS	GEORGETOWN PREPARATORY SCHOOL
2		ALUMNI ASSOCIATION
3		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☒	NONE (No reportable agreements.)	
1		
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☒		NONE (No reportable non-investment income.)	
1			$
2			$
3			$
4			$
5			$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: KAVANAUGH, BRETT M.

Date of Report: 7-29-03

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements.)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts.)		
1	EXEMPT		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities.)		
1	FIRST USA	CREDIT CARD	J PAID IN FULL
2			
3			
4			
5			

*Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: KAVANAUGH, BRETT

Date of Report: 7-29-03

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, (JSP) EXEMPT									
1 BANK OF AMERICA CHECKING	A	Checking Account	J	T					
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: KAVANAUGH, BRETT

Date of Report: 7-29-03

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Brett M. Kavanaugh Date July 29, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Information Sheet	Confidential	2	04/15/2004	P6/b6;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh] [1]

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/6/2018 by erg

AFFIDAVIT

I, Brett Kavanaugh, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 22, 2003 (DATE)

Brett Kavanaugh (NAME)

(NOTARY)

Notary Public for the District of Columbia

Commission expires 1/31/08

Setting the Facts Straight on Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

Brett Kavanaugh is a highly respected attorney with a broad background in both government service and private practice. His legal experience makes him uniquely suited to serve on the D.C. Circuit. Over the course of his career, Mr. Kavanaugh has served as a federal appellate law clerk, a federal prosecutor, an appellate lawyer representing both private clients and the United States, and a senior advisor to the President. While Mr. Kavanaugh's record has been mischaracterized by some, the facts point to a well-qualified nominee who deserves to be confirmed by the Senate.

Myth: Brett Kavanaugh does not have enough experience to be a judge on the D.C. Circuit – he's never tried a case.

Facts on Experience:

- The ABA rated Mr. Kavanaugh "Well Qualified" for a position on the U.S. Court of Appeals for the D.C. Circuit. A rating of Well Qualified means:

  "To merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

- Mr. Kavanaugh would bring a broad range of experience to the D.C. Circuit. He has substantial experience in the appellate courts, both as an attorney and clerk. From his work in the executive branch, he brings a wealth of knowledge about the inner workings of the federal government.

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit; Ninth Circuit Judge Alex Kozinski of the U.S. Court of Appeals; and, U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.

- Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.

- Mr. Kavanaugh's legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.

Myth: Mr. Kavanaugh's legal career has consisted largely of partisan activities, making him unsuited to the federal bench.

Facts on Suitability for the Bench:

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." Letter to Chairman Hatch, April 26, 2004.

- Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy

- As every lawyer is required to do, Mr. Kavanaugh has zealously represented his clients' positions and made the best arguments on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

Myth: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts on the Judicial Nominations Process:

- The President selects judicial nominees. Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard." One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

Myth: Mr. Kavanaugh is out of the mainstream because he publicly praised Miguel Estrada and Priscilla Owen, along with the rest of President Bush's first 11 nominees to the U.S. Courts of Appeal.

Facts about President Bush's Nominees:

- At the time of their nomination, Democrat senators had positive things to say about President Bush's first group of nominees.
  - ✓ Senator Leahy said that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work." *NPR: All Things Considered* (Radio Broadcast May 9, 2001).
  - ✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations." Amy Goldstein and Helen Dewar, *11 Judicial Nominees Named*, Wash. Post, May 10, 2001, at A2.
- Miguel Estrada and Priscilla Owen, both unanimously rated "Well Qualified" by the ABA, enjoyed widespread bipartisan support and would have been confirmed if given an up-or-down vote by the full Senate.
- Each of the first 11 nominees was rated "Well Qualified" or "Qualified" by the ABA – the Democrats' "Gold Standard."

Myth: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts about the Starr Report:

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – grounds for impeachment – was required by law.
  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- The Independent Counsel's report did not conclude that President Clinton should have been impeached. Rather, it ~~only~~ simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.

  - ✓ The House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- Democrat senators agreed with the Independent Counsel that President Clinton gave false or misleading testimony.

  - ✓ Senator Feinstein introduced a censure resolution that stated President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." Senators Durbin, Kennedy, Kohl, Schumer, Daschle, and Kerry co-sponsored the resolution. S.Res. 44, 106th Cong. (1999).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

  - ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- The U.S. Senate already has confirmed judicial and executive branch nominees who worked for Independent Counsel Ken Starr. If the work these nominees performed for the Office of Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.

  - ✓ Individuals confirmed to judicial positions include: Steven Colloton – 8th Circuit; John Bates – D.C. District Court; Amy St. Eve – Northern District of Illinois.

Myth: Mr. Kavanaugh returned to the Office of Independent Counsel ("OIC") when the Monica Lewinsky scandal broke because he wanted to participate in the investigation.

Facts about Mr. Kavanaugh's Return to the OIC:

- Mr. Kavanaugh came back to the OIC to handle a Supreme Court argument regarding privilege, which he had worked on before returning to private practice.
  - ✓ From the May 8, 1998 Washington Post: Washington lawyer Brett M. Kavanaugh has left private practice at Kirkland & Ellis for another temporary stint at the office of Whitewater independent counsel Kenneth W. Starr, also a Kirkland & Ellis lawyer. Kavanaugh is working on the Vincent Foster attorney-client privilege case to be argued at the Supreme Court June 8.

Myth: Brett Kavanaugh has praised Independent Counsel Starr despite Starr's partisan tactics, including his release of the entire report on President Clinton with a description of wide array of questionable facts that were highly offensive.

Facts about the Release of the Report and Support of Judge Starr:

- The House of Representatives, not the OIC, publicly released the Independent Counsel's Report.
- Mr. Kavanaugh criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.
- Judge Starr was unfairly criticized for his work as independent counsel. Even the Washington Post editorial page acknowledged that much of the criticism was unwarranted:
  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

Myth: Mr. Kavanaugh is willing to twist legal theories to best serve his own partisan interests. The best example of this is his flip-flop on executive branch privilege from his arguments against the Clinton Administration's assertions of privilege to his drafting of the Bush Administration's Executive Order 13233, which gives both sitting and former presidents authority to claim privilege over records.

Facts about Mr. Kavanaugh's Work on Executive Branch Privilege:

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
  - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Myth: Mr. Kavanaugh has argued extreme right wing positions on behalf of clients. For instance, he submitted an amicus brief in a school prayer case.

Facts about Mr. Kavanaugh's Work on First Amendment Issues:

- In the amicus brief Mr. Kavanaugh filed on behalf of his clients in *Santa Fe Independent School District*, he acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.

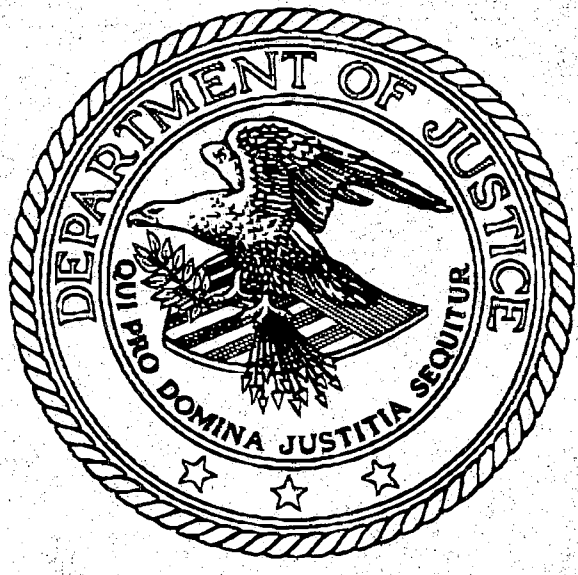
- However, Mr. Kavanaugh argued that a school district's policy that permitted high school students to choose whether a statement would be delivered before football games and who would give that statement did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement.

- Mr. Kavanaugh's brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."

- Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

- As an attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.



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May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

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May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

bcc: David Best (202-616-3180)

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

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United States Senate

WASHINGTON, DC 20510-4904

May 5, 2006

VIA FAX to the Department of Justice – [202-353-9163]

Mr. Brett Kavanaugh
Assistant to the President and Staff Secretary
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. Kavanaugh

As you know, I was not able to attend your first hearing before the Senate Judiciary Committee on April 27, 2004, but I did submit written questions to you following that hearing. Those questions were delivered to the Committee for transmission to you on May 4, 2004. Your attached responses, which were not sent to the Committee until November 19, 2004, were inadequate. In light of your failure to answer written questions for over seven months, it was by no means clear that you were serious about pursuing the nomination so I did not ask you for additional information at that time.

In recent weeks, the leadership in the Senate has indicated renewed interest in your nomination, and Chairman Specter has now scheduled a second confirmation hearing for you on Tuesday, May 9, 2006. In anticipation of that hearing, I request that you now answer my questions 3 through 7. These questions, other than the very last part of question 7, concerning your recommendation to the President on the signing of Judge Ron Clark's commission, which I hereby withdraw, fall into two categories. Both kinds of questions are entirely appropriate for me to ask and for you to answer:

1. Factual questions concerning your knowledge and the timing of your knowledge of ethical controversies that arose in connection with certain nominations that occurred during your time in the White House Counsel's office. Answering these questions will not in any way intrude on internal Executive Branch communications concerning these long since confirmed judges. Many of them can be answered with a simple "yes" or "no."

2. Questions concerning your current, personal judgment on and analysis of certain ethical issues raised during consideration of nominations that occurred during your time in the White House Counsel's office. It is not

only appropriate but crucial for you to answer questions concerning judicial ethics since you seek confirmation to be a federal appellate judge.

I would appreciate your providing answers to these questions, which are not complicated or lengthy, by the close of business on Monday, May 8, so that I may discuss them with you at the hearing on Tuesday. Thank you for your prompt attention to this matter.

Sincerely,

Russell D. Feingold
United States Senator

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

Response: The responsibility for reviewing background investigation files was performed by the Counsel and Deputy Counsel to the President, as well as attorneys in the Department of Justice. I therefore was rarely involved in that particular aspect of the judicial selection process.

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

Response: Yes.

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . . The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: I believe Judge Pickering addressed inquiries about this matter in his confirmation hearings. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a

confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black*, and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black*. Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" – free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: On these kinds of ethics issues, I would faithfully follow all applicable statutes, court decisions, and policies. I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Response: It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

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[Brett Kavanaugh] [2]

S. HRG. 108–878

CONFORMATION HEARING ON THE NOMINATION OF BRETT M. KAVANAUGH TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

APRIL 27, 2004

Serial No. J–108–69

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
24–853 PDF WASHINGTON : 2005

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Cornyn, Hon. John, a U.S. Senator from the State of Texas, prepared statement	146
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	1
prepared statement	148
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	11
prepared statement	151
Schumer, Hon. Charles E., a U.S. Senator from the State of New York	7
prepared statement	155

PRESENTER

Cornyn, Hon. John, a U.S. Senator from the State of Texas presenting Brett M. Kavanaugh, Nominee to be Ciruit Judge for the District of Columbia Circuit	4

STATEMENT OF THE NOMINEE

Kavanaugh, Brett M., Nominee to be Circuit Judge for the District of Columbia Circuit	13
Questionnaire	14

QUESTIONS AND ANSWERS

Responses of Brett M. Kavanaugh to questions submitted by Senators Leahy, Kennedy, Feingold, Schumer and Durbin	93

SUBMISSION FOR THE RECORD

National Association for the Advancement of Colored People, Hilary O. Shelton, Director, Washington, D.C., letter	152

NOMINATION OF BRETT M. KAVANAUGH, OF THE DISTRICT OF COLUMBIA, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

TUESDAY, APRIL 27, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Sessions, Cornyn, Leahy, Kennedy, Feinstein, Schumer, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning. I am pleased to welcome to the Committee today members, guests, and our nominee, Mr. Brett Kavanaugh, who has been nominated by President Bush to be United States Circuit Judge for the District of Columbia Circuit. We also welcome members of his family. I would note his father, Mr. Ed Kavanaugh, a long-time president of CTFA. We all know Ed. We know what a fine person he is and what a great individual he is, and we all respect him. So we want to welcome you, Judge, Ed's wife, the mother of Brett, who is a renowned judge, and we appreciate having both of you here.

Before we turn to the nomination, I want to tell members of the Committee that I remain hopeful that we can continue to complete the work of the Committee on both legislation and nominees. I was disappointed that we were not able to accomplish more at the markup last week. Earlier this month, we did report five district judges and two circuit judges. So I do appreciate the Committee's efforts in that regard.

Now, I remain concerned about the executive calendar and floor action. I remain hopeful that an accommodation on nominees can be reached and that floor action can be scheduled for those judges. The Senate has confirmed only four judges this year—all district court judges. By comparison, in the last Presidential election of 2000, with a Democratic President and a Republican Senate, seven judges had been confirmed by this point in the year, including five circuit court judges. Furthermore, we are way behind the pace of that election year, which saw a total of 39 judges confirmed. And

we remain well behind President Clinton's first-term confirmation total of 203.

So while we have made some progress in reporting nominees to the full Senate, the work of confirming judges remains. We presently have 29 judges on the executive calendar. Five circuit court nominees remain from last year on the executive calendar in addition to the six reported this year. Eighteen district nominees are available for Senate confirmation, including two holdovers from the last session. But we are making progress, and I thank all members for their support and ask for their continued cooperation.

Now, today we will consider the nomination of Mr. Brett M. Kavanaugh. He is an outstanding nominee who has been nominated to the Circuit Court of Appeals for the District of Columbia. He comes to us with a sterling resume and a record of distinguished public service. Mr. Kavanaugh currently serves as Assistant to the President of the United States and Staff Secretary, having been appointed to the position by President George W. Bush in 2003. He previously served in the Office of Counsel to the President as an Associate Counsel and a Senior Associate Counsel.

After graduating from Yale Law School in 1990, Mr. Kavanaugh served as a law clerk for three appellate judges, so he has extensive judicial experience as well: Justice Anthony M. Kennedy of the Supreme Court, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Judge Walter K. Stapleton of the United States Circuit Court of Appeals for the Third Circuit. He served for 1 year as an attorney in the Office of the Solicitor General, where he prepared briefs and oral arguments.

Mr. Kavanaugh served in the Office of Independent Counsel under Judge Starr, where he conducted the office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. He also was responsible for briefs and arguments regarding privilege and other legal matters that arose during investigations conducted by the office. Mr. Kavanaugh was part of the team that prepared the 1998 report to Congress regarding possible grounds for impeachment of the President of the United States.

In addition to this extensive public service, Mr. Kavanaugh was also in private practice. As a partner at the distinguished firm of Kirkland and Ellis, one of the great firms in this country, he worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation.

Mr. Kavanaugh, as I have said, received his law degree from Yale Law School, where he was notes editor for the Yale Law Journal. He is a cum laude graduate of Yale College, where he received his B.A. degree.

The American Bar Association has rated Mr. Kavanaugh as "Well Qualified," its highest rating. Let me remind everyone what that rating means. According to guidelines published by the American Bar Association Standing Committee on Federal Judiciary, "To merit a rating of 'Well Qualified,' the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

I want to turn now to a few of the arguments which I have heard raised by a number of Mr. Kavanaugh's opponents and address some of the concerns I expect to hear today.

First, is that Mr. Kavanaugh is too young and inexperienced to be given a lifetime appointment to the Federal bench, particularly to the important Circuit Court of Appeals for the District of Columbia. Now, there are many examples of judges who were appointed to the bench at an age similar to Mr. Kavanaugh, who is 39 years old, and have had illustrious careers. For example, all three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39, and all have been recognized as distinguished jurists. Justice Kennedy was appointed to the Ninth Circuit when he was 38 years old; Judge Kozinski was appointed to the Ninth Circuit when he was 35 years old; and Judge Stapleton was appointed to the district court at 35 and later elevated to the Third Circuit Court of Appeals.

I think many of my colleagues would agree that age is not a factor in public service, other than the constitutional requirements. I would note that many in this body began their service in their 30s, if not barely age 30. Through successful re-elections, we have been benefited from a lifetime of service from such members of this body and members of the judiciary as well.

With regard to judicial experience, I would reiterate that Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials with extensive experience in the appellate courts themselves, both as a clerk and as counsel, having argued both civil and criminal matters before the Supreme Court and appellate courts throughout this country.

As I have pointed out with previous nominees, a number of highly successful judges have come to the Federal appellate bench without prior judicial experience. On this particular court, the D.C. Circuit, only three of the 19 judges confirmed since President Carter's term began in 1977 previously had served as judges. Furthermore, President Clinton nominated and the Senate confirmed a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the D.C. Circuit.

I would mention that I think the work in the Supreme Court and the Circuit Courts of Appeals that Mr. Kavanaugh has had, do qualify him highly, in addition to all the other qualifications that he has.

Opponents will attempt to portray Mr. Kavanaugh as a right-wing ideologue who pursues a partisan agenda. I have to tell you this allegation is totally without merit, and a careful scrutiny of his record will demonstrate otherwise. He is an individual who has devoted the majority of his legal career to public service, not private ideological causes. Within his public career, he has dedicated his work to legal issues, always working carefully and thoroughly in a professional manner.

In short, Mr. Kavanaugh is a person of high integrity, of skilled professional competence, and outstanding character. He will be a great addition to the Federal bench, and he has the highest rating

that the American Bar Association can give. And all of that stands him in good stead.

So I look forward to hearing your testimony and any responses that you might make to questions from the esteemed members of this Committee.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Now I will turn to our acting Ranking Member at this time, Senator Schumer, for any remarks that he would care to make, and then we will turn to Senator Cornyn, who will introduced Mr. Kavanaugh. But first I would like to introduce your fiancee. I will have you do that for us. Why don't you do it right now?

Mr. KAVANAUGH. My fiancee, Ashley Estes, from Abilene, Texas, is here, as well as my parents, Ed and Martha Kavanaugh.

Chairman HATCH. Ashley, Ed, and Martha, we are so grateful to have all of you here. Ashley, don't let this affect you, this meat grinder that we go through around here. Just understand, okay?

We will turn to Senator Schumer.

Senator SCHUMER. Mr. Chairman, I will defer to Mr. Cornyn first to introduce him, and then I will speak.

Chairman HATCH. That will be fine.

PRESENTATION OF BRETT M. KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. I appreciate that very much, Mr. Chairman and Senator Schumer, that courtesy. I do just have some brief comments I want to make by way of introduction.

It is my honor to introduce to the Committee, to supplement those remarks already made by the Chairman, about a distinguished attorney and devoted public servant, Brett Kavanaugh. I have known Brett for several years and had the privilege of working with him on a case that I argued to the United States Supreme Court, so I have had the chance to observe his legal skills from up close. And I have every confidence that he would be an exceptional jurist on the United States District Court of Appeals for the D.C. Circuit.

His distinguished academic and professional record confirms beyond all doubt that he possesses the intellectual ability to be a Federal judge. His temperament and character demonstrate that he is well suited to that office. Indeed, I can think of no better evidence of his sound judgment than the fact he has chosen to marry a good woman from the great State of Texas, who has just been introduced to the Committee. Brett deserves the support of this Committee and the support of the United States Senate.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit Court is currently vacant, and as you know, Mr. Chairman, the D.C. Circuit is unique among the Federal courts of appeals. Of course, it is an appellate court, not a trial court, and appellate judges do not try cases or adjudicate factual disputes. Instead, they hear arguments about legal issues. But unlike the docket of other courts of appeals, the docket of the D.C. Circuit is uniquely focused on the operations of the Federal Government. Accordingly, attor-

neys who have experience working with and within the Federal Government are uniquely qualified to serve on that distinguished court.

Brett Kavanaugh is an ideal candidate for the D.C. Circuit. He has an extensive record of public service. For over a decade, he has held the most prestigious positions an attorney can hold in our Federal Government. He is, as you pointed out, a graduate of Yale College and Yale Law School. He served as law clerk to three distinguished Federal judges, including United States Supreme Court Justice Anthony Kennedy.

Brett has also served in the Office of the Solicitor General representing the U.S. Government in cases before the United States Supreme Court. He served as a Federal prosecutor in the Office of Independent Counsel under Hon. Kenneth Starr. And as you pointed out, he personally has argued civil and criminal cases in the United States Supreme Court and courts of appeals throughout the country.

And he has been called upon for his wisdom and counsel by the President of the United States, first, by his service as Associate Counsel and Senior Associate Counsel to the President, and now as Staff Secretary, one of the President's most trusted senior advisers.

Mr. Chairman, I can think of few attorneys at any age who can boast this level of experience with the inner workings of the Federal Government. It is no wonder then that the American Bar Association has raised him "Well Qualified" to serve on the D.C. Circuit, the gold standard, as you observed.

Ordinarily, a nominee possessing such credentials and experience would have little difficulty receiving swift confirmation by the United States Senate. Unfortunately, observers of this Committee will know that we are not living under ordinary circumstances today.

I hope that this distinguished nominee will receive fair treatment. His exceptional record of public service in the Federal Government will serve him well on the D.C. Circuit bench. His wisdom and counsel have been trusted at the highest levels of Government. Yet I fear that it is precisely Brett's distinguished record of experience that will be used against him. I sincerely hope that will not happen. After all, it would be truly a shame to use one's record of service against a nominee, especially with respect to a court that is so much in need of jurists who are knowledgeable about the inner workings of the Federal Government.

Indeed, many successful judicial nominees have brought to the bench extensive records of service in partisan political environments. I have often said that when you place your hand on the Bible and take an oath to serve as a judge, you change. You learn that your role is no longer partisan, if it once was, and that your duty is no longer to advocate on behalf of a party or a client but, rather, to serve as a neutral arbiter of the law.

The American people understand that when your job changes, you change, and that people are fully capable of putting aside their personal beliefs in order to fulfill their professional duty. That is why this body has traditionally confirmed nominees with clear records of service in one particular party or of a particular philosophy.

For example, Ruth Bader Ginsburg served as general counsel of the ACLU. Of course, it is difficult for me to imagine a more ideological job than general counsel of the ACLU, yet she was confirmed by an overwhelming majority of the U.S. Senate, first by unanimous consent to the D.C. Circuit and then by a vote of 96–3 to the United States Supreme Court.

Stephen Breyer was the Democrats' chief counsel on the Senate Judiciary Committee before he, too, was easily confirmed to the First Circuit and then to the United States Supreme Court.

Byron White was the second most powerful political appointee at the Justice Department under President Kennedy when the Senate confirmed him to the Supreme Court by a voice vote.

Abner Mikva was a Democrat Member of Congress when he was confirmed to the D.C. Circuit by a majority of the Senate.

Indeed, as many as 42 of the 54 judges who have served on the D.C. Circuit came to the bench with political backgrounds, including service in appointed or elected political office. All received the respect that they deserved and the courtesy of an up-or-down vote on the floor of the U.S. Senate, and all received the support of at least a majority of Senators, as our Constitution demands.

So, historically, this body and this Committee have exercise the advise and consent function seriously and appropriately by emphasizing legal excellence and experience and not by punishing nominees simply for serving their political party. It would be tragic for the Federal judiciary and ultimately harmful to the American people who depend on it to establish a new standard today and declare that any lawyer who takes on a political client is somehow disqualified for confirmation, no matter how talented, how devoted, or how fit for the Federal bench they may truly be.

Brett Kavanaugh is a skilled attorney who has demonstrated his commitment to public service throughout his life and career. He happens to be a Republican, and he happens to be close to the President. This is a Presidential election year, but the rigorous fight for the White House should not spill over to the judicial confirmation process any more than it already has. Last year, it was wrong for close friends of the President, like Texas Supreme Court Justice Priscilla Owen, to be denied the basic courtesy and Senate tradition of an up-or-down vote simply to score political points against the President. And this year, it would be terribly wrong for Brett to be denied confirmation or at least an up-or-down vote simply because he has ably and consistently served his President, his party, and his country.

And, with that, I thank you, Mr. Chairman.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman HATCH. Thank you, Senator. Normally we would defer to the Democrat leader on the Committee, Senator Leahy, but he has asked that I first go to Senator Schumer, and then the last statement will be made by Senator Leahy, and then we will turn to you for any statement you would care to make, Mr. Kavanaugh.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. And, first, I want to welcome Brett Kavanaugh, his parents, and his fiancee to today's hearing. Something tells me this won't be the easiest or the most enjoyable hearing for them or for us. But I know that Brett appreciates what an important position he has been nominated to and how important this process is, and I know how proud his family is of him.

Now, Mr. Chairman, it is really unfortunate we have to be here again on another controversial nomination. It is unfortunate because it is so unnecessary. We have offered time and time and time again to work with the administration to identify well-qualified, mainstream conservatives for these judgeships, especially on the D.C. Circuit. Instead, the White House insists on giving us extreme ideological picks.

In this instance, the nomination seems to be as much about politics as it is about ideology, and I am sometimes a little incredulous. The President makes the most political of picks, and then my colleagues tell us not to be political. Tell the President, and maybe we could come to some agreement here together. While the nominations of William Pryor and Janice Rogers Brown and Priscilla Owen may be among the most ideological we have seen, the nomination of Brett Kavanaugh is among the most political in history.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first-rate. He clerked for two prestigious circuit court judges and a Supreme Court Justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile, controversial issues in his short career, from the notorious Starr Report to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles, including the victims compensation fund, to controversial judicial nominations. If there has been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there is no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-right's political lawyer. Where there is a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics. If President Bush truly wanted to unite us, does anyone believe he would have nominated Brett Kavanaugh? If President Bush wanted to truly unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush wants to change the tone in Washington ought to look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the D.C. Circuit is not just a drop of salt in the partisan wounds, it is the whole shaker.

The bottom line seems simple: This nomination appears to be judicial payment for political services rendered. There is much that

many of us find troubling about this nomination. I look forward to hearing the nominee address our myriad concerns. I would just like to take a moment to lay out two areas that will be central to this discussion.

First, for the first 2 years of the administration, when the administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations. He spoke frequently at public events defending the President's decision to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizable majority of the American people when I say we do not want ideologues on the bench, whether too far right or too far left. Judges who bring their own agendas to the judiciary are inclined to make law, not interpret law, as the Founding Fathers intended. We want fair and balanced judges in the real sense of those words.

Nonetheless, this administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's Office, Brett Kavanaugh played a major role in selecting these judges, preparing them for hearings, and defending their nominations at public events. In the course of defending the administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges. The five criteria he cites are: one, extraordinary intellect; two, experience; three, integrity; four, respect in the legal community and the nominee's home State community; and, five, commitment to interpreting law, not making law.

I don't think I am stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges. But in the same public discussions of the President's judicial nominees where he cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim. It just does not hold water. If ideology did not matter, we would see nominations scattered across the political spectrum. There would be a roughly equal number of Democrats and Republicans, with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, while a few outliers would be at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That is not the case with the nominations Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1 to 10, with 10 being very liberal and 1 being very conservative, there is a huge number of 1s and 2s, some 3s, and only a smattering of 4s and 5s. Of course, ideology played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last 3 years, I have been trying to get us to talk honestly about our differences over judicial nominees. We have pretty much stopped citing minor personal peccadilloes in the nominees' histories as pretext for stopping nominations that we really oppose on ideological grounds. The process is better for the honesty we have brought to it.

Now, I hope we can have an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it is possible that the President who has made some of the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age he has an extraordinary resume and that he has achieved in every job he has held. But there are serious questions—and it is not the age; it is that he has never tried a case; he has a record of service after he clerked almost exclusively to highly partisan political matters—why he is being nominated to a seat on the second most important court in America.

Why is the D.C. Circuit Court so important? The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands of cases a year brought by Americans seeking to vindicate their rights. All other Federal appellate courts handle just those cases arising from within its boundaries. So the Second Circuit, where Senator Leahy and I are from, takes cases coming out of New York and Connecticut and Vermont. But the D.C. Circuit doesn't just take cases brought by residents of Washington, D.C. Congress has decided there is a value in vesting one court with the power to review certain decisions of administrative agencies. We have given plaintiffs the power to choose the D.C. Circuit. In some cases, we force them to go to the D.C. Circuit because we have decided, for better or for worse, when it comes to these administrative decisions, one court should decide what the law is for the whole Nation.

So when it comes to regulations adopted under the Clean Air Act by EPA or labor decisions by the NLRB, rules propounded by OSHA, gas prices regulated by FERC, and many other administrative agencies, the decisions are usually made by the judges on the D.C. Circuit. To most, it seems like this is the alphabet soup court since virtually every case involves an agency with an unintelligible acronym—EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so forth. The letters, though, that comprise this alphabet soup are what makes our Government tick. They are the agencies that write and enforce the rules that determine how much reform there will be in campaign finance reform. They determine how clean clean water has to be for it to be safe for families to drink. They establish the rights that workers have when negotiating with corporations.

The D.C. Circuit is important because its decisions determine how these Federal agencies go about doing their jobs. And in doing so, it directly impacts the daily lives of all Americans more than any other court in the country with the exception of the Supreme Court.

So there is a lot at stake when considering nominees to the circuit and how their ideological predilections will impact the decisions coming out of the court and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the D.C. Circuit votes, when you study them, break down on ideological lines with amazing frequency. People who went to same law schools and clerked for the same courts somehow vote almost dramatically differently depending on who appointed them. I wonder why. Ideology. And this divide happens in cases with massive national impact.

It is not good enough just to cite that someone went to a great law school and clerked for some very distinguished judges. We have an obligation to weigh how the ideological and political predispositions of those who are nominated are going to affect America. So we have a real duty to scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who have equally high intellectual ability but who have more significant judicial, legal, and academic experience to recommend them for this post.

It is an honor and a compliment that, despite his relative lack of experience, this administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second highest court in the land is at stake, the administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question of who has the broadest and widest experience for this job or who can be the most balanced and the most fair. He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Alan Snyder or Elena Kagan, now dean of Harvard Law School, two extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course we would have. But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has demonstrated a history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not just political ideology and political patrons, if confirmed to this lifetime post.

Brett Kavanaugh is the youngest person nominated to the D.C. Circuit since his mentor, Ken Starr. If you go through the prejudicial appointment accomplishments of the nine judges who sit on the D.C. Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high-level executive branch posts, including heading the Antitrust Division of DOJ, and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard law schools and was Chairman of Amtrak's Board of Directors and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a State judge and a Federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and 5 years as a Federal district court judge.

Judge Randolph spent 22 years with Federal and State Attorneys General offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both Federal and State governments, including a stint as corporation counsel for D.C. and several years on D.C.'s equivalent of a State Supreme Court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of Legal Services.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing and the Unabomber trial while in a senior position at the Justice Department.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the nine current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had significant additional experience, non-partisan experience, to help persuade us that they merited confirmation. And, of course, they are of widely different ideologies.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position, providing his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time and different experience we would have greater comfort imagining Mr. Kavanaugh on this court. Suffice it to say, on the record before us Mr. Kavanaugh faces a serious uphill battle.

I look forward to hearing his answers to the difficult questions we will pose.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Chairman HATCH. Senator Leahy, we will now call on you, and then we will turn to Mr. Kavanaugh.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

I listened with interest to the Chairman's comments at the beginning about moving judges quickly or not. I would point out that we have confirmed more judges for President Bush so far in his term than all of President Reagan's first term, and President Reagan, of course, had a Republican majority throughout that.

Now, I know that sometimes there have been some differences. During the 17 months the Democrats controlled the Senate, we did confirm 100 of President Bush's nominees. During the 22 months that the Republicans were in control of the Senate, I believe they confirmed about 73 or 74.

One could say, if we just wanted to go by statistics, that the Democrats have been a lot better to President Bush on his judicial nominees than the Republicans have.

I would like to pick up on something that Senator Schumer said, and it refers to another statement made about whether everybody should get votes. We have differing opinions. The Democrats have blocked a handful of judges from votes. The Republicans, when they were in charge during President Clinton's time, blocked 61 judges from having votes. And I will mention a couple of them, and Senator Schumer has, too: Alan Snyder and Elena Kagan.

Alan Snyder was 54 years old when he was nominated to the D.C. Circuit. He had 26 years of experience as an appellate specialist at the firm of Hogan and Hartson. He was a graduate of the Harvard Law School. He held the prestigious post of president of the Harvard Law Review. He clerked with two Justices of the Supreme Court. But he was not allowed to have a vote by the Republican-controlled Senate, and the reason for that, he had represented Bruce Lindsey, who was an aide of President Clinton. And so I would tell my friend from Texas, he was told that because of his representation of a client he had had, he could not have a vote. And it was determined that he would not be allowed to have a vote by the U.S. Senate, even though I suspect he would have been confirmed had there been a vote.

Elena Kagan was another one. She, too, went to Harvard Law School. She served as a Law Review supervising editor. She supervised 70 student editors, including Miguel Estrada. She went on to clerk for a Justice of the Supreme Court, Justice Marshall, and extraordinarily qualified. But she was told, I guess, because she had had some association working, I think, a job similar to yours at the White House that she should not be allowed to have a vote, and this Committee determined she would not be allowed to come to a vote. One or two Republicans opposed her, so she was never allowed to even be given a vote. Of course, to point out her qualifications, she now has what is arguably the most prestigious post in legal academia. She is dean of the Harvard Law School.

I have made a suggestion to the White House—I realize that they may be disappointed that during Republican control of the Senate they have not moved as many of the President's nominees as the Democrats did during their control of the Senate, but I have made a suggestion to them of a way to move forward. As you know, Mr. Kavanaugh, because you worked in that area, we have the so-called Strom Thurmond rule, which has been followed by this Committee for years, which limits the number of nominees that you get within a few months of the nomination of Presidential candidates during a Presidential election year.

I have suggested that the White House do what all six Presidents have done since I have been here, and that is to work out, as we always have, a list of those who may well be confirmed. Every President can determine how they want it. That is what President

Ford did, that is what President Reagan did, what the former President Bush did, what President Carter did, and what President Clinton did. Maybe President Bush will decide to do the same. That is a decision he has to make, not this Committee.

Senator Hatch and I worked with a number of these other Presidents in doing that. I would hope that we might be able to do it again. As we have demonstrated, in the 17 months that the Democrats were in charge of the Senate, we moved 100, both district court judges and circuit court judges, President Bush's nominees. During the 22 months that the Republicans were in charge, they moved another 70 or 73. I forget what the exact number is. So we have demonstrated our good faith. We have done this notwithstanding the 61 of President Clinton's nominees that were blocked—61 of them were blocked by the Republicans.

Mr. Chairman, I appreciate you and Senator Schumer holding this hearing. I appreciate your courtesy, which I might say is typical of the courtesy you always show in having me make a statement. I will hold my time for questions.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

Mr. Kavanaugh, if you will stand and be sworn. Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAVANAUGH. I do.

Chairman HATCH. Thank you. Mr. Kavanaugh, we will be happy to take any statement you would care to make at this time.

STATEMENT OF BRETT M. KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. KAVANAUGH. Mr. Chairman, I don't have an opening statement. I am prepared to answer the Committee's questions. And Senator Schumer raised a number of important points. I look forward to answering his questions and the questions of the Committee today.

I do thank, again, my parents and Ashley for being here and look forward to the hearing.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

   Brett Michael Kavanaugh.

2. **Address: List current place of residence and office addresses.**

   Residence: Washington, DC 20007.
   Office: Staff Secretary's Office, White House West Wing, Washington, DC 20502.

3. **Date and place of birth.**

   February 12, 1965. Washington, DC.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Single. I have never been married.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Yale Law School, 1987-90. J.D. 1990.
   Yale College, 1983-87. B.A. 1987.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

   President George W. Bush.
   Assistant to the President and Staff Secretary, 2003-present.

   President George W. Bush.
   Senior Associate Counsel to the President, 2003.
   Associate Counsel to the President, 2001-2003.

   Kirkland & Ellis, Washington, DC.
   Partner, 1997-98, 1999-2001.

   Office of Independent Counsel Kenneth W. Starr.
   Associate Counsel, 1994-97, 1998.

Justice Anthony M. Kennedy, Supreme Court of the United States.
Law Clerk, 1993-94.

Office of the Solicitor General, U.S. Department of Justice.
Attorney, 1992-93.

Munger Tolles & Olson, Los Angeles, CA.
Summer Associate, Summer 1992.

Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit.
Law Clerk, 1991-92.

Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit.
Law Clerk, 1990-91.

Williams & Connolly, Washington, DC.
Summer Associate, Summer 1990.

Covington & Burling, Washington, DC.
Summer Associate, Summer 1989.

Miller Cassidy Larocca & Lewin, Washington, DC.
Summer Associate, Summer 1989.

Pillsbury Madison & Sutro, Washington, DC.
Summer Associate, Summer 1988.

Other:

Commission on the Future of Maryland Courts.
Research Associate to the Chairman, 1996.

Georgetown Prep Alumni Association (since 1990's).

Federalist Society.
Co-Chair of School Choice Subcommittee of Religious Liberties Practice Group, 1999-2001.

Class Secretary for Yale Law School Class of 1990 in 2000-01.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Cum laude graduate of Yale College.
Notes Editor, Yale Law Journal, 1989-90.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Maryland State Bar Association.
Montgomery County Bar Association.
District of Columbia Bar Association.
American Bar Association.
Federalist Society. Co-Chair of School Choice Subcommittee of Religious Liberties Practice Group, 1999-2001.
Commission on the Future of Maryland Courts. Research Associate to the Chairman, 1996.

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Lobbying Organizations: None.
Other Organizations:
Congressional Country Club.
Holy Trinity Roman Catholic Church.
Georgetown Prep Alumni Association.
Delta Kappa Epsilon (when at Yale College).
Truth and Courage Society (when at Yale College).
I have been a member of the American Bar Association and the Federalist Society at various times since law school.

11. Court Admission: **List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Supreme Court of the United States, 1994.
Maryland, 1990.
District of Columbia, 1992. (Lapsed for brief period in 2002 when renewal form was sent to incorrect home address.)

I also have been admitted at various times to several lower federal courts, including the United States Court of Appeals for the D.C. Circuit and the United States District Court for the District of Columbia.

12. Published Writings: **List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Articles:

The President and the Independent Counsel, 86 Georgetown Law Journal 2133 (1998).

Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings, 99 Yale Law Journal 187 (1989).

Op-eds:

Washington Post, November 15, 1999 (joint op-ed responding to Richard Cohen's column criticizing Judge Starr).

Wall Street Journal, September 27, 1999 (op-ed about Supreme Court case in which I represented an amicus curiae as a client; the Supreme Court agreed 7-2 with the position in the amicus brief).

American Spectator, April 1999 (brief submission describing lessons from independent counsel investigations).

Washington Post, February 26, 1999 (op-ed criticizing the operation of the independent counsel statute in relation to impeachment and the House of Representatives for its "immediate and unscreened release of the referral").

Letters to Editor:

Washington Post, August 31, 1999.
New York Times, August 1, 1999.
Washington Post, July 1, 1999.

Speeches:

I have given remarks on occasion in official and personal capacities. These remarks have most often occurred at legal conferences and on panels. I also have guest-taught classes at various law schools. In the White House Counsel's office, I also spoke to visitors to the White House and on Capitol Hill. I generally have spoken with short written points, which I have not ordinarily retained, rather than prepared speeches. I also have not maintained an ongoing list of remarks, but I have attempted to reconstruct a responsive list for this purpose. I will supplement the list if I become aware of other speeches that fit within this question.

Remarks to Log Cabin Republicans on judicial appointments, 2003.
Remarks to Yale Law School Association of Washington, DC, on judicial appointments, 2003.
Remarks to American Forest and Paper Association on variety of legal issues, 2003.
Remarks to Federalist Society Southern Leadership conference, 2003.
Remarks to groups of historians interested in Presidential records, 2001-03.
Remarks to Iowa State Bar Association on judicial appointments, 2002.
Remarks to National Conference of Women's Bar Associations on judicial appointments, 2002.
Remarks at American Judicature Society panel on judicial appointments, 2002.
Remarks at Republican National Lawyers Association on judges, 2002, 2003.
Participant in Yale Law School panel on judicial appointments, 2002.
Participant in panel on judicial appointments sponsored by Association of the Bar of the City of New York, 2002.
Participant in panel on judicial appointments sponsored by Washington Council of Lawyers, 2002.
Moderator of Federalist Society panel on originalism, 2001.
Remarks at Yale Club of Pittsburgh on independent counsel law and role of White House Counsel's office, 2001.
Moderator of Federalist Society panel on First Amendment, 2000.
Remarks at American Bar Association panel on Internet regulation, 2000.
Participant in symposium sponsored by Georgetown Journal of Legal Ethics, 2000.
Moderator of Federalist Society panel on charitable choice, 2000.
Remarks at Federal Bar Association symposium on federal Sentencing Guidelines, 2000.
Remarks at Duke University Law School panel on independent counsel statute, 1999.
Remarks at tribute dinner for Judge Ken Starr, 1999.
Remarks at Georgetown University Law Center panel on independent counsel law, 1998.

Television Appearances:

CNN The World Today with Wolf Blitzer (2000).
CNN Burden of Proof (in 1999 and 2000).
MSNBC (2000).
ABC 20/20 (1998).

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. June 2003.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

Not applicable.

16. Public Office: **State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Appointed by President George W. Bush as Assistant to the President and Staff Secretary, 2003-present.

Appointed by President George W. Bush as Associate Counsel, 2001-2003, and Senior Associate Counsel, 2003.

Appointed by Judge Kenneth W. Starr as Associate Counsel in Office of Independent Counsel, 1994-97, 1998.

Appointed by Justice Anthony M. Kennedy as Law Clerk, 1993-94.

Employed as Attorney, Office of the Solicitor General, 1992-93.

Appointed by Judge Alex Kozinski as Law Clerk, U.S. Court of Appeals for the Ninth Circuit, 1991-92.

Appointed by Judge Walter K. Stapleton as Law Clerk, U.S. Court of Appeals for the Third Circuit, 1990-91.

17. Legal Career:

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

From 1993 to 1994, I served as a law clerk to Justice Anthony M. Kennedy on the Supreme Court of the United States.

From 1991 to 1992, I served as law clerk to Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit.

From 1990 to 1991, I served as a law clerk to Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit.

2. **whether you practiced alone, and if so, the addresses and dates;**

I have never been a sole practitioner.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

President George W. Bush
Assistant to the President and Staff Secretary, 2003-present
The White House
1600 Pennsylvania Avenue
Washington, DC 20502

President George W. Bush
Office of Counsel to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20502
Senior Associate Counsel, 2003.
Associate Counsel, 2001-2003.

Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005
Partner, 1997-98 and 1999-2001.

Office of Independent Counsel
1001 Pennsylvania Ave., N.W., Suite 490-N
Washington, DC 20004
Associate Counsel, 1994-97 and 1998.

Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530
Attorney, 1992-93.

Munger Tolles & Olson
355 South Grand Ave., 35th Floor
Los Angeles, CA 90071
Summer Associate, 1992.

Williams & Connolly
725 12th St., N.W.
Washington, DC 20005
Summer Associate, 1990.

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

I have devoted the bulk of my professional career to public service.

Clerkships:

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

Office of the Solicitor General:

I served for one year as an attorney in this office from 1992 to 1993. I was responsible for preparing briefs in opposition to certiorari petitions and appeal recommendations. In addition, I assisted the Solicitor General and his Deputies and Assistants in preparing briefs and in preparing for oral arguments before the Supreme Court. I also handled two court of appeals cases, writing the brief in both cases and arguing one in the U.S. Court of Appeals for the Fifth Circuit. The government prevailed in both cases.

Office of Independent Counsel:

In the summer of 1994, after my clerkship with Justice Kennedy concluded, I interviewed with law firms. At about the same time, in August 1994, Judge Starr was appointed independent counsel. I had worked briefly for Judge Starr in the Office of the Solicitor General, and he offered me a position in the Office of Independent Counsel.

In that Office, I performed six main functions during the course of my service.

First, I was a line attorney responsible for the Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. This assignment required management and coordination with a number of FBI agents and investigators, FBI laboratory officials, and outside experts

on forensic and psychological issues. I was responsible for conducting and assisting with interviews of a wide variety of witnesses with respect to both the cause of death and Mr. Foster's state of mind. I was responsible for preparing a draft of the report on his death. The investigation and report resolved questions about the cause and manner of Mr. Foster's death, concluding that he committed suicide in Fort Marcy Park, Virginia.

Second, I was one of two line attorneys responsible for conducting the investigation into possible obstruction of justice in the wake of Mr. Foster's death, including whether documents had been unlawfully removed from his office or otherwise concealed from investigators. This was an extensive grand jury investigation. I conducted numerous interviews and grand jury sessions and, with another attorney, prepared a memorandum of more than 300 pages summarizing the matter. At the time, this matter also was being investigated by the Senate. The Office conducted a thorough investigation of the facts and did not seek criminal charges against any individuals.

Third, I was substantially responsible for writing briefs and conducting oral arguments regarding privilege and other legal matters that arose frequently during the investigation. These included cases about the government attorney-client privilege, Secret Service privilege, and private attorney-client privilege. I argued once before the Supreme Court of the United States and twice before the U.S. Court of Appeals for the D.C. Circuit.

Fourth, I served as a legal advisor on a variety of issues facing the Office. I and several other attorneys sometimes served a function roughly equivalent to that of attorneys in the Office of Legal Counsel in the Justice Department. This required analysis of, for example, statutory reporting requirements, Rule 6(e) obligations, FOIA disclosure rules, and issues related to interaction with Congress.

Fifth, I was part of the team that prepared that part of Judge Starr's 1998 report to Congress, submitted pursuant to statute, that outlined information that "may constitute grounds" for impeachment. Although many volumes of evidence were provided to the House of Representatives under seal, the report as publicly released by the House of Representatives was divided into two parts. The first part was a summary of facts known as the "narrative" section. I did not draft that part of the report. The second part was a description of possible grounds for impeachment that identified areas where the President may have made false statements or otherwise obstructed justice. I drafted portions of that part of the report. This is a matter of some continuing controversy. As I have stated publicly before, I

regret that the House of Representatives did not handle the report in a way that would have kept sensitive details in the report from public disclosure (as had occurred with the House's handling of the Special Prosecutor's report in 1974) or, if not, that the report did not further segregate certain sensitive details. The House of Representatives voted to publicly release the report without reviewing it beforehand.

Sixth, I was an attorney primarily responsible for assisting Judge Starr with preparation of his two-hour statement to the House Judiciary Committee, which he submitted in written form and delivered orally on November 19, 1998. The statement identified and discussed the investigation and evidence.

Kirkland & Ellis:

At Kirkland & Ellis, I worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. My most significant corporate clients were firm clients Verizon, America Online, General Motors, and Morgan Stanley. I represented them in a variety of litigation and administrative matters. I also represented individuals and non-corporate entities in litigation matters. I represented Adat Shalom synagogue pro bono in a case involving Montgomery County zoning regulations. I represented Governor Jeb Bush in his official capacity against a constitutional challenge to Florida's school choice legislation. I represented Elian Gonzalez's American relatives pro bono in their petition for rehearing in the Eleventh Circuit and their petition for certiorari in the Supreme Court. In all of these matters, I was part of a larger litigation team.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Assistant to the President and Staff Secretary:

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

In private practice, I specialized in constitutional issues, commercial litigation, and appellate practice. My typical former clients are described in the previous answer.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

Occasionally. In both public service and private practice, I argued a number of appellate matters and also conducted legal arguments in district court.

2. **Indicate the percentage of these appearances in:**

(A) civil proceedings: approximately 50% (private practice)
(B) criminal proceedings: approximately 50% (government practice)

3. **What percentage of these appearances was in:**
   (a) federal courts;
   approximately 90%
   (b) state courts of record;
   approximately 10%
   (c) other courts.

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

None, as I have not been a trial lawyer. I have worked on legal issues and appeals in both public service and private practice and argued in court, including the Supreme Court of the United States, the U.S. Court of Appeals for the D.C. Circuit, federal district courts, and state courts.

5. **What percentage of these trials was:**
(a) jury;
(b) non-jury.

Not applicable.

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**
(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Swidler & Berlin v. United States, 524 U.S. 399 (1998), reversing 124 F.3d 230 (D.C. Cir. 1997).

I represented the United States and argued and briefed this case in both the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia Circuit. The court of appeals decision was rendered in 1997 and the Supreme Court decision in 1998.

The case presented the question whether the attorney-client privilege continues to apply in federal criminal proceedings when the client is deceased. A federal grand jury issued a subpoena for communications that occurred between Vincent W. Foster, Jr., and his attorney James Hamilton nine days before Mr. Foster's suicide. Mr. Hamilton challenged the subpoena, arguing that the attorney-client privilege continued to apply after the death of the client and that he was not permitted to disclose what Mr. Foster had told him. The United States, represented by the Office of Independent Counsel, sought to enforce the grand jury subpoena, arguing that the attorney-client privilege did not apply with full force in federal criminal proceedings when the client was deceased. Many legal treatises, including the American Law Institute's Restatement of the Law, had agreed with the position advocated by the Office of Independent Counsel. The U.S. Court of Appeals for the D.C. Circuit, in an opinion by Judge Patricia Wald and Judge Stephen Williams, ruled in favor of the Office of Independent Counsel. Judge Tatel dissented. The Supreme Court then granted certiorari and ruled 6-3 in favor of Mr. Hamilton in an opinion by Chief Justice Rehnquist. The dissent written by Justice O'Connor and joined by Justices Scalia and Thomas agreed with the position of the Office of Independent Counsel.

My co-counsel in this case were Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130, and Craig Lerner, now a professor at George Mason University Law School, 3301 N. Fairfax Drive, Arlington, VA 22201, (703) 993-8080. The opposing counsel was James Hamilton of Swidler Berlin Shereff Friedman, 3000 K Street, N.W., Suite 300, Washington, DC 20007, (202) 424-7826. The counsel of record on the primary amicus brief was Mark I. Levy, Howrey & Simon, 1299 Pennsylvania Ave., N.W., Washington, DC 20004, (202) 383-7441.

Concerned Citizens of Carderock v. Hubbard and Adat Shalom Reconstructionist Congregation, 84 F.Supp.2d 668 (D. Md. 2000).

In this case, I represented pro bono Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland (Judge Andre Davis). The district court decided the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the County. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

My primary co-counsel at Kirkland & Ellis were Jay P. Lefkowitz, now at the White House Domestic Policy Council, 1600 Pennsylvania Ave., N.W., Washington, DC 20502, (202) 456-1473, and John Wood, now at the Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2001. The primary counsel for the plaintiffs was Stanley D. Abrams of Abrams, West & Storm, 4550 Montgomery Ave., Suite 760N, Bethesda, MD 20814, (301) 951-1550. The primary counsel for Montgomery County were Charles W. Thompson and Edward B. Lattner of the County Attorney's Office for Montgomery County, 101 Monroe St., 3rd Floor, Rockville, MD 20850, (240) 777-6700.

America Online 5.0 Litigation (1999-2000).

In these cases, I represented America Online (AOL) in a series of class-action lawsuits. In particular, I filed briefs and conducted oral arguments for AOL in a number of federal district courts around the country. I also argued a proceeding before the Judicial Panel on Multidistrict Litigation and a motion to dismiss in a related case in the Circuit Court for Baltimore City. The complaints in these cases alleged that AOL had engaged in a variety of deceptive tactics and antitrust violations in designing and marketing AOL Version 5.0.

My primary co-counsel at Kirkland & Ellis were Thomas Yannucci and Eugene Assaf, Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5000. The opposing counsel were a large group of attorneys representing different plaintiffs from around the country; many of the attorneys are listed in a reported consolidated case at 168 F.Supp.2d 1359.

In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998), cert. denied, Office of the President v. Office of Independent Counsel, 525 U.S. 996 (1998).

I represented the United States (Office of Independent Counsel) in this case. I briefed and argued the case in the U.S. Court of Appeals for the D.C. Circuit and worked on the brief in opposition to the petition for certiorari in the Supreme Court of the United States. I also had worked on a petition for certiorari before judgment to the Supreme Court.

This case arose out of a federal grand jury subpoena issued to Bruce R. Lindsey, an attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Office of Independent Counsel sought to have the subpoena enforced. The D.C. Circuit (Judges Randolph and Rogers for the majority; Judge Tatel in dissent) ruled in favor of the Office of Independent Counsel. The Office of the President then filed a petition for certiorari in the Supreme Court. The Supreme Court denied the petition.

My co-counsel were Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130, and Joseph Ditkoff, now of the Suffolk County District Attorney's Office in Massachusetts, One Bulfinch Place, Boston, MA 02114, (617) 619-4000. The primary opposing counsel were David Kendall of Williams & Connolly, 725 12th Street, N.W., Washington, DC 20005, (202) 434-5000; Neil Eggleston, Howrey Simon Arnold & White, 1299 Pennsylvania Ave., N.W., Washington, DC 20004, (202) 783-0800; and Douglas Letter, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20005, (202) 514-3301.

Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000) (denying petition for rehearing en banc), cert. denied, 530 U.S. 1270 (2000).

In this case, I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for stay in the Supreme Court of the United States, and petition for writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing, application for stay, and petition for certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing and rehearing en banc arguing, in essence, that the court's original decision granting an injunction pending appeal had analyzed the issue correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing and rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

My co-counsel included Jeffrey Clark, then at Kirkland & Ellis and now at the U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-3370; and Kendall Coffey of Coffey & Wright, 2665 South Bayshore Drive, Miami, Florida 33133, (305) 857-9797. The primary opposing counsel was Ed Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).

I represented the United States (Office of Independent Counsel) in this case. I primarily wrote the brief in the U.S. Court of Appeals for the Eighth Circuit and worked on the brief in opposition to the petition for certiorari in the Supreme Court of the United States. I also briefed the case in the United States District Court for the Eastern District of Arkansas.

This case arose out of a federal grand jury subpoena issued to the White House Office for documents of a government attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Eighth Circuit (Judges Bowman and Wollman for majority; Judge Kopf in partial dissent) ruled in favor of the United States, represented by the Independent Counsel. The Office of the President then filed a petition for certiorari in the Supreme Court. The Supreme Court denied the petition.

My co-counsel were Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130; and John Bates, now of the U.S. District Court for the District of Columbia, 333 Constitution Ave., N.W., Washington, DC 20001, (202)

354-3430. The primary opposing counsel were David Kendall of Williams & Connolly, 725 12th Street, N.W., Washington, DC 20005, (202) 434-5000; Lawrence Robbins, Robbins, Russell, Englert, Orseck & Untereiner, 1801 K Street, N.W., Suite 411, Washington, DC 20006, (202) 775-4500; Andrew Frey, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000; and Miriam Nemetz, now of Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

In this Supreme Court case, I represented an amicus curiae, Sally Campbell, and filed an amicus brief.

The case involved a Free Speech Clause and Free Exercise Clause challenge to the community use policy of a school district in New York. The policy excluded religious organizations from using public school facilities after school hours. (Ms. Campbell had challenged a similar policy in Louisiana.) The question in the case was whether the exclusion of religious organizations was permitted under the Religion and Free Speech Clauses of the First Amendment. The amicus brief filed on behalf of Ms. Campbell argued that the policy was neither required nor permitted by the Constitution. The Supreme Court agreed in a 6-3 decision.

The counsel for the plaintiff/petitioner was Thomas Marcelle, 71 Fernbank Ave., Delmar, NY 12054, (518) 475-0806. The primary counsel for other amici were Paul Clement, now Deputy Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2206; and Viet Dinh, now at Georgetown University Law Center, 600 New Jersey Ave., N.W., Washington, DC 20001, (202) 662-2000. The primary counsel for the defendant/respondent was Frank W. Miller, 6296 Fly Road, East Syracuse, NY 13057, (315) 234-9900.

Rubin v. United States, 525 U.S. 990 (1998).

In this case, I represented the United States (Office of Independent Counsel) in the Supreme Court proceedings in which the Office of Independent Counsel opposed a petition for certiorari filed by the Secretary of the Treasury and Director of the Secret Service.

The question presented was whether the federal courts should recognize a new "protective function" privilege in federal criminal proceedings that would prevent Secret Service agents from testifying in the grand jury. The U.S. Court of Appeals for the D.C. Circuit ruled in favor of the Office of Independent Counsel (Judges Williams, D.H. Ginsburg, and Randolph). The Secretary of the Treasury filed a petition for certiorari and sought a stay of enforcement of the subpoena. The Supreme Court denied a stay and then denied the petition for certiorari (over the dissents of Justices Ginsburg and Breyer).

My co-counsel included Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130. The primary opposing counsel was Ed. Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

General Motors v. Green, 709 A.2d 205 (N.J. Super. Ct. App. Div. 1998).

General Motors was a significant institutional client of my former firm, Kirkland & Ellis. In this particular case, I was asked to represent General Motors and conduct oral argument on its behalf in the Appellate Division of the New Jersey Superior Court before Judges Dreier, Levy, and Wecker. The case was a design defect products liability case involving an alleged roof design defect. At trial, the jury had found General Motors liable and awarded plaintiff $25 million. General Motors appealed on numerous grounds, challenging both the liability judgment and damages award. The Appellate Division affirmed the liability judgment and substantially reduced the damages award.

My primary co-counsel at Kirkland & Ellis was Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and another co-counsel was Thomas F. Tansey, 521 Green Street, Woodbridge, NJ 07095, (732) 634-7880. The primary opposing counsel was Maurice Donovan, 405 Northfield Ave., West Orange, NJ 07052, (973) 736-8050.

Lewis v. Brunswick, No. 97-288 (Supreme Court of the United States) (dismissed as moot because of settlement after oral argument).

In the Lewis case, I represented General Motors in filing an amicus brief in the Supreme Court. The question presented in the case was whether the Boat Safety Act preempted a state common-law requirement that recreational boats be equipped with propeller guards. Because of the similarity of the question to a question under the National Traffic and Motor Vehicle Safety Act, General Motors filed an amicus brief. The Supreme Court subsequently dismissed the case after oral argument because the parties settled.

My primary co-counsel were Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and Richard A. Cordray, of counsel at Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5000. The primary counsel for plaintiff/petitioner was David E. Hudson, 801 Broad Street, Suite 700, Augusta, GA 30901, (706) 722-4481. The primary counsel for defendant/respondent was Kenneth S. Geller, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

19. Legal Activities: **Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

Clerkships:

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Office of Staff Secretary:

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   None. I have a government Thrift Savings Plan retirement fund.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   I will faithfully follow all applicable statutes, court decisions, and policies regarding recusal, including 28 U.S.C. 455.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   It is possible in the future that I would want to teach part-time at some point or write articles or books. If so, I would faithfully follow all applicable laws and policies.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   See attached financial disclosure report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

   See attached net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Lawyers for Bush Cheney, 2000. Regional Coordinator for Pennsylvania, Maryland, Delaware, and District of Columbia. I also went to Daland, Florida, in November 2000 to participate in legal activities related to the recount.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	10k		Notes payable to banks-secured		
U.S. Government securities-add schedule			Notes payable to banks-unsecured		
Listed securities-add schedule			Notes payable to relatives		
Unlisted securities--add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid income and interest		
Doubtful			Real estate mortgages payable-add schedule		
Real estate owned-add schedule			Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:		
Autos and other personal property	20k				
Cash value-life insurance					
Other assets itemize:					
TSP account	55k				
			Total liabilities	0	
			Net Worth	85k	
Total Assets	85k		Total liabilities and net worth	85k	
CONTINGENT LIABILITIES	No		GENERAL INFORMATION		
As endorser, comaker or guarantor			Are any assets pledged? (Add schedule)	No	

On leases or contracts				Are you defendant in any suits or legal actions?	No			
Legal Claims				Have you ever taken bankruptcy?	No			
Provision for Federal Income Tax								
Other special debt								

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

I have devoted 10 of the 13 years of my legal career to public service for the United States Government in a variety of capacities. In private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez's American relatives. I have participated in community work on occasion, most recently by participating in an all-day playground build in Washington. I contribute to various charities and community organizations, including by way of the Combined Federal Campaign.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No, other than my college fraternity and senior society, which were all-male.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There was no commission process. In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit. In 2003, he discussed with me a vacancy on the U.S. Court of Appeals for the D.C. Circuit. Later in 2003, Judge Gonzales informed me of the President's intent to nominate me to the D.C. Circuit. I underwent an FBI background investigation and was then nominated.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

A court of appeals judge should interpret constitutional and statutory provisions without regard to personal or policy views on any issue. Our legal system must ensure equal justice under law for all, and a court of appeals judge should interpret the law as enacted and as subsequently interpreted by the Supreme Court where applicable. A judge should treat parties and colleagues with dignity and respect and should act at all times -- in and out of the courtroom -- with an appropriate judicial temperament. A judge should always remember that the court's decisions will have an enormous impact on the lives and liberties of the individuals involved in the cases, as well as the American people. And a judge should approach the task of judging with humility, recognizing that federal judges are entrusted with a sacred responsibility to the American people.

JO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
KAVANAUGH, BRETT M.	NOMINEE TO U.S. COURT OF APPEALS FOR D.C. CIRCUIT	7-29-03
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type** (check appropriate type)	**6. Reporting Period**
CIRCUIT JUDGE - NOMINEE	✓ Nomination. Date 7-25-03 __ Initial __ Annual __ Final	1-1-2002 7-25-2003
7. Chambers or Office Address	**8.** On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
STAFF SECRETARY THE WHITE HOUSE WASHINGTON, DC 20502	Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions.)	
1	ALUMNI BOARD OF GOVERNORS	GEORGETOWN PREPARATORY SCHOOL ALUMNI ASSOCIATION
2		
3		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☒	NONE (No reportable agreements.)	
1		
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☒		NONE (No reportable non-investment income.)	
1			$
2			$
3			$
4			$
5			$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: KAVANAUGH, BRETT M.

Date of Report: 7-29-03

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements.)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts.)		
1	EXEMPT		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities.)		
1	FIRST USA	CREDIT CARD	J PAID IN FULL
2			
3			
4			
5			

*Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: KAVANAUGH, BRETT

Date of Report: 7-29-03

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 14-17 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period — If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, GSP) - EXEMPT									
1 BANK OF AMERICA CHECKING	A	Checking Account	J	T					
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001 - $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001 - $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	KAVANAUGH, BRETT	7-29-03

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Brett M. Kavanaugh Date July 29, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

43

AFFIDAVIT

I, Brett Kavanaugh, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 22 2003 (DATE) Brett Kavanaugh (NAME)

(NOTARY)
Notary Public for the District of Col.
Comm. exp. 1/31/08

Chairman HATCH. Well, thank you. Let me begin the questioning. We will have 10-minute rounds, and hopefully we can complete this in a reasonable period of time.

You have served in both the executive and the judicial branches of Government, the Federal Government. You graduated from Yale University, one of the finest law schools in the land. You have clerked for two separate circuit courts, and you have also clerked for the United States Supreme Court. You have tried cases before the Supreme Court. You have tried other appellate cases, so I dispute anybody's argument that you have never tried a case. There are appellate lawyers and there are trial lawyers. Some can do both. Some do do both. But primarily your experience has been on the appellate side, which is generally considered a very sophisticated side of the law.

But let me just ask you this question: How has your education and experience prepared you to be a Federal circuit court of appeals judge?

Mr. KAVANAUGH. Well, Mr. Chairman, I've always had a devotion to public service that I've had since I was young, and it was instilled in me again at Yale Law School, which has a deep commitment to encouraging its students to pursue public service. My mother had been a judge and a State prosecutor. She had instilled that and a lot more in me. And I went to become a law clerk after graduation from law school, and then after that I've chosen a variety of different jobs in public service, in the Independent Counsel's office, in the White House Counsel's office, as Staff Secretary. I've had a range of experience in the judicial branch, in the executive branch, in difficult matters. Senator Schumer raised a couple of them. I've clearly been in the arena for a lot of different types of matters, and I think I've learned a lot from those about the importance of being fair and impartial. And I come to the bench, were I to be confirmed, with a broad range of experiences and I think a commitment to fairness and impartiality in public service.

Chairman HATCH. You have been involved in improving the law, in the administration of the law, and I am interested in your work for the Commission on the Future of Maryland Courts. It is my understanding that this Commission was tasked with discovering ways to coordinate and promote fair and efficient criminal justice and public safety systems. Could you just tell the Committee a little bit about what lessons you have learned from that type of experience and how that might help you in your job as a circuit court judge if you are confirmed?

Mr. KAVANAUGH. In that Commission, I was asked by a lawyer in Rockville, Maryland, whom I knew to participate and help him—he was Chair of the Commission—and to help find ways to improve access to judicial services, access to legal services throughout the State of Maryland, which was my home State. So I helped with that Commission. The idea was that the justice system, while the best in the world, can always be better, and the idea of the Commission was to improve the delivery of legal services and the justice system in the State of Maryland and to look at recommendations of all kinds, whether it was creating a new family court, dealing with drug crimes, or what have you.

Chairman HATCH. As you are aware—I am just going to get into one aspect because that is about all the time I have right now. You are aware that an investigation was conducted by the Senate Sergeant-at-Arms into the downloading of certain Judiciary Committee files by two former Committee staffers. That investigation is complete and has been referred to the Department of Justice, so I want to ask you just a few basic questions about that matter.

Are you generally aware of that incident and that investigation?

Mr. KAVANAUGH. I am.

Chairman HATCH. Okay. I understand that as an Associate Counsel to the President of the United States, among your responsibilities was to advise the President on judicial nominations. Could you briefly outline your responsibilities and procedures you followed in fulfilling that duty?

Mr. KAVANAUGH. I was one of eight Associate Counsels who worked for Judge Gonzales. We had different areas of the country that we would work on and different nominations that we'd work on. I worked on California and Illinois, for example, with Senator Feinstein's office and Senator Durbin's office. I also worked on certain circuit court nominations. There's both the selection side and then the nominations—the confirmation side, working on the confirmation.

On the confirmation side, the idea was to help prepare the nominees for their hearings, to coordinate with our press office and other press offices in the Justice Department and in the Senate, to coordinate with the public liaison in the White House and the Justice Department and the Senate regarding any issues that could arise in connection with hearings or votes on nominees.

Chairman HATCH. As part of that responsibility, you had to meet with various staff members of the Senate Judiciary with regard to the limited work that you did for certain States, your share of the work on judges. And so I think you met with various staff members.

Now, did any staff member of the Senate Judiciary Committee or the Department of Justice ever provide you with information or documents that you were led to believe were obtained or derived from Democratic files or from my files?

Mr. KAVANAUGH. No.

Chairman HATCH. Do you know Manuel Miranda, the former Senate staff member?

Mr. KAVANAUGH. I do know him from his time and service on the Committee staff.

Chairman HATCH. Did you ever meet with him to discuss judicial nominations?

Mr. KAVANAUGH. He was part of the team—yes, he was part of the team that worked in your office and then in Senator Frist's office on judicial nominations.

Chairman HATCH. What were the circumstances of those meetings?

Mr. KAVANAUGH. Those meetings were usually to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in.

Chairman HATCH. Now, this is an important question. Did Mr. Miranda ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?

Mr. KAVANAUGH. No, I was not aware of that matter ever until I learned of it in the media late last year.

Chairman HATCH. Did Mr. Miranda ever share, reference, or provide you with information that you believed or were led to believe was obtained or derived from Democratic files?

Mr. KAVANAUGH. No. Again, I was not aware of that matter in any way whatsoever until I learned it in the media.

Chairman HATCH. Do you know if any other Associate White House Counsels had access to these type of materials that were improperly taken?

Mr. KAVANAUGH. I don't know of anyone who was aware of this matter, again, until the media reports late last year.

Chairman HATCH. But you were not?

Mr. KAVANAUGH. I was not aware of it.

Chairman HATCH. Okay. Just one final question. Could you please speak about the significance of judicial temperament and indicate what aspects of judicial temperament you consider to be the most important?

Mr. KAVANAUGH. Well, I think it's critically important, Mr. Chairman, for any judge to exhibit the proper temperament on and off the bench at all times, and what that means is in dealings with one's colleagues on the bench, having an open mind, being respectful of a colleague's views, both at oral argument and in writing opinions. I think it means being respectful of the lawyers who come before the court and not treating them disrespectfully, but to have proper respect for the lawyers in the court. And it means having a proper respect for the law and a humility, understanding that you are just one judge on a panel. There's a reason you wear a black robe. It's because you lose your individual preferences, your individuality when you take a seat on the bench. The black robe signifies that you're part of the judicial system and you're there to interpret the law fairly.

So I think that's all encompassed within judicial temperament, and it's something I've seen firsthand with Justice Kennedy and Judge Stapleton and Judge Kozinski, and it's something that I, were I to be confirmed, would always remember my proper place in the system.

Chairman HATCH. One last question. Would you please explain to the Committee why you want to be a Federal judge?

Mr. KAVANAUGH. I've always had, Mr. Chairman, a commitment to public service since I was young. Since I got out of law school, I've always thought that being a judge was the highest form of public service that a lawyer could render because it helps maintain our constitutional system, which has been in place for over two centuries, and helps protect the rights and liberties of the people.

What the courts do every day—and I think Senator Schumer alluded to this—is not always apparent to the people, but it's critically important, and there's much of what Senator Schumer said about that that I agree wholeheartedly with about how important it is.

And so in terms of commitment to public service, a commitment to our constitutional form of government, and a commitment to protecting rights and liberties of the people, that's why I think I would want to be a judge.

Chairman HATCH. Okay. I have a little bit of time left, but I think I will turn to Senator Schumer at this point.

Senator SCHUMER. Thank you, Mr. Chairman. And thank you, Mr. Kavanaugh.

First, I just want to clear up the questions that Orrin asked. You had said that Mr. Miranda never provided these documents, you know, that were from this.

Mr. KAVANAUGH. Right.

Senator SCHUMER. Had you seen them in any way? Did you ever come across memos from internal files of any Democratic members given to you or provided to you in any way?

Mr. KAVANAUGH. No.

Senator SCHUMER. Thank you.

Okay. Now, as I noted in my opening remarks, you have cited the five criteria the President uses in selecting nominees, and at the same time you have repeatedly denied the President considers ideology when selecting judges. Am I correct to anticipate you stand by that claim?

Mr. KAVANAUGH. Yes, Senator.

Senator SCHUMER. Thank you. Now, you get high marks for consistency, but this claim raises serious credibility concerns.

If ideology doesn't affect the nomination process, how is it possible we have seen so many extreme conservatives and almost no progressives?

Ninth Circuit nominee William Myers thinks the Clean Air Act and the Endangered Species Act have harmed the environment.

District court nominee James Lee Holmes endorsed Booker T. Washington's notion that God brought slaves to America to teach white people how to be more Christ-like.

D.C. Circuit nominee Janice Rogers Brown has praised the Supreme Court's notorious ruling in Lochner, perhaps the most criticized decision of the 20th century, and has said the New Deal is the triumph of America's socialist revolution.

Charles Pickering unethically intervened on behalf of a convicted cross-burner, and William Pryor has spent a career trying to undo Federal laws that have achieved broad consensus in America that protect women, workers, and the disabled.

Carolyn Kuhl has one of the most restrictive views on the right to privacy of any judge in the country, ruling that a woman has no meaningful right to privacy in her own doctor's office.

The list goes on and on, extreme views all from the far right. How do you square the reality of these totally ideological nominations with the lack of any nominations that would be the mirror image or even close to those people when you say with the rhetoric that there is a non-ideological judicial nomination process?

Mr. KAVANAUGH. Senator, I'd like to answer that in a couple ways. First, as you and Senator Leahy pointed out, the vast majority of the President's nominees have been approved by this Committee and confirmed by the Senate. That's point one.

Point two is in terms of court of appeals nominees, we've worked very closely with home State Senators in individual States to find nominees that were consensus nominees in that State. We've worked, including States with two Democratic Senators, we've worked closely with Senator Leahy on the one nomination, and Rena Raggi in New York, Judge Callahan and Judge Bea on the Ninth Circuit in California. We have tried to work closely, and in each of those cases those nominations—

Senator SCHUMER. Did you work closely with the Senators from Michigan on the Sixth Circuit?

Mr. KAVANAUGH. The Sixth Circuit situation in Michigan, Senator, is one that goes back many years. I don't understand that situation to be related to the particular nominees, but to a—

Senator SCHUMER. But you haven't consulted either Senators Levin or Stabenow on that. Is that correct?

Mr. KAVANAUGH. My understanding is that Judge Gonzales has talked often to the two Senators, but they have not reached an accommodation that's—

Senator SCHUMER. What about on the D.C. Circuit? Have you talked to any Senators on this side, Senator Leahy or any of the members of this Committee, about nominees for the D.C. Circuit?

Mr. KAVANAUGH. I don't know who Judge Gonzales talked to before the nominations, the D.C. Circuit nominees. But I know as a general proposition we've been very careful to consult with the home State Senators.

Senator SCHUMER. So you would say ideology has no factor in the nominations you have put forward for circuit court judges? Is that correct? Do you truly stand by that statement?

Mr. KAVANAUGH. We don't—Senator, I appreciate the question, but we don't ask questions about one's personal views on—

Senator SCHUMER. I didn't ask that.

Mr. KAVANAUGH. Well—

Senator SCHUMER. I asked you: Does ideology play a role in who you select? And if it does not, why have there not been hardly any nominees—I mean, the most you could say are one or two, mainly from my circuit, who tend to be a little more moderate. Why are there nominees that are almost exclusively conservative? And we discussed the degrees of conservative. Many of the nominees I have voted for, some of us have voted for, we don't think are down-the-middle. We voted for them because we feel we have to pick our shots and because we give the President some deference. But I don't think anyone in this room, when they look at it fairly, believes that the President is choosing judges without ideology entering into it. And if that is the case, then answer again: Why have there been virtually no progressive nominees to circuit courts of appeals if ideology doesn't play a role?

Mr. KAVANAUGH. Senator, in terms of ideology, what the President is looking for is nominees who have a respect for the law and who understand that the legal system and the role as a judge is different from one's personal views or political views or political affiliation. So you're looking for someone who understands what the judicial function is.

Senator SCHUMER. You don't think there are any liberal people who feel that way?

Mr. KAVANAUGH. I think there are people of all political ideologies, Senator—

Senator SCHUMER. Well, how come no liberals have been nominated? I am not objecting to the President using ideology. Presidents do. I am objecting to the denial. It seems there is a credibility problem, because you know and I know—and my guess is if I was a fly on the wall and you had conversations with your other counsels and other things like that, that ideological considerations of course were part of the vetting process.

Mr. KAVANAUGH. Senator—

Senator SCHUMER. Have you ever used the word to any of the counsels when you were vetting judges, "This one may be too liberal"? Never?

Mr. KAVANAUGH. Senator, the important thing that Judge Gonzales emphasized to us and that the President has emphasized is to find people of experience who have good records and who know—

Senator SCHUMER. Have you ever used the words that someone might be "too liberal" to be a good judge—to be nominated by President Bush?

Mr. KAVANAUGH. I am confident, Senator, that in the course of 3 years I have thought that some people did not understand the proper judicial—

Senator SCHUMER. Did you ever use those words?

Mr. KAVANAUGH. I don't know whether I ever—

Senator SCHUMER. What do you think?

Mr. KAVANAUGH. —used the word "too conservative" or "too liberal" to be a—in the sense that they don't understand the proper judicial function.

Senator SCHUMER. Let me go to the second part of the questioning. It defies belief, in all due respect, sir, for anyone who looks at the broad nature of the nominees, particularly the court of appeals, that ideology didn't play some role as you selected judges.

The second—

Mr. KAVANAUGH. Senator—

Senator SCHUMER. I just want to ask my second, because my time is limited. Now, when Ken Starr started his Independent Counsel investigation, he was tasked with looking into financial improprieties tied to a land deal in Arkansas. When he finished, he produced, with substantial assistance from you, a lengthy report that frequently dwelt on salacious details from President Clinton's personal life. I am not asking did you—I am asking your personal opinion because we have to get your personal opinions here. I am not asking did you serve your client well.

In retrospect, did you go too far?

Mr. KAVANAUGH. Senator Schumer, in terms of the first part of your question, Judge Starr was assigned by Attorney General Reno to look into the Whitewater and Madison-related issues. It was then her decision to add on other investigations to his original jurisdiction, including the Travel Office matter—

Senator SCHUMER. But that is not my question, sir. I am asking your personal opinion. When the Whitewater commission ended up dwelling on the salacious details from President Clinton's personal

life, do you believe personally that that was the correct thing to do or that went too far?

Mr. KAVANAUGH. I have said publicly before, as has Judge Starr, Senator—and I've written this publicly—that the way that the House of Representatives released the report without reviewing it beforehand caused unnecessary harm, combined with the way the report was structured—

Senator SCHUMER. I am not asking you a procedural issue. I am asking—you, as the chief cook and bottle washer here, working for Starr, came up with a report that focused on the salacious details—this is the last chance. Did it go too far? Yes or no.

Mr. KAVANAUGH. I think the way the House of Representatives released the report was a mistake, and I've said so publicly.

Senator SCHUMER. Do you think you are being—do you think you are giving me an answer to my question?

Mr. KAVANAUGH. I think given the public release of the report—

Senator SCHUMER. I am asking your personal views, not on the House of Representatives' procedure. I am asking you, just as a person, an observer, and a nominee to an important court, ended up with a report that focused on personal detail. Was that the correct thing to do?

Mr. KAVANAUGH. Senator, this is an important question, so I want to take a minute to answer this.

Senator SCHUMER. I know, but I would like you to answer your personal view on it, not what the House of Representatives did, not what Ken Starr did, not what Janet Reno did, but what you think now, 4 years later?

Chairman HATCH. Let him answer the question.

Mr. KAVANAUGH. And this is an important question so I want to take a minute to answer this.

First I worked on the grounds section part of the report, which was the part of the report that outlined possible legal grounds consistent with Judge Starr's statutory obligation under Section 595(c), so that is the first point I want to make clear.

Second, I have said publicly, I think I said it in my Committee submission, that I regret that the report was released to the public in the way it was released. I personally regret how that was released because I don't think it put the case in the perspective that Judge Starr thought about it, as he testified later, and you were there, in November of 1998 before the House Judiciary Committee. It was a serious legal matter. I think, Senator, you at the time made some strong statements about the legalities involved, and I regret how the report was released because I think it created a misimpression of what we thought and Judge Starr thought were the important aspects of the investigation, which he subsequently made clear in his House testimony.

So I personally regret how that report was released because I think it was—parts of it that were released were unnecessary to be in the public domain.

Senator SCHUMER. Do you think the President should have been convicted by the Senate? If you were a Senator, would you have voted aye or nay? And you cannot use Scottish law.

[Laughter.]

Senator SCHUMER. How would you have voted, aye or nay?

Mr. KAVANAUGH. Senator, as a—

Senator SCHUMER. Please answer my question.

Mr. KAVANAUGH. That is an important question as well, but I think I need to explain.

Senator SCHUMER. Can you give me a yes or no answer and then explain it, please?

Mr. KAVANAUGH. I cannot, because it was exclusively the Senate's province to make that determination—

Senator SCHUMER. I am asking you as a—

Chairman HATCH. Let him answer.

Senator SCHUMER. He said he cannot answer it, Mr. Chairman.

Chairman HATCH. He said he can answer it. He just cannot answer it the way you want him to.

Senator SCHUMER. Yes or no is a pretty simple way to put it.

Chairman HATCH. This is not a court of law. Let him answer it the way he wants to answer it.

Mr. KAVANAUGH. It would be a simple answer, but it is a complicated question. In our role, in Judge Starr's role as assigned by Attorney General Reno, was to find the facts and to submit any evidence to Congress that may constitute grounds for an impeachment based on history and historical practice. As part of the office that submitted that report, Judge Starr made it very clear in his November testimony—and I have always tried to maintain this as well—that it was not our place to say what the House should do with that or what the Senate should do with that evidence. There is an important reason for that.

Senator SCHUMER. Sir, I am not asking you as a member working for Ken Starr. I am asking you now as an individual who has broad ranges of opinions—we know that—on all sort of things, who is before this Committee, where there is a great deal of doubt whether how you feel about things or whether you can be fair and dispassionate. It is not a question that seals your nomination or guarantees a veto. I am asking you as a person, as a nominee, would you have voted yes or no, or do you refuse to give me a yes or no answer.

Mr. KAVANAUGH. Senator, again, I think that is an important question, and because I worked—

Senator SCHUMER. That is why I asked it.

Mr. KAVANAUGH. Right, I understand. And because I worked in that office, just as a prosecutor works on a criminal case should not be commenting about whether the jury got it wrong or got it right, I do not think it is appropriate for me to say whether the House got it right in impeaching President Clinton or the Senate got it right in declining to convict. I think there was serious legal issues involved, as Judge Starr explained, and there was a debate about what to do about what everyone agreed were serious issues. I know Senator Feinstein authored the censure resolution in the Senate, and that many members of the Committee joined her censure resolution, which used very strong language about President Clinton in that censure resolution. There was a debate about what sanction should be imposed, and having worked in the office that was assigned a narrow legal duty, I just do not think it is appropriate for me to say what my personal view is on that issue.

Chairman HATCH. Certainly not in retrospect.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Welcome to the pit, Mr. Kavanaugh.

Mr. KAVANAUGH. Thank you, in the arena.

Senator SESSIONS. The arena. It is a great country. People have a right to express their views, and I appreciate your willingness and your consistent dedication to public service. I think it is something to be respected and not denigrated. Your legal skills are extraordinary, and I think the way your background and record has been portrayed is not fair, is not accurate, and does not fully reflect your contributions to law and what you would do on the bench.

As a Yale undergraduate, Yale Law School graduate, you came out and clerked for three Court of Appeals Judges. As a law clerk to a Court of Appeals Judge, and you are being nominated to a Court of Appeals position, what do you do? What kind of experience do you have in dealing with the cases and how does that help you take a position that you might take with the D.C. Circuit?

Mr. KAVANAUGH. I think, Senator, I was very fortunate to serve as a law clerk to three outstanding judges, and serve as a law clerk on the Supreme Court.

Senator SESSIONS. That is correct. Two Court of Appeals Judges and one Supreme Court Justice, Anthony Kennedy, you clerked for.

Mr. KAVANAUGH. Right. I learned a lot from each of them about how I should perform my role were I to be confirmed to be a Judge. Judge Stapleton, as Senator Biden knows well, in Delaware, is one of the most widely respected judges in that circuit or in the country because of his judicial temperament, because of his dedication and fairness. I do not think there is anyone who has ever said anything negative about Judge Stapleton. He treats everyone with complete respect. He works hard, and he taught me how to try to get the right answer in every case.

Judge Kazinski has a unbelievable passion for the law, unbelievable passion for getting the right answer, for working and working and working, and for his law clerks working and working and working, to get the right answer. He is someone who I think has proved to be as a judge someone who takes a new angle on a lot of different cases. He does not just see a case and say the accepted wisdom or the conventional wisdom about an issue is right. He is someone who rethinks everything from first principles. That is something I learned from him.

Justice Kennedy has passion for the law, has passion for American history, has devotion to how the Supreme Court fits into our constitutional system. Anyone who has heard Justice Kennedy talk about the role of the Supreme Court or the history of the Supreme Court cannot help but be influenced, and I heard that day in and day out for a year and it just had a profound effect on me.

If I were to be confirmed to be a judge, I would, I think, take lessons from each of those three with me, and I hope I could be like all three of them.

Senator SESSIONS. You were just participating and doing the very thing you would do now. You were participating with those judges and helping them write opinions, to analyze complex legal questions and briefs, and to distill that into a principled decision. I think that is terrific background for you, and I also notice you

were in the Solicitor General's Office of the Department of Justice, where in that position you represent the United States of America in Appellate Courts around the country, which also is extraordinarily good background for an appellate lawyer, and I also notice you served a period of time as a partner with the great law firm of Kirkland and Ellis, one of the best known law firms I guess in the country.

Senator Schumer and I, we have had—I chair the Courts Committee now. For a while he chaired it. We had a different view about this ideology question, and I think he uses the word maybe a little differently, people interpret it differently. Let me tell you what I think we are dealing with.

Is it not appropriate, Mr. Kavanaugh, for the President of the United States, when he appoints someone to a life term appointment on a bench, to know what that person's judicial philosophy is, his approach to the law, how it should be interpreted and how decisions should be made?

Mr. KAVANAUGH. It is important to know that the person is someone who will put aside personal beliefs, prior political affiliations, and will approach the law, follow precedent fairly and impartially, follow the text and the precedent and the history to try to reach the right answer that will come to each case impartially. All of that is very important and people use different labels to describe those factors that I just described, but the President has made clear, and Judge Gonzales to us, those are the things we should be looking at, not an individual's views on any particular issues.

Senator SESSIONS. The President would not be concerned about a person's view on the death penalty or an issue like that. He would be more concerned, in making an appointment, as to how he would interpret the Constitution's injunctions or requirements with regard to the death penalty; is that correct?

Mr. KAVANAUGH. I think the President has spoken publicly many times about how it is important that a judge or a judicial nominee be someone who is going to interpret the Constitution fairly and consistent with precedent, and not superimpose his or her personal beliefs onto any judicial decision, and it is a very critical function of a judge.

Senator SESSIONS. I think ideology is an entirely different matter. Ideology suggests that judges should in fact, according to Senator Schumer's arguments, it seems to me, allow their personal ideological views to affect their judicial decisionmaking processes. Let me ask you, do you believe that? Do you believe that a person's political philosophy, whether or not they think a death penalty is good or bad, should affect their interpretation of existing Supreme Court precedent or the Constitution of the United States when it speaks to the death penalty?

Mr. KAVANAUGH. I do not think one's personal views on that issue or on other policy issues should affect how you go about deciding the cases. I think what Senator Schumer points out on pointing out some differences between judges on the D.C. Circuit is that judges reach different results in different cases, but I think that happens because judges just analyze the cases differently, not because of any partisan affiliations. It is critically important for

judges, when they become judges, to recognize that they are entering a new phase, a new role, and political background has been very common, Government service background has been very common for judges, not because we want the Judiciary to be an extension of the Congress, quite the contrary, but we want the Judiciary to be independent and for the judges on the Judiciary to understand how the Government operates. So that is why political service has been common in judicial nominees' backgrounds in the past. That is why it is important, but it is not because courts are then just an extension of the political differences that may exist elsewhere. It is because of that important Government service gives you a perspective, whether it is Judge Buckley or Judge Mikva on the D.C. Circuit, or Justice Breyer who served on this Committee.

Senator SESSIONS. I agree with that, and I think that is why the American Bar Association, which is certainly a liberal political institution, in my view, has rated you the highest rating, well qualified. They believe that if their members appear before you, your demonstrated record of commitment to following the law as written, whether you agree with it or not, is clear. In fact, let me ask you, is it a deep personal philosophy of yours that a judge should follow the law whether or not he agrees with it, and is that one of the most key points of your personal judicial philosophy?

Mr. KAVANAUGH. It is critical, Senator, for a lower court judge to follow Supreme Court precedent faithfully in all instances. Whether you might agree with it, you might have decided differently, you have to follow that precedent faithfully. It is something I learned when I was a law clerk, and I have seen in practice, and it is something I can commit to this Committee, were I to be confirmed, that I would do.

Senator SESSIONS. We have a difference of views in America today about what judges should be—their philosophy as a judge. There is no doubt about it. A number of members of this Committee and this Senate are determined to see judges appointed that believe—that are activists, as Senator Hatch described it, and he defined very carefully what that word means. It means promoting a political, ideological agenda from the bench, which I believe is incorrect, President Bush believes is incorrect, and I believe overwhelmingly the American people believe it is incorrect. The reason it is incorrect is judges, if you are confirmed, are not accountable to the public. You never stand for election again. You hold your office for life. Many of your decisions are unreviewable ultimately, and it leaves the American people subject to decisions in an antidemocratic forum unless that judge restrains him or herself, and enforces the law as written or the Constitution as declared by the people of the United States. I think that is important. We do not need ideology, and as Lloyd Cutler, the White House Counsel under President Clinton and Carter, really criticized the idea that we should politicize the courts and bring ideology into the courts.

Chairman HATCH. Senator, your time is up.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman HATCH. We will turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Let me shift to a slightly different area. I am sure everybody is going to ask these questions on some of the other areas. I am

thinking back to right after September 11th, back in 2001. On September 20th, a week later, you came to the Hill as a representative of President Bush to offer legislation designed to protect the airline business from having to take responsibility for the death and destruction of the attacks in New York and Pennsylvania and Virginia. That is a bill that ultimately became law. It provided victims compensation in return for immunizing the airlines from liability.

When you brought the bill up, it had no compensation for victims. It had immunization for the airlines, nothing for the victims. It actually had sort of a wish list of tort reforms that the airline industry had punitive damages caps for the airlines, attorney fee limits against victims' lawyers, but not against the airlines' lawyers. It even reduced victim compensation court by disaster payments that may have been in there.

I remember the negotiations on this bill. You vehemently opposed any compensation for the victims' families. You insisted the bill only limit the liability of the airline industry. Now, wisely, we rejected that approach. We established the September 11th Victims Compensation Fund. I happened to write it. And in that bill, while we limited liability for the airlines, we did compensate the victims.

Why were you so opposed to compensating the victims, and why were you so singularly fixed on protecting just the airlines?

Mr. KAVANAUGH. Senator, I do not think the facts as stated in the question are accurate.

Senator LEAHY. How would you state them?

Mr. KAVANAUGH. They are not consistent.

Senator LEAHY. How would you state them? Let me ask you this then. Let me break it down. Did you not come up with a bill that had nothing in it for victims, but did have a list of areas where airline liability would be limited?

Mr. KAVANAUGH. Senator, I think there were two separate issues. One was the airlines, which were going to go bankrupt that Monday.

Senator LEAHY. But I am thinking—I may not have stated my question well. I am just a small-town lawyer from Vermont, but let me try it one more time. Did you not come up with a bill that had a number of different limits of liability for the airlines and nothing for the victims? Yes or no?

Mr. KAVANAUGH. And to answer that question, I need to explain, Senator, and the reason is there were two separate issues that were in play at that time. One was the airline liability issues because the airlines were potentially going to go bankrupt on that Monday unless Congress acted. That is why, as I recall, there was—

Senator LEAHY. They found out afterward they were not going to go bankrupt on that Monday, but did the bill—

Mr. KAVANAUGH. There was bipartisan agreement that the airlines were going to go bankrupt that Monday unless Congress acted and the President signed the bill.

Senator LEAHY. Did you object strongly, or did you object to putting in compensation for victims?

Mr. KAVANAUGH. No. The question was what kind of precedent should be used to compensate the victims.

Senator LEAHY. Mr. Kavanaugh, I was there. You are under oath. I am not. But let me ask you again, did you object on that legislation—you are under oath—to having compensation for the victims?

Chairman HATCH. Senator, let him answer the question.

Senator LEAHY. I will.

Chairman HATCH. He said there were two—

Senator LEAHY. That is why I made sure he understood it.

Chairman HATCH. But let him state it.

Mr. KAVANAUGH. Senator, I was there as a representative of the administration, and there were two separate issues that needed to be addressed, one which needed to be addressed immediately, as I recall, was the question of liability for the airlines. I think there was bipartisan agreement. And I participated in a meeting in the Speaker's Office after the President's speech on Thursday night, the 20th, where the Speaker and Senator Lott, Representative Gephardt, and Senator Daschle were all present, as was the Director of OMB.

The question was there at the airlines' liability. There was a separate question which was important, and the two ultimately got linked in the same bill, of compensation for the victims of September 11th. On that separate question there was an issue, what precedent do we have for compensation for victims of terrorism? There was the Oklahoma City issue, which Senator Nichols raised, that they had not received significant compensation. There was the Police Safety Officers Benefit Legislation. That was a possible precedent. We were looking at those precedents.

Then there were further discussions including with Mr. Pagano and your staff, Senator Leahy, and there was a discussion of if we are going to do the limitations on airlines' liability, we should give the victims the same kind of compensation that they would recover had they been allowed to litigate the matter in court, but to do it more expeditiously.

Senator LEAHY. What position did you take on that?

Mr. KAVANAUGH. On that we were concerned about the fact—

Senator LEAHY. I am not asking what you were concerned about. What position did you take?

Mr. KAVANAUGH. At the ultimate meeting on behalf of the administration, Director Daniels agreed to that.

Senator LEAHY. Did you oppose that initially?

Mr. KAVANAUGH. There were discussions about how to do it and there was concerns about—

Senator LEAHY. Did you oppose that initially?

Mr. KAVANAUGH. The precedent that was on point that we cited initially was the Police Safety Officer's Benefits Fund. That was the most relevant precedent. We had not thought, at least I had not thought of doing a separate litigation model for—essentially a damages model at that point. That was an idea that was raised during the discussions with Senator Lott's staff, as I recall. Senator Lott's staff, I believe, first raised that idea, at least in my presence. And the one concern about that at the time that I recall being discussed with your staff, Senator Leahy, was the fact that that would mean unequal compensation. In other words, the victims of a rel-

atively poor family would get a much smaller amount. The family of a poor victim would get a much smaller amount.

Senator LEAHY. Did you oppose linkage of the two?

Mr. KAVANAUGH. As I recall—

Senator LEAHY. When the proposal was made to you, okay, we will agree on protecting the liability of the airlines—and I was meeting with the heads of all the airlines at that time too—we will do that, but we are going to take care of the victims and get this is. We will Public Service Commission them both. Did you oppose that linkage?

Mr. KAVANAUGH. I remember personally being involved in those discussions and saying that it was important, I thought—at least this was in the fluid negotiations—of compensating each victim's family equally. That was the principle that I had stated at the time.

Senator LEAHY. Did you oppose linking them?

Mr. KAVANAUGH. Linking the two bills?

Senator LEAHY. Yes.

Mr. KAVANAUGH. I do not remember opposing linkage of the two bills. I knew the two had to be—both had to occur. Whether they had to occur together I think was a discussion. It was fluid discussions. I was not speaking for the administration either. It was Director Daniels who was.

Senator LEAHY. So you did not oppose the idea of putting victims' compensation in that airline bill? It is kind of hard to understand your answer with all the caveats, and I realize you have not spent much time in trying cases, but let me assure you that if you had, the judge would be all over you on the way you are answering.

Mr. KAVANAUGH. Senator, I do not recall opposing the linkage of the two. I remember they started as two separate issues and then they got linked. Then the second question, which was important, was what precedent do we look to for compensation? There were precedents out there in terms of Oklahoma City, in terms of the Police Safety Officer Benefit Fund. I remember also being concerned about the administrative time it would take for people to get compensated through the kind of fund.

Now I want to say—

Senator LEAHY. You did not have any problem with the administration trying to wipe out all our liability statutes to help the airlines to make sure that their attorneys were compensated, but to put limits on anybody else's attorneys? That did not bother you.

Mr. KAVANAUGH. Senator, as I recall, there was bipartisan, I think unanimous—

Senator LEAHY. It did not bother you. I do not care what—I was involved in those negotiations, Mr. Kavanaugh. I remember them very well. It did not bother you.

Mr. KAVANAUGH. It was unanimous agreement, as I recall, Senator, that something had to be done for the airlines or they were going to go bankrupt that Monday morning.

Senator LEAHY. Let me go to a different subject because you are not going to answer my question, so let me go to another one.

The question of secrecy in Government, and this administration has shown more secrecy than any administration I have served with from the Ford administration forward. You were the author,

one of the first indicators of this increase in secrecy, Executive Order 13233, that drastically changed the presidential records. It gave former Presidents, their representatives, and even the incumbent President, virtual veto power over what records of theirs would be released, posed a higher burden on researchers petitioning for access to what had been releasable papers in the past. After the order was issued, a number of historians, public interest organizations, opposed the change. The Republican-led House Committee on Government Reform approved a bill to reverse this. A lawsuit to overturn it was filed by Public Citizen, American Historical Association, Organization of American Historians, and a number of others. Why did you favor an increase in the secrecy of presidential records?

Mr. KAVANAUGH. Senator, with respect to President Bush's Executive Order, I think I want to clarify how you described it. It was an order that merely set forth the procedures for assertion of privilege by a former President, and let me explain what that means.

The Supreme Court of the United States in *Nixon* v. *GSA* in 1977, opinion by Justice Brennan, had concluded that a former President still maintains a privilege over his records, even after he leaves office. This was somewhat unusual because there was an argument in the case that those are Government records. But the Court concluded that both the current President and the former President have the right to assert privilege to prevent the release of presidential records. That is obviously a complicated situation. The issue was coming to a head for the first time because there is a 12-year period of repose, so 12 years after President Reagan left office was when this President Bush came into office, and there was a need to establish procedures. How is this going to work, two different Presidents asserting privilege or having the right to review?

No one really had a good idea how this was going to work. The goal of the order was merely to set forth procedures. It specifically says in Section 9 of the order that it is not designed in any way to suggest whether a former President or current President should or should not assert privilege over his records.

You are quite right, Senator Leahy, that there was initial concern by historians about the order. I like to think it was based on a misunderstanding, and Judge Gonzales and I undertook to meet every 6 months or so with a large group of historians first to discuss the order and to explain it, and then after that, to discuss any problems they were having with the order, and to help improve it if they suggested ways for improvement. I think those meetings, I think the historians who come to see us, have found them useful, and I think we helped to explain what we had in mind and what the President's Order meant in terms of the procedure. So that is my explanation of that order.

Senator LEAHY. Thank you, Mr. Chairman. I have other questions for the record, although I suspect they probably will not be answered, but I will still submit them. Thank you.

Chairman HATCH. Thank you, Senator.

Senator Cornyn.

Senator CORNYN. Mr. Kavanaugh, as I understand, the objections to your nomination go like this. First, you do not have the proper

experience. Alternatively, you have the wrong kind of experience. And alternatively, or maybe concurrently, you have represented the wrong clients. Could you explain to the Committee how you view the role of a lawyer as an advocate, which has been your professional career to this point, and how you view the role of Judge, which of course will be your duty and obligation when you are confirmed?

Mr. KAVANAUGH. Senator, every lawyer has ethical obligation to zealously represent his or her client in court or in other matters, regardless of whether the lawyer might agree with the position of the client. That is true as well as a law clerk for a judge or Justice. You have the obligation to give the judge your best advice, but then to do what the judge decides, not what you may think is right. When you are working in public service in the Independent Counsel's Office or in the White House Counsel's Office or in my current role as staff secretary, my job is to give recommendations and advice, but ultimately to carry out the direction of my superiors without regard to whether I might have chosen a different path. And that is an important function of our legal system, the adversary system when I was in private practice, and in Government service, and it is something that I feel strongly about.

As a judge, again, it is not your personal views. It is a similar kind of mindset in some ways. It is not your personal views that are relevant or your past affiliations that are relevant. It is important to follow the law faithfully, the precedent of the Supreme Court, regardless of what those views may be.

Senator CORNYN. I happen to agree with the distinction of a lawyer as an advocate and a judge as an impartial decider of the law and fact as the case may be. Unfortunately, we seem to have—some seem to be engaging in what I think is a very dangerous tendency to associate a lawyer, who is a professional advocate, with the views of their client as if they were always inseparable and as if they were always one.

I don't have any doubt that if you were a criminal defense lawyer and represented those accused of crime in courts on a daily basis, members of this Committee and others would surely have no trouble distinguished between the views of your client and your duties as a criminal defense lawyer to represent that client in court. But somehow when it comes to the administration's policies or lawyers representing the President or the Department of Defense in the case of Mr. Haynes, who has been nominated to the Fourth Circuit, people have trouble making that distinction. But I believe it is a very important one, and I appreciate your answer.

And I have to say that Senator Schumer said no one in the room disagrees with him about the role of ideology in judicial selection, and I just want to say "me, too" to Senator Sessions who said he had disagreed with Senator Schumer on that.

But as I understand the role of the Committee and the advise and consent role under the Constitution, it is to explore qualifications and judicial philosophy, that is, whether you are willing to subjugate any personal views that you may have, whether they be political, ideological, or otherwise, to what the law is and to faithfully enforce the law as written by the Congress or as determined by precedents of the United States Supreme Court.

Do you have a similar understanding of what the role is of a judge and how that is different from any personal opinions, philosophical or ideological or others that you may have?

Mr. KAVANAUGH. Well, I think, Senator, the Founders established an independent judiciary, discussed it in the Federalist Papers, because they wanted people who would be independent of the legislative and executive branches to decide cases fairly and impartially, without regard to their personal preferences.

There was discussion at the time, I think Federalist 81 discusses making the judiciary an extension of the legislature, or somehow having review by the legislature. But there was a decision made to have an independent judiciary, and that is the foundation of our system of rule of law.

The Founders also recognized, I think necessarily and certainly at the time, that people with Government service who had served in the legislative branch or served in the executive branch would become judges—Chief Justice Marshall, for example—would have backgrounds that involved Government service or political service. But they also had confidence in the ability of people in our system, once they became judges and put on the black robes, to decide cases fairly and impartially. And that's the way that system has worked for more than two centuries. And I know there has been some discussion about that, but that's the way the system has worked in terms of deciding cases fairly and impartially and not based on political of personal views.

Senator CORNYN. In your opinion, did Justice Kennedy in your experience, was he able to make the transition from lawyer to judge and make that sort of transition you described?

Mr. KAVANAUGH. Justice Kennedy always decided cases fairly and impartially and taught a lot to his law clerks about how to do the same.

Senator CORNYN. And in my introductory comments, I pointed out that you are not the only person to come before the Court who has represented a client in the arena, for example, Justice Ruth Bader Ginsburg. In your opinion, has she been able to successfully distinguish between her role as general counsel for the American Civil Liberties Union and her role as a judge?

Mr. KAVANAUGH. In my observation, she's—yes, she's an excellent Justice on the Supreme Court. It's not for me to be commenting too much on Supreme Court Justices, but I think she obviously decides cases fairly and impartially and was a judge on the D.C. Circuit before that who was widely respected, as she is on the Supreme Court.

Senator CORNYN. And Justice Breyer, who was the Democrats' chief counsel on the Senate Judiciary Committee, do you think he has been able to successfully make the change between that job and the role as judge, a circuit judge first and then now as a member of the United States Supreme Court?

Mr. KAVANAUGH. Yes.

Senator CORNYN. And Byron White, who was a political appointee at the Justice Department under President Kennedy, Abner Mikva, I guess the list could go on and on. But in your experience and in your observation, have others that have had perhaps not the same but a similar experience, either in the political arena

or representing clients who were, been able to successfully make the transition from advocate to impartial judge?

Mr. KAVANAUGH. Yes, Senator, absolutely.

Senator CORNYN. And I guess the problem is, in some instances, there are those who just don't simply believe that is true, that anyone can actually make that transition. There are those, I guess, who think that those who come to the bench continue to be advocates for an ideology or political persuasion or see it as appropriate to issue judicial edicts or decisions that satisfy only their own sense of justice and not what the law is.

I don't know how anyone can truly believe that and still say that we are Nation of laws and not individuals. Do you have any thoughts on that?

Mr. KAVANAUGH. I agree with that, Senator, very much, and I guess I firmly disagree with the notion that there are Republican judges and Democrats judges. There is one kind of judge. There is an independent judge under our Constitution. And the fact that they may have been a Republican or Democrat of an independent in a past life is completely irrelevant to how they conduct themselves as judges. And I think two centuries of experience has shown us that that ideal which the Founders established can be realized and has been realized and will continue to be realized.

Senator CORNYN. And I know for all the attempts made during the confirmation process to try to predict how an Article III judge will act once they have a life-tenured position and have the responsibility of being a judge, we don't have a particularly good track record of making that prediction. I point out Harry Blackmun, who I believe was appointed by President Nixon; Justice Souter, appointed by President Bush; and Earl Warren, appointed by President Eisenhower.

Have you observed judges consciously or unconsciously make that transition of judge in your experience, in your clerking experience? Or have you discussed that with Justice Kennedy or Judge Kozinski or any other judges you have worked with?

Mr. KAVANAUGH. I believe that the judges for whom I've worked and all the judges I've observed in my experience understand the importance of putting on the robe and understand the importance of sitting in the courtroom as a fair and impartial arbiter of cases, and I think they all have understood that and helped pass it along.

Chairman HATCH. Senator, your time is up. Thank you.

Senator Feinstein? Then we will go to Senator Kennedy and finally Senator Durbin.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Kavanaugh, while you worked for Mr. Starr in the Office of the Independent Counsel, you argued to the D.C. Circuit in an opinion entitled *In re Bruce Lindsey*. There you convinced the D.C. Circuit that the Deputy White House Counsel Bruce Lindsey must testify to a grand jury despite his claims that the information sought was protected by attorney-client privilege.

Since then, you yourself have worked in the White House Counsel's Office. There you drafted Executive Order 13233. That order significantly limits which documents the administration releases to the public.

Do you see any contradiction between the arguments you made in the D.C. Circuit in the *Lindsey* case, which weakened Presidential privilege, and your work on the Executive Order, which strengthened Presidential privilege?

Mr. KAVANAUGH. Senator Feinstein, let me explain that in two ways.

First, in both instances, I was representing a client, in the first in Judge Starr's office, and the second working in the White House.

But, second, let me answer the heart of the question, which is, I think, the two positions are consistent in that the *Lindsey* case arose in the context of a criminal investigation, and the Supreme Court had said years ago in the *U.S.* v. *Nixon* case that the needs of a criminal investigation trump any governmental interest in confidentiality, whether it be Everything privilege—and the question in the *Lindsey* case was whether that *Nixon* case also extended to Government attorney-client privilege. And the court concluded that it would.

The Executive Order, as I explained to Senator Leahy in some part, was merely designed to set up procedures for the assertion of privilege. The order itself didn't assert any privileges. President Bush wasn't asserting any privileges there. It merely set up the procedures to implement the assertion of privilege by a former President. And so that's what the order was designed to do. It didn't address the context of the criminal investigation at all.

So I think the two are, in fact, consistent.

Senator FEINSTEIN. Okay. In response to a question by Senator Schumer, you indicated that ideology is not—and you were rather definite—any kind of a test for a Bush judge. Let me read you from a Patriot News editorial. This is a Pennsylvania newspaper, and the date is April 30, 2003. The editorial stated, "Only two things apparently guided Bush's selection: first, that the candidate be sure of Senate confirmation; and, second, that he be opposed to abortion."

The article goes on to add, "What we find perplexing and more than just a little disturbing is that the abortion issue was put forward by the Bush administration as the sole litmus test."

I would like you to respond to that.

Mr. KAVANAUGH. Senator, as Judge Gonzales has said before publicly, as have I, we don't ask judicial nominees or candidates their positions on issues like that. We don't know in the vast, vast majority of cases, unless there has been a public record before—

Senator FEINSTEIN. You say you don't know?

Mr. KAVANAUGH. Don't know, correct. We don't know what someone's position is.

Senator FEINSTEIN. Well, let me ask you this: Could you identify five pro-choice judges that the White House sent to the Hill?

Mr. KAVANAUGH. I don't know whether the nominees are pro-choice or pro-life unless—

Senator FEINSTEIN. Four? Three? Two? One?

Mr. KAVANAUGH. Senator, I'm sure there are many. I don't know what someone's—I don't know and we don't ask what someone's position on issues like that is. So I don't know if there are some, many, of any particular viewpoint on any particular issue like that. So we don't ask, and that's an important part of the process.

Senator FEINSTEIN. Well, let me ask this question: Would you agree, then, that most nominees that come up here are politically conservative?

Mr. KAVANAUGH. This goes to a question that Senator Schumer asked, and I'm going to answer you directly. Most of the nominees of any President share the same political affiliation as the President. That's been a tradition in our country going back two centuries. Most of President Clinton's nominees were Democrats. Now, that didn't mean they couldn't be independent and fair judges. It just meant that their prior political affiliation was Democrat. So, too, most of President Bush's nominees—not all by any stretch, but most are Republicans. Again, that's part of the tradition.

Again, as with President Clinton's nominees, it doesn't mean that they won't be—because they will be—fair and impartial judges. It's a difference between political affiliation and political beliefs and being a fair and impartial judge. And I believe firmly in the notion that there is a strong difference in those two things, and I think our system has reflected that for two centuries.

So they might be mostly Republican, just as President Clinton's might be mostly Democrat. But they'll be all good judges.

Senator FEINSTEIN. Well, we take that for a given and that isn't the problem. The problem is where they are on the political spectrum and whether their ideology is so strong that they can't separate themselves from that ideology to be a fair and impartial judge on major questions that come up before an appellate court. And what I'm trying to find out is if you're willing to do that, and thus far the indicators are that you are not.

Mr. KAVANAUGH. Willing to be a fair—

Senator FEINSTEIN. Willing to separate yourself from the ideology. I think to say that ideology is not any kind of a test, it is just that somebody belongs to the Republican Party, really I find dismaying because the evidence of the people that come before us doesn't really display that in any way, shape, or form.

Mr. KAVANAUGH. I understand the question, Senator—

Senator FEINSTEIN. And what I had hoped you would be is up front and direct with this Committee.

Mr. KAVANAUGH. Well, Senator Feinstein, it's important that a judge understand the proper role of a judge to decide cases based on the law before him or her. In terms of the judges that have come before the Committee, I know there have been a few that have been raised here today and discussed publicly, but the vast majority have been approved by the Committee. We've worked closely with your office and Senator Boxer's office. In California, a commission has been set up. The district court judges have moved through, Judge Bea and Judge Callahan, Consuelo Callahan and Carlos Bea. I talked to your office and Senator Boxer's office about those two nominees, and they were approved.

So there have been some that have been highlighted, I understand, but I think the vast majority have been approved, and I think we've worked—tried to work well with the home State Senators.

Senator FEINSTEIN. Well, let me just set the record straight. I don't review nominees to the district court. We have a screening committee, three Republicans, three Democrats, non-partisan. All

the nominees go there. They review them and they make recommendations. I don't believe Senator Boxer—and I know do not interfere in that process.

With respect to the circuit court, what has happened is, on occasion, I would receive a call from Judge Gonzales. Now, if this is conferring, so be it. But it is, "Do you have an objection to Carlos Bea?" That is the specific question. It really isn't conferring in the traditional sense.

However, I must tell you, I welcome even that phone call. So, you know, I am not being critical about it. But, you know, for me—and I can only speak for myself as to how I judge a nominee. It is my interest—because I happen to know that everybody coming out here is conservative. Do I believe they can be a fair and impartial judge? Do I believe they can interpret the law without a particular political bias of any kind?

Mr. KAVANAUGH. And I agree that should be—

Senator FEINSTEIN. Now, say something that gives me some assurance that you can do that, because the questions that Senator Schumer asked to detect just that you wouldn't respond to.

Mr. KAVANAUGH. Senator, I have throughout my career committed myself to public service. When I work in the independent counsel's office, I thought deeply about the issues raised by that investigation and raised by the statute. I wrote an article in the Georgetown Law Journal trying to outline a new approach for independent counsel investigations, and I hope, you know, you have it. And it's important because it shows that I took what I thought was a fresh look, an independent look at an issue raised by the investigation. I talked about how reports were a problem, how they were inevitably perceived as political acts. I wrote that in 1997. I talked about some of the problems in the investigation in terms of the statute afterwards. I think I was trying to—what I was trying to do there was taken an independent look at an issue that I had personally been involved in. When I've written other matters—when I wrote on Batson procedures when I was in law school, about the hearings for *Batson* v. *Kentucky*, I tried to take a fresh look at an issue on how procedures should work.

When I was in law practice, I tried to—I represented clients of the firm, but I also made sure to do pro bono cases. And I got a range of pro bono clients that I worked on for the firm.

When I was in public service in the Starr office, before the Lewinsky matter came to the office, one of the important things that I worked on was what was known as the Foster documents investigation. And we received a referral from the Committee about a few people, and we concluded in that office not to seek charges against any of the individuals named in those referrals from the Senate.

When I was in the Starr office, we prepared a report under Section 595(c)—and Judge Starr has talked about this before publicly—a report on the Whitewater-Madison matter outlining whether there were grounds for an impeachment. And we looked at that report, and we decided the evidence was not sufficient under the statute to send it to the Senate.

When I worked for Justice Kennedy—and he knows—I gave him my independent advice on matters that probably didn't always fit a pre-existing impression of what I would say.

When I worked in the Justice Department, I represented clients on—I represented the United States on a variety of issues, and I think the people who worked with me in the Solicitor General's office know I took an independent looks. The judges I clerked for on the court of appeals, the same.

I think throughout my career in the White House as Staff Secretary, one of my jobs is to be the honest broker for competing views that come in on memos to the President. Will those views be reflected accurately in the memo? One of my jobs is to make sure not to let the memo get slanted, not to let one person dominate the memo, to make sure the President is getting the best advice from all sides, regardless of what I think is the right answer or the right policy position the President should take in a particular case. I was selected for that job to be the honest broker for the President in making sure he got competing views.

In the counsel's office, so too I tried to work very closely with home State Senators in Illinois and in California. I might not have always agreed with particular recommendations that came from Senators. I tried to work closely to do the best job I could for the President.

So I think my record is replete with examples where I've been independent, where I've tried to take a fresh look, where I've done something because I'm an honest broker. And I think that's how I would serve as a judge as well.

Chairman HATCH. Senator, your time is up.

Senator FEINSTEIN. Thank you. My time is up.

Chairman HATCH. Senator Kyl?

Senator KYL. Mr. Kavanaugh, I want to get back to the privilege issue. You have been criticized on the one hand for attacking the Clinton administration's assertions of various privileges during your work in the Office of Independent Counsel, and on the other hand helping to draft Executive Order 13233, which establishes policies and procedures to govern the processing of requests for Presidential records and the assertion of constitutionally based privileges.

Does this Executive Order set forth those circumstances under which an assertion of Executive privilege should be made or would be successful? Or does anything in the Executive Order purport to block prosecutors or grand juries from gaining access to Presidential records in a criminal investigation?

Mr. KAVANAUGH. Senator, nothing in the order purports to assert a privilege at all. It's up to the individual President, former President or current President, to assert a privilege following the procedures in the order. So nothing blocks anything from a criminal or grand jury investigator. And, again, there have been some misimpressions about the order when it first came out. Some historians were concerned, and we took proactive steps. Judge Gonzales and I met with historians to try to allay their concerns and explain the order. We met with people on the Hill also who had questions about it, and over time I think we've explained what the order was designed to do, which is merely to set up procedures.

Senator KYL. And with regard to the criminal aspect, does it block prosecutors or grand juries from gaining access to Presidential records in a criminal proceeding?

Mr. KAVANAUGH. It does not block any access.

Senator KYL. And your arguments on behalf of the Office of Independent Counsel regarding privilege was that Government attorneys in the Clinton administration could not invoke the attorney-client privilege to block the production of information relevant to a Federal criminal investigation, right?

Mr. KAVANAUGH. The court ruled that the Government could not assert a privilege to block it from a criminal investigation under *Nixon*. It said that it would—yes, that's correct.

Senator KYL. So I don't understand where the inconsistency is here. I know some of my colleagues may have tried to assert it, but I don't see it. And correct me if I'm wrong or if I'm missing something here. But the key issue is the assertion of privileges in the context of Federal criminal investigations. In fact, you referred to your Georgetown Law article in 1998 which was authored during the Clinton administration, and didn't you there specifically recognize the difference between asserting Executive privilege in the criminal context versus outside of the criminal context?

Mr. KAVANAUGH. I did recognize the difference in that article. That was a difference that had been also recognized in the cases.

Senator KYL. And isn't it further the case that you actually acknowledged or argued a presumptive privilege for Presidential communications—and I have a quotation here that was supplied to me by the staff—and that "it may well be absolute in civil, Congressional, and FOIA proceedings"?

Mr. KAVANAUGH. That's correct. That's from my Georgetown article.

Senator KYL. And entirely consistent with this statement, doesn't the Executive Order that I referred to specifically recognize that there are situations where a party seeking access to Presidential records may overcome the assertion of constitutionally based privileges?

Mr. KAVANAUGH. Yes.

Senator KYL. Okay. A few more points here.

During your service as Associate White House Counsel, have you ever worked on a matter where the President invoked or threatened to invoke Executive privilege in a criminal context?

Mr. KAVANAUGH. Senator, I'd like to answer that question, but I don't think it's my place to talk about internal discussions of privilege claims.

Senator KYL. Okay.

Mr. KAVANAUGH. I just want to be careful not to go down a road—

Senator KYL. All right. Well, let me ask you—

Mr. KAVANAUGH. There's been no public assertion. I just don't want to go down that road.

Senator KYL. I appreciate your desire to treat that with confidentiality.

Did you work on the Bush administration's assertion of Executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his Presidency and to withhold from Con-

gress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton administration?

Mr. KAVANAUGH. I was involved in that matter working for Judge Gonzales, who in turn was providing advice to the President, yes.

Senator KYL. So it seemed, at least I would assert, Mr. Chairman, that Mr. Kavanaugh has been evenhanded and hardly partisan with respect to the privilege issue. And if I have just a little bit more time—

Chairman HATCH. You do.

Senator KYL. One of the last questions had to do with the Starr Report. I understand you were one of several authors for that report, and that that report was actually required as a matter of Federal law. Is that correct?

Mr. KAVANAUGH. That report was required as a matter of Federal law based on the jurisdiction that Attorney General Reno had given Judge Starr.

Senator KYL. And what part of the report did you help draft?

Mr. KAVANAUGH. I helped on the grounds section of the report, which outlined possible grounds for an impeachment, which was the standard specifically in the statute.

Senator KYL. Did the independent counsel's report ever state that President Clinton should be impeached?

Mr. KAVANAUGH. It never did.

Senator KYL. Now, of course, majorities in the House of Representatives determined that information presented by the independent counsel constituted grounds for impeachment, but that report did not state that conclusion. Is that correct?

Mr. KAVANAUGH. That is correct. And Judge Starr in his November testimony before the House Judiciary Committee emphasized over and over again that it was for the House solely to decide whether to impeach, that he was making no recommendation.

Senator KYL. And the House concluded that the evidence was sufficient to impeach, and 50 members of the Senate found the evidence compelling enough and acted accordingly. Much of the report was criticized for containing extensive details of certain activities which some considered sensational.

What part, if any, did you have in the authorship of that section of the report?

Mr. KAVANAUGH. On the narrative section of the report, I did not write or work on the grounds section of the report. I worked on, again, how the report was released, I think was an issue I've discussed publicly before, and said how it was released by the House turned out to be a mistake, but—and I've said that publicly before.

Senator KYL. Is it fair to ask you whether you had an opinion on whether or not some of the details in the narrative part of the report should have been included?

Mr. KAVANAUGH. They were relevant to the facts in the case, but I've said that how the report was released publicly was a mistake because some of those facts should not have been necessarily released publicly.

Senator KYL. Well, again, Mr. Chairman, it seems to me that in looking at the entirety of Mr. Kavanaugh's record and the activities

in which some of have criticized him for participating, in fact, the record reveals a very evenhanded, straightforward, honest, forthright, and very non-partisan approach to these issues. And I would hope that my colleagues, unhappy about certain historical events, would not transfer that unhappiness to a candidate here who is obviously extraordinarily well qualified, has served in a variety of public capacities, and in my view would make a tremendous addition to the bench. I hope that they wouldn't transfer that unhappiness with certain things that occurred in the past to Mr. Kavanaugh, who I think has demonstrated that he would not be the source of any of the unhappiness if the issue were carefully considered.

Chairman HATCH. I certainly agree. Would the Senator yield his last 2 minutes to me?

Senator KYL. I am happy to do that.

Chairman HATCH. Because I just want to clarify a few things. The editorial referred to by Senator Feinstein, that was not a White House statement.

Mr. KAVANAUGH. I am not sure where that came from.

Chairman HATCH. I am not either, but let me just say this. The Committee questionnaire asks judicial nominees if any specific case, legal issue, or question has been discussed in a manner that could reasonably be interpreted as asking how a nominee would rule on such a case, question, or issue. So I think the question is this: Is it a practice of the White House to discuss particular issues, like abortion, with the nominees?

Mr. KAVANAUGH. No, it's—

Chairman HATCH. I know that that's true. You don't. And one reason you don't is because of the Committee's requisite there, plus it is just you know darn well somebody would make a fuss about it if you did up here. Is that right? I may have said it in more blunt terms than you would with your finesse, but—

Mr. KAVANAUGH. Mr. Chairman, the President has said and Judge Gonzales has said that one's personal views on particular policy issues is not relevant to how one goes about being a fair and impartial judge.

Chairman HATCH. I agree with that.

Mr. KAVANAUGH. And so we don't ask questions about personal views on policy issues.

Chairman HATCH. Or on litmus test issues that have become litmus test issues up here, apparently.

Mr. KAVANAUGH. We don't ask questions on that and don't know the answers.

Chairman HATCH. Now, with regard to the airlines, as I understand it, the proposed legislation did not provide immunity to the airlines; rather, it limited their liability to their insurance policy limits. Is that correct?

Mr. KAVANAUGH. That is correct, Senator.

Chairman HATCH. Okay. Now, the administration did not oppose the principle of victim compensation, but wanted to get that issue right. The airline liability issue was a more urgent matter in that they were facing bankruptcy. And that is why these issues were not originally linked. Isn't that a fair appraisal?

Mr. KAVANAUGH. That's absolutely right, Mr. Chairman. The two issues were separate.

Chairman HATCH. I just wanted to clarify that because if you just listen to one side up here, you might get the wrong impression. But that is actually what happened, isn't it?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman HATCH. I stated it correctly.

Mr. KAVANAUGH. They're two separate issues. The question—ultimately in the discussions, the two became part of the same bill, and there were discussions then about what kind of compensation fund, we were looking at precedents that were already in place, and then ultimately the administration supported the proposal that was discussed on the night of September 20th, after the President's speech.

Chairman HATCH. Senator Kyl was kind enough to give his time to me. I appreciate it. My time is up.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Kavanaugh, thank you for joining us today.

Mr. KAVANAUGH. Thank you.

Senator DURBIN. You have many friends in this room, but you certainly do not have as many as your mother and father who have many friends in Washington on Capitol Hill and many of them have contacted me. And it is a testament to your family, and I am sure you are very proud of them and the support that they give you.

I listen to the questions that have been asked, and no one has questioned your honesty, nor should they. There is no indication on the record of any reason to question, but it comes down to two areas, repeatedly: your skill and talent, whether you are up to this job and, second, whether you can be fair and objective. That is really, all of the questions focus on those two areas.

I have been a fan of baseball since I was a little kid. If the owner of the Chicago Cubs called me and said, "Listen, we know you follow baseball very closely, and we would like you to be the starting pitcher tonight in Arizona," I would say, "Stop. I know my limitations. I am flattered that you would even consider me."

Did that thought ever cross your mind when they said it is time for the D.C. Circuit Court of Appeals, that it was a flattering offer, but frankly your resume just was not strong enough? When you listen to what Senator Schumer says about the people serving on that court, Republicans and Democrats, when you consider the fact that despite your commitment to public service, you have limited experience when it comes to litigation, and trial work, and things that may be very important in decisions that you make, did it ever just dawn on you at some point to say, "Stop. I am flattered, but in all honesty, I am not ready to be the starting pitcher on that team"?

Mr. KAVANAUGH. Senator, when it was mentioned to me, I was humbled and honored to be considered, but I also, based on my record and experience, am ready to hit the ground running, were I to be confirmed to be a judge, based on my experience as a law clerk, in the Justice Department, performing grand jury work, working on matters in litigation, arguing before the Supreme Court, private practice for major clients, for pro bono clients, work-

ing in the White House Counsel's Office on difficult matters, several of which we have discussed here today that were difficult matters, working now as staff secretary for the President and anticipating a lot of conversations with senior staff and with the President at the White House.

Senator DURBIN. But, Mr. Kavanaugh—

Mr. KAVANAUGH. I think that record means that I think I can hit the ground running.

Senator DURBIN. It is a good record. It is a great record, but it does not avoid the obvious, and that is that you come to this position, the second-highest court in America, the second-highest court in America, the training ground for the U.S. Supreme Court, with less legal experience than virtually any Republican or Democratic nominee in more than 30 years. Of the 54 judges appointed to this court in 111 years, only one—Kenneth Starr—had less legal experience. That is a fact.

And you have made it your professional life now, for some time now, to look closely at the qualifications of nominees. Were you able to look at your own qualifications in this context? Would it not have been better for you to have started off at a District Court or some other appointment and work your way up? But to start at this level is—I do not think it is warranted.

Mr. KAVANAUGH. Senator, I think the President made the decision to nominate me. I know the American Bar Association, which many in this Committee have relied on for years, rated me well-qualified for a seat on this bench at this time. And so I look to other evaluations of me—the American Bar Association conclusion—and based on my own record in appellate law, and my experience in a wide range of difficult issues, which I have not shied away, but have tackled the best I could, I think I am prepared to be a judge on the circuit.

Senator DURBIN. Let us talk about that wide range of issues. Of course, the fear is, if you hit the ground running, are you only going to be running to the right, and that is a legitimate fear.

As I look through all of the different issues that you have been involved in as an attorney in public service and the private sector, it seems that you are the Zelig or Forrest Gump of Republican politics. You show up at every scene of the crime. You are somehow or another deeply involved, whether it is Elian Gonzalez or the Starr Report, you are there.

And it strikes me as worrisome, as Senator Schumer and others have noted, that you have been in this position consistently and raises the question in my mind, would you not understand that an attorney coming before the D.C. Circuit Court, looking at your resume, has to assume—just assume—where you are going to end up. There are so few exceptions, if any, in your legal career that point to objectivity.

Give me a good example of where you just flat out disagreed with the Republican Party and leadership and said, "I am going to do the right thing, even if my party elders do not agree with me on this." Give me an example of that.

Mr. KAVANAUGH. Well, Senator, my background has not been in party politics. I have been a lawyer for clients, working for judges, Justice Kennedy, working in the Justice Department, working in

the Independent Counsel's Office. I guess I cited to Senator Feinstein an example where the Senate had referred some people over for possible violations. We declined to seek charges in those cases. In private practice, again, my clients were not Republican clients or Democratic clients. They were just clients, whether institutional clients of the firm or pro bono clients that I worked on at the firm.

So my background and experience is one where I have been in the law, primarily. And then in the White House Counsel's Office and as staff secretary, as in any White House, there is the mix of law and policy that goes with it to be sure, but my background has been one where I have been involved in legal issues.

Senator DURBIN. Well, I would disagree. I think your high-profile work has all been on one side, but I want to go to one area that is particularly personal to me.

I was victimized by Manny Miranda and the computer theft more than any other member of this Committee. We believe over 2,000 documents were stolen from my computer. At the time, Mr. Miranda served first on the Republican staff of the Senate Judiciary Committee and then in Senator Frist's office, involved in judicial nominees. And, clearly, you had a working relationship with him. You have conceded that point.

He, also, we believe, distributed the memoranda, which he stole from my computer and other computers, to organizations such as C. Boyden Gray's operation—I am going to get these names wrong, so I better read them—something called the Committee for Justice, a fellow named Sean Rushton. Do you happen to know Sean Rushton?

Mr. KAVANAUGH. I have met him, yes.

Senator DURBIN. In what context did you meet him?

Mr. KAVANAUGH. I think I met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees. I think I have met him at those meetings.

Senator DURBIN. And so the horror that has been expressed by the right-wing press about members of the Senate meeting with outside groups to speak of nominees turns out to be a sin committed by the administration, as well.

Mr. KAVANAUGH. I think it is quite proper, and certainly we did it, and appropriate for anyone to speak to members of the public who are interested in public issues. That is one of the important functions of anyone in Government, and we certainly do it.

Senator DURBIN. How about Kay R. Daly, president of a group called the Coalition for a Fair Judiciary, do you know her?

Mr. KAVANAUGH. I have met her as well and do know her.

Senator DURBIN. In what context?

Mr. KAVANAUGH. Same context.

Senator DURBIN. She published on her website the stolen memos. Were you aware of that?

Mr. KAVANAUGH. I was not aware of that until I read it in some stories in the media or on the Internet, I guess.

Senator DURBIN. I guess what it boils down to is this. Since you've worked up here for so long. You had to be able to spot things that were being said that looked revealing. When Manny Miranda

has a revelation about questions that might be asked of a nominee or what the schedule is going to be under a Democratic Chairman, did that ever come up, and did it ever raise a question in your mind that perhaps he knew just a little bit too much for a staffer on Capitol Hill?

Mr. KAVANAUGH. There was—I have thought about this, Senator—there was nothing out of the ordinary of what Senate staffs would tell us or what we would hear from our Legislative Affairs folks. That said, I cannot tell you whether something that he said at some point, directly or indirectly, derived from his knowledge that may have come from these documents. I just cannot speak to that at all. I can say, in direct response to your question, that, no, I never suspected anything untoward. Had I suspected something untoward, I would have talked to Judge Gonzalez about it, who I know would have talked to Senator Hatch about it, but I never did suspect anything untoward.

Senator DURBIN. One last brief question. One percent of the lawyers in America are members of the Federalist Society, a third of the Circuit Court nominees you have sent to the Judiciary Committee have been members of that society. Coincidence?

Mr. KAVANAUGH. I think the Federalist Society is a group that brings together lawyers for conferences and legal panels. I guess others would have to make a judgment about that. The Federalist Society does not take position on issues. It does not have a platform. It brings together people of divergent views. Many of them may share a political affiliation, I do not know that, but they do not take a platform on particular issues.

Senator DURBIN. Just a coincidence.

Mr. KAVANAUGH. I think a lot of them are members of the American Bar Association and of the Federalist Society because—and I have been a member of both—because, for me at least, both organizations put on conferences and panels that you can attend or speak at to learn more about legal issues you are interested in and meet some of your colleagues. So I have always found both organizations helpful to me in my legal practice.

Senator DURBIN. Thank you, sir.

Chairman HATCH. Senator, your time is up.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

There is a very definite philosophical common view with regard to members of the Federalist Society, is there not, though, Mr. Kavanaugh? You are not trying to suggest that this is just some social group that they are getting together.

Mr. KAVANAUGH. No. And I agree with that, Senator Kennedy. I do think there is wide disparity in views, for example, on some might call it libertarian versus conservative, whether the text of the Eleventh Amendment or the sovereign immunity principle behind the Eleventh Amendment should govern, I have heard debates on that by people who are members of the Federalist Society. So I think that within the group that are members, there are wide views.

And the panels they put on, and the ones I have worked on, are designed to bring together divergent views. I was responsible for putting on a Federalist Society panel one time on First Amendment

cases. And on it, I recruited the people to be on the panel, and it was Judge Starr, Mr. Dellinger and Nadine Strossen, the head of the ACLU, to talk about the Supreme Court's First Amendment jurisprudence. I thought that was a representative panel of diverse views to discuss the Supreme Court. That is what the—

Senator KENNEDY. Well, I had not planned to go down this, but, as I understand, you were co-chair of one of the practice groups?

Mr. KAVANAUGH. Yes, I was co-chair of the School Choice Practice Group.

Senator KENNEDY. And do you agree with the following statement from the Federalist Society's mission statement that "law schools and the legal professions are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society"?

Mr. KAVANAUGH. I can only speak to Yale Law School, where I attended, and the professors I attended there—

Senator KENNEDY. Well, that is not what I am asking you. That is in the, that is part of the—

Mr. KAVANAUGH. But I cannot—

Senator KENNEDY. You can answer the question in any other way, but I am just telling you what we are trying to find out here. You can say anything you want to, but I mean that is the—you have the right, obviously, to do it.

But I am just asking you whether you agree. That is the mission statement. If you want to answer what happened at Yale, that is fine, too, but if you want to answer it with regard to that question, that is what I would like to hear.

Mr. KAVANAUGH. There is a common perception that law school faculties are more Democratic than the population as a whole, but I do not know if that is—I have not done my own survey at Yale Law School. My mentors, and the people I looked up to, and the people who wrote my recommendations were Harold Koh, Paul Gewirtz, and George Priest, three people with different views, who recommended me for my initial clerkships out of law school. I think I will leave it at that, Senator.

Senator KENNEDY. I am going to come back. I just wanted—I am sorry Senator Cornyn is not here because I want to make a brief comment. He mentioned about Byron White being a political appointee. Of course, Byron White was a Rhodes Scholar. Byron White was the leading law partner at one of the prestigious law firms in Denver. Byron White was a deputy attorney general. Byron White was a Silver Star winner. I know that some are disparaging about people who fought in wars recently, but he was a hero in World War II, in the Navy. Plus, he was a leading groundgainer when he was in his first year at Yale Law School, and he served with great distinction in the Justice Department.

So I resent, very deeply—I am sorry Senator Cornyn is not here. I will make sure he knows. I did not have a chance because others wanted to question—and I will just talk about Byron and about Judge Breyer was probably one of the leading antitrust and deregulation professors in the country. And to somehow, I guess it is meant to be in a disparaging way, that they are nominated by political individuals to serve in this part, and was extraordinarily thoughtful, and his record can speak for itself.

Mr. KAVANAUGH. Senator, can I say one thing there?

Senator KENNEDY. Yes.

Mr. KAVANAUGH. I think the question there was about prior Government service in the administration with Justice White, and I just want to say—

Senator KENNEDY. It was generally about the, the question about legal experience. I mean, the fact is, on the average, judges appointed to the D.C. Circuit in the past three decades have over 20 years of experience—Justice Scalia, 22 years; Rogers, 30 years; Tatel, 28 years.

You have had just over 13 years of legal, counting your service as a law clerk. You have been a practicing attorney for only 10 years, and you have never tried a case.

Mr. KAVANAUGH. I have been—

Senator KENNEDY. I think the record is, when people were talking about or characterizing some of the concerns that people have up here about that background and experience and comparing them to the others, I just wanted to make—you can make whatever comment you want to make.

Mr. KAVANAUGH. I was going to say that Justice White is one of the justices—and people who know me know this well—who I have the most admiration for, in terms of his background, and his record, and how he conducted himself as a Supreme Court justice. He is one of the ones, maybe with Chief Justice Marshall, if you put aside the current Court, that I really think did a tremendous service to the Court.

And so when you mentioned Justice White, I just wanted to underscore that people who have known me for years know how much I talk about him, and I have read a lot of his—

Senator KENNEDY. Well, I appreciate that. I appreciate that. He was an extraordinary individual.

Let me come at this in a somewhat different way, and that is about the District Court, the D.C. Circuit Court and its importance to the millions of Americans. This court draws the opinions on the air we breathe, and the water, the cleanliness of the water the children are going to drink, whether workers will be safe on the job, can join unions without fear of reprisal, minorities will be free to work in the workplace without harassment.

So, for me, the nominees to this important Court must demonstrate a commitment to the core constitutional issues, but also to the statutory principles that protect these basic rights. Many of us have worked long and hard to get these rights, and we are not going to support, at least this Senator is not going to support someone that is going to undo them or vote to undo these parts.

And as you are familiar, in the sixties and seventies, the D.C. Circuit expanded public access to administrative proceedings, protected the interests of the public against big business. The Court enabled more plaintiffs to challenge agency decisions. It held that a religious group, as a member of the listening public, could oppose the license renewal of a television station accused of racial and religious discrimination. It held that an organization of welfare recipients was entitled to intervene in proceedings before Federal agencies, and these decisions empowered, at least from this Senator's

point of view, individuals and organizations to shine a brighter light on the governmental agencies.

Then, we have over the same period of time, for example, with the NLRB, which, as you know, guarantees a worker's right to join a union without discrimination or reprisal from employers, and the NLRB interprets the act, and those are appealable to the Circuit Court.

As a result, the D.C. Circuit is available as a forum to challenge the decision. In 1980, the D.C. Court fully enforced the Board's decision 83 percent of the time, at least partly enforced the Board's decision in all other cases. By the year 2000, when the Court had a 5–4 Republican majority, including a solid majority of Reagan and Bush appointees, the D.C. enforced it only 57 percent of the time and enforced at least part of the Board's decision just 70 percent of the time.

These enforcement statistics puts the D.C. Circuit significantly below the national average of 83-percent enforcement for the Board in all of the Courts of Appeals.

Now, I am concerned about your own kind of background, experience, commitment in these areas that affect working families and the national labor protections that are protected in this, and ask you what is your experience involving labor law?

Mr. KAVANAUGH. Senator, if I were to be confirmed as a judge, I would follow and enforce the laws passed by the Congress, signed by the President, faithfully, regardless of what position they took, faithfully enforce the environmental laws of this country and the workers' rights laws of this country, absolutely.

In terms of my background, it has been primarily in public service, in Government positions. In those positions, I have tried to work for the benefit of all of the people. I have had specific assignments in those and tried to do them to the best of my ability.

In private practice, I have represented a few institutional clients of the firm and also made sure that I did pro bono work and also did outside activities.

So I have not been involved in some of the areas that you have mentioned, but I have a range of experience, and I can commit to you that I will faithfully interpret all of the laws passed by this Congress.

Senator KENNEDY. Well, this is important. I mean, we passed the Americans With Disabilities Act. It took a long time to get there, a long time to make progress.

Mr. KAVANAUGH. That is right.

Senator KENNEDY. And we are seeing, at least for many of us who were very much involved in the passage of that, the gradually whittling away in terms of the rights and protections and this kind of—as someone who was very much involved in the shaping of that legislation, interpretations that are far beyond what was—in restricting these rights.

This is a very deep concern, since this is the Court. The Supreme Court, obviously, number one. This is the number one court in terms of interpreting Americans With Disability, the wide range of environmental acts. Many of us are deeply concerned by judgments, and decisions, and orders that this administration has taken with

regards to environmental, and these are going to be directly appealed to the District Court.

I see this red light on.

And the real concern that many of us have is what, in your background and experience, could give us at least some indication or show some sensitivity to these kinds of concerns, to these interests, to the issues on clean air and clean water, to the issues in terms of affecting the disabled in the society, to the concerns in terms of working families that they are going to get a fair shake. And that is, with all respect to it, I give great respect to a brilliant background, academic background, and I admire your commitment to public service, but this is something that is of concern.

My red light is on.

Mr. KAVANAUGH. I appreciate that, Senator. What the Committee is entitled to expect from a judge on the D.C. Circuit or any court is that that judge will follow the law passed by the Congress and signed by the President faithfully, and independently, and impartially. And I can commit to you, my public service has been in different areas than the few that you have mentioned, but I can commit to you that I will faithfully follow the law, and enforce the law in all respects were I to be confirmed to sit as a judge. And I think, although it has been in different areas, I have background with a wide range of experiences that I could bring, and it shows that I would do that, but I commit to you that I would.

Chairman HATCH. Thank you, Senator.

Senator Schumer, we will turn to you.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate the witness staying for a second round.

First, Senator Sessions described you as nonpartisan. Do you believe you are nonpartisan?

Mr. KAVANAUGH. I am a—

Senator SCHUMER. I do not mean how you will be as a judge. I mean, in your life, up to now, have you been nonpartisan?

Mr. KAVANAUGH. Let me explain that. I am a registered Republican. I have been a Republican. I have supported Democrats for office. I have contributed to Democrats for office. My background, family background, shows bipartisanship, I would say. But anyway, in my personal life, I have supported Democrats.

Senator SCHUMER. I am asking you do you consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself someone who, as a judge, would be independent—

Senator SCHUMER. I am not asking that.

Mr. KAVANAUGH. I know, and I am going to answer the question.

Senator SCHUMER. You are never answering my questions, sir, I have to tell you.

Mr. KAVANAUGH. Senator—

Chairman HATCH. I think he does. I mean, he said he is a Republican.

Senator SCHUMER. We will have to disagree.

I asked him if he considered—Jeff Sessions, Senator Sessions described as nonpartisan. I think that defies, I mean, we are in "Alice in Wonderland" here. I do not think anybody, I would say even you,

yourself, do not consider yourself nonpartisan. You treat the two parties equally. You are not involved.

I mean, let us talk, frankly.

Mr. KAVANAUGH. I am a Republican, and I work for President Bush—

Senator SCHUMER. You consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself—

Senator SCHUMER. If you are a Republican, and you have worked mainly for Republican causes, 99,999 people out of 100,000 would say you cannot consider yourself nonpartisan. Now, why is it so hard for you to say that?

Mr. KAVANAUGH. I guess I am concerned with how the term is being used. I am a Republican—

Senator SCHUMER. I am not asking are you unfair or fair. I am asking are you nonpartisan? Most of the judges we have voted for I doubt would say that they are or some of them, at least—you cannot go through all of them—would say some of them are partisan. You have had a more partisan record than any single nominee who has come before us, Democrat or Republican. You have been more active in more political causes, hot-button issues than anyone. Now, I am asking you to be, you know, to give a straight answer with this Committee. Do you consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself a Republican, and I support President Bush, and I have worked for him, and others can attach labels to it.

Senator SCHUMER. Let me ask another question.

The Committee for Justice, Boyden Gray's group, which very few consider nonpartisan, they have a distinct point of view; is that correct?

Mr. KAVANAUGH. I know that they support the President's judicial nominees. Beyond that, I do not know what they might do.

Senator SCHUMER. How often—did you go to a fund-raiser for them?

Mr. KAVANAUGH. I attended it was a party where I think it cost, and it might have been a fund-raiser, I do not know, but I think it cost $20 or something.

Senator SCHUMER. Did you make a contribution?

Mr. KAVANAUGH. I do not think I did. I think I just went.

Senator SCHUMER. You just went, okay.

Mr. KAVANAUGH. It was a—

Senator SCHUMER. Do you think that was, if somebody is trying to be down the middle—

Mr. KAVANAUGH. Senator, can I say I will try to check on that, but I am pretty sure I just went to that. It was a Friday afternoon.

Senator SCHUMER. How often do you speak to Boyden Gray?

Mr. KAVANAUGH. I—

Senator SCHUMER. Once every 6 months? More than that?

Mr. KAVANAUGH. Less than that.

Senator SCHUMER. Less than that.

Mr. KAVANAUGH. He is, since—

Senator SCHUMER. How about Sean Rushton.

Mr. KAVANAUGH. Since I have been staff secretary, he would come—Boyden Gray—would come at times to meetings where

members of the administration would talk to outside groups, and he would be there at times.

Senator SCHUMER. How often have you—you have had a conversation with him less than once every 6 months?

Mr. KAVANAUGH. Well, since I have been staff secretary, I do not think I have talked to him at all, not since July of last year.

Senator SCHUMER. How about Sean Rushton?

Mr. KAVANAUGH. I am pretty sure I have not talked to him since July of last year either, and I—

Senator SCHUMER. How about before that?

Mr. KAVANAUGH. I do not think I talked to him much. I think, again, he was in the groups sometimes, but not often. He would come to those meetings where we would talk about the President's judicial nominees. There were people who would come, and we would provide information about them.

Senator SCHUMER. How often, over the 4 years, say, you have been in the White House?

Mr. KAVANAUGH. On the phone or in person?

Senator SCHUMER. Either one. I did not qualify it.

Mr. KAVANAUGH. Very rarely.

Senator SCHUMER. Even by signals. Signals would be included.

[Laughter.]

Mr. KAVANAUGH. Rarely. I think the one thing I want to be careful, the one caveat I will say, is I think he has a mass e-mail list or had one that would sent out these mass e-mails of newsletters. So, if those are counted, then that would be more, but not in terms of personal communication.

Senator SCHUMER. Now, I asked you another question, and you are under oath, I asked you had you ever in your course in vetting judges used the word "too liberal." You said you could not recall. Have you ever heard others use the word "too liberal" who were White House employees?

Mr. KAVANAUGH. Senator, I think with respect to discussions of nominees, it is not my place to go into internal discussions of character—

Senator SCHUMER. You do not want to answer the question?

Mr. KAVANAUGH. I do not think it is my place to talk about—

Senator SCHUMER. Why not? You have maintained—

Mr. KAVANAUGH. I think it is Judge Gonzalez's—

Senator SCHUMER. —and we have heard maintained that ideology does not enter into any discussions or vetting. So, counselor, you have opened this line of questioning up. I am asking you something that would prove that one way or the other, and that is because liberal is an ideological term.

Have you heard people use the term "too liberal," yes, no or you do not want to answer?

Mr. KAVANAUGH. I think that is—I am going to answer that in part—but I think it is a question that is not my place to answer, but it should be directed to Judge Gonzalez. But in terms of—I want to say this, though.

Senator SCHUMER. You are the nominee, not Judge Gonzalez.

This is the first time that you are sort of stepping out on your own, in a certain sense, you know, except when you did maybe those pro bono activities that you volunteered for. So we want to

know your views, not Judge Gonzalez's, not George Bush's. You are going to have a lifetime appointment should you get this nomination, okay? So I am not asking—if Judge Gonzalez were here, I would ask him the same question. You are the nominee. Now, have you heard the words used?

Mr. KAVANAUGH. Senator, it is not my place to disclose the internal communications—

Senator SCHUMER. Okay. You do not want to answer.

Mr. KAVANAUGH. —but there are people who have been too political in the judgment—

Senator SCHUMER. I did not ask that question. I asked you have you heard the term used by others or used yourself "too liberal"?

Mr. KAVANAUGH. And I was going to say I have heard, and I know that there have been people who have been judged to be, who could not shed, in the judgment of people there, personal beliefs to be fair and impartial judges, and shorthand could have been used to describe those—

Senator SCHUMER. Did you ever use it?

Mr. KAVANAUGH. —on either way.

I do not recall using it.

Senator SCHUMER. Next question: We have talked about judicial activism here. Would you like to define what you think is judicial activism?

Mr. KAVANAUGH. Yes, Senator. I think judicial activism is when a judge does not follow the law before him or her, but instead superimposes his personal beliefs on the decisionmaking process.

Senator SCHUMER. Fair enough. When Judge Brown says that she believes *Lochner* was correctly decided and when she says that San Francisco should not have any zoning laws, is she being an activist?

Mr. KAVANAUGH. I am not familiar with all of her statements, but I will say—

Senator SCHUMER. You said you vetted judges for California. You didn't vet her?

Mr. KAVANAUGH. I wasn't involved in—

Senator SCHUMER. Well, let me tell you she said repeatedly both in court decisions and in conversation that *Lochner* was correctly decided. I think it is about 70 years ago that that doctrine was discarded. It meant you couldn't pass any kinds of labor laws because—is that being an activist, yes or no?

Mr. KAVANAUGH. Can I take a minute to answer the question?

Senator SCHUMER. Yes, surely.

Mr. KAVANAUGH. Senator, first of all, I want to clarify that I am familiar with Judge Brown's judicial record. I am not familiar with her speeches. So I just want to clarify that.

Senator SCHUMER. It was in one of the decisions—I don't remember the name of the decision—it was in one of the decisions she dissented from. You are not familiar with it?

Mr. KAVANAUGH. I don't remember that phrasing. I am familiar with her judicial record, although it has been a while, but I am familiar with some of her judicial record.

As to your question of examples of judicial activism, I think *Lochner* is often cited as a classic example of judges superimposing their personal views on the decisionmaking process in an improper

manner. The case has been discredited. The case isn't followed any longer.

Senator SCHUMER. So that means it would seem that that is being an activist to want to undo *Lochner*, undo zoning laws.

Now, I want to ask you this. I don't like activists on either side.

Mr. KAVANAUGH. Right.

Senator SCHUMER. Your administration and you in this process seem to say that activism on the right is just fine. After all, Judge Brown was sent here. And activism on the left is activism. How can you discourage us from believing that?

Clearly, many of the judges you have set forward do not believe in what is established law. And, again, it is not that they wouldn't as judges—every judge who comes before us says, I will be fair. We all have to take that with a grain of salt, obviously. We have to make our own judgment, not just their assertion.

Yet, we see a nominating process skewed hard to the right. And then when Jeff Sessions, whom I enjoy bouting with here, says, well, I am talking about activist judges, activist means nothing more than conservative because Judge Brown is as activist as they come. She wants to turn the clock back a hundred years.

Did you have any dissent in the office when they nominated her? How do you square the view that it is okay to nominate Justice Brown and she is okay, but others are activists whose views are more to the left? I mean, I would just like some understanding here because I think it is code words. Activist means liberal; strict interpretation means conservative. The nominees we have had before us are clearly not interpreting the law. They believe they should interpret the law as it was 100 years ago or 200 years ago.

I will give you a few minutes to elucidate on this. It seems to me the whole process is a subterfuge, basically.

Mr. KAVANAUGH. Senator, the President's nominees, the majority of them, the vast majority, have been approved by this Committee and supported by both sides of this Committee, and confirmed by the Senate. There have been some examples where that hasn't occurred and there have been debates about their records. But in terms of the description of the nominees as a general class, it is important to make that point.

They are also, as I understand it, the highest rated nominees ever under the ABA's rating standards.

Senator SCHUMER. Do they look at activism or non-activism when the ABA judges? No. You know that.

Mr. KAVANAUGH. They look at the traditional criteria for—

Senator SCHUMER. Right, law school, right. Many of us have broken with that tradition. The President has forced us to because he has nominated judges through an ideological prism. It is obvious.

So I want to ask you again, why is it, if ideology doesn't matter and the President is just—do you think Democrats or liberals are less likely to interpret the law fairly—just interpret the law, than conservatives?

Mr. KAVANAUGH. Senator, I think this is an important question. And I mentioned earlier, but I am not sure you were here, it is tradition since the founding of our country for Presidents to select judicial nominees from the party of the President.

Senator SCHUMER. That is not the question I asked.

Mr. KAVANAUGH. But I want to help explain. And so President Bush—most of his nominees, not all by any stretch, are Republicans. President Clinton—most of them were Democrats, their backgrounds, their political affiliations. That has been the way. It doesn't have to be that way, but it has always been that way, and that is the tradition that has—

Senator SCHUMER. And do you think there were ideological differences as a whole between the Clinton nominees and the Bush nominees?

Mr. KAVANAUGH. I think there were policy differences in their backgrounds. I don't know in terms of ruling on the bench. I do know on the Ninth Circuit, for example—

Senator SCHUMER. Well, have you seen Cass Sunstein's study? You don't know that study?

Mr. KAVANAUGH. I do.

Senator SCHUMER. Okay. Doesn't it show that Democratic nominees, particularly on economic and environmental and other issues, decide things quite differently than Republicans, and that the difference is stark?

Mr. KAVANAUGH. Senator, I know that that study has been challenged as to its accuracy, as well.

Senator SCHUMER. Can you give me a yes or no answer to any question? I apologize, but you haven't answered it. I asked you simply is that what Sunstein's study shows?

Mr. KAVANAUGH. I am told—

Senator SCHUMER. If you said, yes, but let me say that it has been challenged, I would appreciate that a lot more than refusing to answer just about a single question that any of us have asked.

Mr. KAVANAUGH. Yes, but it has been challenged.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. And it has been challenged because the sample was under-representative, and I think the Ninth Circuit is a good example, Senator. My understanding—and I am familiar only at the margins with this now—is that the range of President Clinton's nominees, for example—there is a wide range of views represented in his nominees and in President Reagan's nominees on that court, and that some of President Reagan's nominees joined with some of President Clinton's nominees.

And the reason for that, Senator—and it is something I firmly believe and I think it is important—is there should be no such thing, and there hasn't been such a thing as a Republican judge or a Democrat judge. And I think it is very important that we maintain that in our system.

Senator SCHUMER. So why do we see virtually very few—if ideology doesn't matter and if we are just nominating people on legal qualifications and their ability to interpret the law—and when I asked you the question, you basically acknowledged that Democrats and Republicans could interpret the law equally.

Mr. KAVANAUGH. Yes, I agree firmly with that.

Senator SCHUMER. Why is it that one-third of the nominees here are from the Federalist Society, one of the most conservative groups in town? And everyone knows that. You are telling me Judge Scalia is no more conservative than Justice Ginsburg if you

don't acknowledge that the Federalist Society is an extremely conservative group.

Chairman HATCH. Senator, I have been very lenient on the time.

Senator SCHUMER. Yes, you have, Mr. Chairman.

Chairman HATCH. You are way over.

Answer that question, and then we will turn to Senator Kennedy and then I will sum up.

Mr. KAVANAUGH. Well, I think there were two questions there. One, in terms of why most of the nominees of a President are of the same party, that is the tradition.

Senator SCHUMER. I didn't ask party; I asked ideology.

Mr. KAVANAUGH. Okay, but then the study refers to Democrat judges and Republican judges, which is party. So I think the study you cited as evidence of ideology actually is party.

Senator SCHUMER. So you don't think ideology enters into President Bush's selection of judges, particularly at the court of appeals level, at all?

Mr. KAVANAUGH. I think it is critical to have people who have demonstrated experience and—

Senator SCHUMER. I didn't ask that question. Can you answer yes or no?

Chairman HATCH. Senator, this isn't a court of law. He ought to be able answer the question.

Senator SCHUMER. He ought to be able to.

Chairman HATCH. And if you don't like the answer, rephrase another question.

Senator SCHUMER. Okay, I will.

Mr. KAVANAUGH. It is important that the judge or judicial candidate demonstrate both in the interview process and in his or her record an ability to follow the law fairly, and you judge that based on an assessment of the entire record.

Senator SCHUMER. And so ideology has not entered one iota into President Bush's selection of court of appeals nominees. Is that correct? Do you believe that?

Mr. KAVANAUGH. I am not sure how you are defining ideology.

Senator SCHUMER. I am not asking you whether people can judge the law fairly. We have been through that part of this discussion. I am asking you as someone intimately involved with the process, has ideology at all entered into the nomination of judges by President George Bush to the court of appeals?

Mr. KAVANAUGH. Can I ask you how you are defining ideology in that question?

Senator SCHUMER. I am defining ideology by their predispositions on the issues that face the day. And I am not asking you whether you asked them or not. It is plain as the nose on your face, sir, that the nominees don't come from across the political spectrum; they come from one side of the political spectrum. Everyone in this room would admit that.

Chairman HATCH. Not I. That isn't true. That is not true.

Senator SCHUMER. How many ACLU members have been nominated by President Bush?

Chairman HATCH. There have been a few, I have got to say.

Senator SCHUMER. I disagree with the ACLU on a whole lot of things.

Chairman HATCH. Well, so do I.

Senator SCHUMER. But the Federalist Society has one-third and the ACLU probably has none. You are denying the obvious, I guess is what I have said.

Chairman HATCH. Senator, come on. We have got a conservative President. He naturally is trying to find people who agree with his philosophy.

Senator SCHUMER. Orrin, thank you. I was trying to get Mr. Kavanaugh to say that for the last 15 minutes.

Chairman HATCH. I think he has been saying it. He just hasn't said it in the words you want to hear. That is all.

Senator SCHUMER. Okay.

Mr. KAVANAUGH. But in terms of judges who will apply the law without their personal predisposition on the issues, that is exactly what the President has said he is looking for, and that is your definition.

Senator SCHUMER. It seems to me—and I will conclude, Orrin, thank you.

Chairman HATCH. Okay.

Senator SCHUMER. It seems to me and to just about everyone else, not judging whether they would apply the law despite their predisposition on the issues, that predisposition on the issues, for one reason or another, has greatly influenced who the nominees are because they come from a rather narrow band of political thinking by and large.

With that, Mr. Chairman—

Chairman HATCH. Well, with that, I just have to make this comment before I turn to Senator Kennedy. I have been here for the Carter judges, for the Reagan judges, the Bush I judges, the Clinton judges, and now George W. Bush's judges. Every one of those Presidents tried to find people who shared their philosophy.

I have got to say Carter appointed basically all Democrats, with very few exceptions. Reagan basically appointed all Republicans, very few exceptions, and the same with the others. The fact of the matter is, of course, they are trying to find people who share their philosophy. That is why they ran for President.

This is the third of the separated powers of Government. It is one of the biggest issues there is, whether we are going to have liberals on the courts throughout the country or conservatives, or a mixture of both.

Having sat here through all of the George W. Bush's 173 confirmed judges, 29 that are on the executive calendar reported out of this Committee sitting there vegetating, I have to say that there is a wide variety—yes, more on the moderate to conservative side, but a wide variety of judges.

Now, look, I think where you have had trouble is with the word "partisan," and I would, too, if I were in your shoes.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Just quickly, I will mention, since this topic has come up, President Clinton nominated several individuals to both the circuit and district courts with no close ties to him or other Democrats who were championed by Republican Senators because they were either

registered Republicans or close friends of Senators of the other party.

For example, Richard Talman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gorton. Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the request of Jon Kyl. Judge William Traxler was put on the district court by President Reagan and was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond. Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Connie Mack.

Did you ever consider that some nominees who were Democrats should be nominated?

Mr. KAVANAUGH. I think, Senator, President Bush has chosen to nominate some Democrats for a variety of seats, as I understand it. I know in his first group of nominees, Roger Gregory was nominated, along with others. I know that in Pennsylvania—I just know more of the States that I worked on at the district court level—there were several Democrats, and some very strong Democrats, nominated for district court seats in Pennsylvania that I worked on and helped through the process. So there have been some Democrats. I am sure there are others, but I can't recall them all here.

Senator KENNEDY. Let me, if I could, ask you about your role in the vetting process, and particularly with regard to William Pryor. The requirement that appellate judges follow the Supreme Court is a bedrock principle, but Mr. Pryor repeatedly criticized decisions of the Supreme Court in ways that raise serious questions about whether he would follow those decisions.

He called *Roe* v. *Wade* the worst abomination of constitutional law in our history. He criticized the Supreme Court's decision in *Miranda* v. *Arizona*. He referred to the members of the Supreme Court as nine octogenarian lawyers.

When you recommended Mr. Pryor for nomination to the Eleventh Circuit, were you aware that he had made these extreme statements? And if so, do they cause you any concern?

Mr. KAVANAUGH. Senator Kennedy, I know President Bush nominated Mr. Pryor. And Judge Gonzales, of course, chairs the judicial selection committee. That was not one of the people that was assigned to me. I am familiar generally with Mr. Pryor, but that was not one that I worked on personally.

Senator KENNEDY. Well, did you know those remarks had been made prior to the time that he appeared before the Judiciary Committee?

Mr. KAVANAUGH. Senator, can I answer that this way? It is not my place to discuss our internal deliberations, but it is safe to assume that we have done a thorough vet of the nominee's records.

Senator KENNEDY. Well, if you agree it is important that judges obey the precedent, why didn't you recommend against Pryor's nomination? Why take the chance that he might seek to undo an important legal precedent such as *Roe* v. *Wade*?

Mr. KAVANAUGH. Senator, again, the President nominated Bill Pryor. I know he has got a lot of Democrat and Republican support in Alabama, support in his home State community. In terms of in-

ternal discussions, I don't think it is my place to talk about those here.

Senator KENNEDY. Well, I know you are talking here about the background discussions, but once you have the nominee and you are involved in the process where he calls a case the worse abomination of constitutional law in our history, criticizes the *Miranda* case and refers to the Supreme Court as nine octogenarian lawyers—you are involved in the vetting process. Whether you did anything at all about it, I gather you say that you did not.

Mr. KAVANAUGH. No, I was not involved in handling his nomination. I do know he explained that in his hearing, and I will leave it at that.

Senator KENNEDY. After the Supreme Court decision of five-to-four in *Bush* v. *Gore*, Mr. Pryor said that he—this is Mr. Pryor—wanted the decision to be decided five-four so that President Bush would have a full appreciation of the judiciary and judicial selection so that we can have no more appointments like Justice Souter.

Did you know about Pryor's criticism of Souter?

Mr. KAVANAUGH. Senator, again I think it is safe to assume that the record was fully vetted and fully known.

Senator KENNEDY. So you weren't involved in any of the vetting, as I understand it, of Mr. Pryor. Is that right?

Mr. KAVANAUGH. No. I know him and I have met him before, but it wasn't one of the—the way the work is divvied up, that wasn't one of the ones I—

Senator KENNEDY. Well, did you know about his involvement with the Republican Attorney Generals Association?

Mr. KAVANAUGH. I actually—I think I heard that for the first time the day before his hearing, but that doesn't mean it wasn't known. I am just talking about what I—you asked me about my personal knowledge.

Senator KENNEDY. Did you ever discuss that subject with Mr. Pryor or anyone before his hearing?

Mr. KAVANAUGH. Again, Senator, it is not my place, I think, here to disclose internal communications, but the background record of someone is vetted before nomination.

Senator KENNEDY. So your response with regard to the Attorney Generals Association is that you didn't know anything about it prior to the time of the hearing?

Mr. KAVANAUGH. Yes. Again, it is not for me to discuss internal deliberations. The record, I am sure, was fully known. Someone's background is fully vetted before nomination, and so it is safe to assume that people knew about involvement in various organizations.

Senator KENNEDY. Well, did you prepare him for his testimony on that subject?

Mr. KAVANAUGH. I don't remember preparing for his testimony on that subject. I might have attended a moot court session, but I don't know—that subject might—I don't know. I might have attended a moot court session. Oftentimes, we will go to moot courts to prepare nominees for hearings to prepare them for this process.

Senator KENNEDY. Well, I think you just said that you didn't know about this until the day before his testimony. Did that come up during the moot court session?

Mr. KAVANAUGH. I think there were news articles, I think, if I recall. But I want to be careful, Senator. I don't recall precisely when—

Senator KENNEDY. Well, I am just wondering whether this did come up during the preparation of the nominee.

Mr. KAVANAUGH. Again, Senator, it is not for me here, I think, to disclose internal discussions and deliberations. Someone's record is thoroughly vetted before nomination. In terms of internal discussions, what I was referring to by that is I remember a news article at some point reading, but I can't place it in time. If I saw the news article in relation to his hearing, I might be able to place it better.

Senator KENNEDY. Well, the Washington Post had reported that RAGA was founded by Pryor and the Republican National Committee, with the explicit aim of soliciting funds from the firearms, tobacco and paint industries and other industries facing State lawsuits over cancer deaths, lead poisoning, gunshot wounds and consumer complaints, according to statements by Pryor and other officials. That was in the newspaper.

I am trying to find out, if you knew about this, what you did about it, if you did anything about it. And if you didn't do anything about it, then you didn't do anything about it, but once you found out about it, whether you thought that it was important enough to do anything about it. Did you ask the FBI to check it out or do anything further about it? Did you ask the FBI to investigate, or did you discuss it with Pryor or anyone else? That is what we are trying to find out. These are serious charges, obviously.

Mr. KAVANAUGH. Senator, I think that issue was explored at his hearing, as I recall, and that probably would be the best record of the issue.

Senator KENNEDY. Well, I know he was here, but I am just trying to find out the information that you all had about it. He was asked if he ever solicited funds from corporations with business before the State and he replied he did not think so. He told the Committee that the RNC had all the records regarding corporate contributions raised by RAGA.

So the question is you must have had, or someone or prepped him must have had the conversation and know about those records before he came to the Committee. The evidence received by the Committee indicated that Mr. Pryor had repeatedly been assigned to make RAGA fundraising solicitations of the type he denied making. That is the issue.

So did you or anyone you were working with receive copies of the evidence before it was leaked to an Alabama columnist friendly to Mr. Pryor? And did you or anyone you were working with leak any of the material, or do you know of anyone who did?

Mr. KAVANAUGH. Senator, I know very little about this. You know far more than I do about it, and I think it was explored at the hearing. I don't know enough to give you much of an answer on that. I don't know much of anything specific about that.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman HATCH. Well, let me just say with regard to that the materials were leaked by a former employee of the organization who basically, according to the record, stole the materials. By the way, the Democrats set up their own Democrat Attorney Generals

Association to compete with the Republican one. So, you know, you can find fault on both sides as far as I am concerned.

I think what you have had trouble with here is the word "partisan" and the word "ideology." I wouldn't have answered those questions either, to be honest with you. What bothers me about this hearing is that much of the hearing has been spent attacking other Republican nominees, not you, other Republican nominees. And in every case, I think their records have been distorted.

When General Pryor was asked why he said the *Roe* v. *Wade* case was an abomination, I mean he answered it very forthrightly. He said, if I recall it, because of the millions of unborn children who were killed. Now, people may not agree with that assessment, but it was a sincere statement and certainly a matter of fact, whether you agree with the nature of it.

With regard to *Lochner* and Janice Rogers Brown, I certainly don't remember it the way Senator Schumer does. As a matter of fact, she gave a speech and it was tremendously distorted here in this Committee. It bothered me a great deal, to be honest with you.

Now, let me just say a few other things here with regard to ideology, and Professor Sunstein's study has been brought up. Let me just make a few basic observations. First, there is no doubt that in the vast majority of cases there is a unanimous result from the court throughout the country.

You agree with that, don't you?

Mr. KAVANAUGH. And especially in the D.C. Circuit.

Chairman HATCH. Well, that is right. The law is clear and the application of the law is straightforward. Professor Sunstein attempts to explain the context in which Democratic and Republican appointees largely agree by noting that in many areas the law is clear and binding, and that judges appointed by different Presidents largely agree on the appropriate principles. Ideology apparently doesn't matter in those cases.

We don't hear much about these cases, probably, because they don't lend themselves very well to charged political speeches or questions, or emotional fundraising appeals from the usual suspects. But the fact remains that these cases make up the lion's share of Federal court jurisprudence.

Do you agree with that?

Mr. KAVANAUGH. Excuse me, Senator?

Chairman HATCH. The cases that basically both sides agree on?

Mr. KAVANAUGH. Absolutely, Senator. In the D.C. Circuit, I think, in response to the Sunstein article, there were some responsive articles that both, number one, attacked the methodology that Mr. Sunstein used, and, number two, pointed out how many cases were unanimous in the D.C. Circuit. And I think that is because the culture of the D.C. Circuit and the people who are on that court are outstanding judges.

Chairman HATCH. That collegially work together.

Mr. KAVANAUGH. Right.

Chairman HATCH. Which you would do, as well, once confirmed.

Mr. KAVANAUGH. Absolutely.

Chairman HATCH. Now, Professor Sunstein is a brilliant professor. I have a lot of respect for him, but there is no question he is a brilliant liberal professor. His study does not examine large

areas of case law, including torts, bankruptcy, labor law and civil procedure. Those are serious liabilities to the study, and I think anybody who is fair would say that.

Second of all, it is difficult to understand several of the methods used in Professor Sunstein's study. For example, he counts a vote as pro-life if the judge voted at all to support the pro-life position. Why this is done is certainly not clear.

Thus, if a judge votes to strike down part of an injunction against demonstrations near an abortion clinic, his or her vote is pro-life. Well, we know there are different issues there. Of course, a judge casting such a vote is likely relying on First Amendment principles of free speech, but the study takes no apparent accounting of that fact. Instead, it simply counts as pro-life. I would suggest that such a vote may be better counted as pro-free speech or pro-civil liberties, but that isn't the way he did it.

Third, it may come as a surprise to some that Professor Sunstein's study reports that ideology does not matter where some might like to see it. For those who would like to argue that ideology, which Professor Sunstein's study crudely, and I think simplistically derives from, the political party of the appointing President, is especially important in the D.C. Circuit because of the types of cases it hears.

The study shows something else. We hear a great deal from the liberal interest groups about Republican appointees casting extremist anti-environmental votes in taking cases. Unfortunately, Professor Sunstein's study shows no differences between Republican- and Democratic-appointed judges in terms of how their votes are cast.

We also hear so much about how Republican appointees threaten to, quote, "roll back the clock," unquote, or, quote, "take us back to the 19th century," unquote, on civil liberties. But I don't expect these groups to cite Professor Sunstein's study on this point. He examined criminal appeals cases in the D.C. Circuit, the Third Circuit and the Fourth Circuit. Again, there was no difference in how Republican-and Democratic-appointed judges cast their votes either for the Government or for the criminal defendant. And I suspect there is not going to be much more difference when you get on the court.

I also don't expect the usual interest groups to cite Professor Sunstein's study to argue that Republican appointees are striking down Federal statutes on federalism grounds left and right, day and night. Again, there was no difference in Republican- and Democratic-appointed judges in the way that they voted. Both groups have upheld challenged statutes against federalism or Commerce Clause challenges more than 90 percent of the time.

You are aware of that; I know you are.

Those who would like to argue that Republican- and Democratic-appointed judges vote differently in race discrimination cases will also be severely disappointed by Professor Sunstein's study. There is no such evidence. It seems that ideology matters, except when it doesn't.

So I don't blame you for being wary of questions that say yes or no on ideology. Give me a break.

Mr. KAVANAUGH. Mr. Chairman—

Chairman HATCH. Now, let me just finish here because I want to make a couple of these points before we finish here today because I don't think you have been treated very fairly with some of the questions. In fact, I think you have been treated anything but fairly, and you have had patience, have showed good judicial temperament. You have taken all this stuff and answered as best you can back, and I think you have answered very well.

Now, objections to your nomination based on a supposed lack of experience ring pretty hollow to anybody who is fair. First, there is no doubt in my mind that if you had worked in the Clinton White House defending the former President in the various legal battles surrounding the impeachment proceedings, you would be the toast of the national media. And, of course, my Democratic colleagues would be falling all over themselves to support your nomination. That is just a matter of fact.

They would point out that Mr. Kavanaugh has achieved their, quote, "gold standard," unquote. They were the ones who said the ABA rating was the gold standard, the "well qualified" highest rating by the American Bar Association standard given to you.

They might observe that Mr. Kavanaugh has argued both civil and criminal matters before the United States Supreme Court—something that almost none of these other judges that have been put on the bench have done, in both civil and criminal matters before the Supreme Court and appellate courts throughout the country. You have had that experience.

I would just further note your extensive experience in the appellate courts both as a clerk and as a counsel. Those are important positions. Very few people have that opportunity to serve in those areas. You have got to be really somebody special to get those positions. I know it, you know it, my colleagues know it.

They would say that it is remarkable that Mr. Kavanaugh served as a law clerk to not one, but two Federal judges—Judge Walter Stapleton, of the U.S. Court of Appeals for the Third Circuit, and Judge Alex Kozinski, of the U.S. Court of Appeals for the Ninth Circuit.

And then I think any respectful, honest person would praise you, Mr. Kavanaugh, for your service as a law clerk to the United States Supreme Court for Justice Anthony Kennedy, the author of last year's *Lawrence* v. *Texas* decision, with which I am sure most all of our Democrat friends agreed.

Now, if any Republicans were to question Mr. Kavanaugh's qualifications for the D.C. Circuit, if you were their nominee and you had worked in the Clinton White House, they would certainly point out that only 3 of the 18 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.

You have had more judicial experience than them by having been a clerk on major courts, having watched how judges operate, having helped them write the opinions, having done the research for them. Democrat-appointed D.C. Circuit judges with no prior judicial experience include Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel and Patricia Wald.

Judge Edwards, by the way, was 39 years of age when I helped to confirm him, the same age as you. He didn't have quite the same

experience as you do, but he is a fine man and he has been a good judge there. And I don't think any of us can really legitimately find a lot of fault. We may disagree with some of his decisions, but he is a good man.

Also, the current Chief Judge of the Ninth Circuit, Judge Mary Schroeder, was nominated by President Carter and confirmed at the age of 38. So let's not pretend that the expressed concerns about Mr. Kavanaugh's age or experience are anything more than thin pretexts veiling purely political objections. Democrats would never raise such concerns about a nominee of similar age and experience if he or she had litigated across the courtroom aisles from Mr. Kavanaugh.

Finally, let me just point out that President Clinton nominated and the Senate confirmed without a single filibuster, which is what we are putting up with right now—I know; I was Chairman during much of President Clinton's term—a total of 32 lawyers with any prior judicial experience to the Federal appellate courts. Some of these have turned out to be very good judges, and I would be the first to say it.

I have to admit that I get tired of the partisanship in this body. The very people who are trying to use the terms "partisanship" and "ideology" are the ones who are filled with it. Frankly, they have a right to be. I don't have any problem with that. But to try and impose that on you just because you belong to the Federalist Society—I do, too. I am on the board of whatever it is, and all I can say is that I know that it puts on the best seminars in the country right now.

The Board of Advisers. I guess I had better be clean on this. I might be held to account to that someday.

Senator SCHUMER. Only if you are nominated.

Chairman HATCH. Don't worry. I am not so stupid that I would go through this.

See how dumb you are? I just can't believe it.

My point is this: Every President tries to appoint persons who share that President's political philosophy. That is why these presidential elections are so important. Frankly, those who are very liberal naturally will want a liberal President. Those who are conservative are going to naturally want a conservative President in this country.

And you can expect when you get that liberal President that that liberal President, as was the case with Jimmy Carter, in particular, and in the case of President Clinton, will nominate primarily people who agree with his liberal philosophy. And that is going to be true of President Reagan, President Bush I and President Bush II. They are going to try and nominate people of quality, hopefully people like you who have "well qualified" ratings or "qualified" ratings, which is no small thing, who then will serve with distinction on the bench.

Now, let me just close with this final remark. I think you have handled yourself very well here, when you consider some of the tough questions. And my colleagues have a right to ask these questions. I am not finding fault with them. I disagree with the way some of these questions have been asked and I disagree with some of the fairness, because I think some of it was not fair.

I disagree with Senator Kennedy when he brings up Justice White. We all know Justice White was a great Justice. Nobody was saying that he wasn't a great Justice, or not qualified. It is just that he didn't have some of the experience that they claim you don't have, although you have had a lot of experience in the courts that I don't think they are giving you much credit for.

Take Ruth Bader Ginsburg, or take Justice Breyer. Yes, he was one of the leading authorities on antitrust in the country. He served as chief counsel of this Committee when Senator Kennedy was Chairman. I recommended him to President Clinton, but I don't think he had ever tried a case in his life. I am not sure he would know how to try one, had he had a chance. He is smart enough and I am sure he would have figured it out, but he hadn't had any experience in that area.

I happen to really admire him. I happen to think he is a great man; I thought he was when he was chief of staff. He was fair, he was honest, he was decent. That is one of the reasons why I recommended him to President Clinton, and everybody knows that who knows anything about it.

The point is some of these straw issues are brought for only one reason, to try and make nominees look bad or to try and make nominees look like they are not qualified, when, in fact, you are eminently qualified. The fact that you are 39 years of age—you know, that is not exactly young anymore in the eyes of some people. In my eyes, it is very young. In Senator Kennedy's eyes, it is very young. But to other young members of the Senate, you are pretty old.

Hardly anybody who has been nominated to these courts has had the experience that you have had. Now, to sit here and say that you have got to have every aspect of experience to serve on the courts that nobody really has had is a little bit unfair and smacks a little bit of, should I use the word "partisanship?"

I want to say I think you have done very well. I hope my colleagues on the other side will give you a fair shake. If they will, they will pass you out of this Committee and they will confirm you to the Circuit Court of Appeals for the District of Columbia, where I suspect you will become one of the great judges. I suspect that they will find that you will be one of the most fair judges ever to sit on that court, and I suspect you will be one of those judges who will understand those very complex and difficult issues that Senator Kennedy has so eloquently described.

If I didn't think that, I wouldn't be for you. It is just that simple. I wouldn't, because this is in one respect the most important court in the country because it does hear cases that the Supreme Court will never hear, thousands of cases the Supreme Court will never hear, because of the limited number of cases the Supreme Court takes.

The Supreme Court naturally is the more important court, but the fact of the matter is this court is extremely important. And I have every confidence, knowing you—and I have known you for a long time—that not only can you do this job, but you can do it in an honest, fair way, and that you know the difference between an activist judge, one who just ignores the law and does whatever his or her personal predilections dictate, and a real judge who does

what is right and who looks at the law and lives within the law, as defined by the legislative body, and perhaps through executive orders of the President and, of course, by prior decisions by the United States Supreme Court.

I admire my colleagues on this Committee. They are a tough bunch. I love my friend from New York. There is no question about it. He gets on my nerves terribly from time to time with some of this stuff that he comes up with, but the fact of the matter is I care a great deal for him. And he is sincere on this; he really believes in what his position is. He is nuts, but he believes it.

[Laughter.]

Chairman HATCH. All I can say is that I respect him and I respect the other members of this Committee, but I hope they will be fair and give you this shot that you really deserve. And I will guarantee you I will be watching just like they will to make sure that you are one of the best judges in the country, and I believe you will be.

With that, we will adjourn until further notice.

[Whereupon, at 1:22 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Brett M. Kavanaugh
3633 M Street, N.W., #3A
Washington, DC 20007

November 19, 2004

The Honorable Orrin G. Hatch
Chairman of the Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Attached please find responses to written questions from Members of the Committee.

Sincerely yours,

Brett M. Kavanaugh

Brett M. Kavanaugh

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Leahy

1. In your testimony before the Senate Judiciary Committee, you indicated that the work on judicial nominations was divided in the Office of White House Counsel among several Associate Counsels. You testified that you had "different areas of the country that we would work on and different nominations that we'd work on." You mentioned that California and Illinois were among the states you worked on, and that you "worked on certain circuit court nominations." A) Could you please list your particular geographic areas of responsibility, whether you covered just district or circuit court nominations or both within those areas, and the names of all of the circuit court nominees you worked on? B) What percentage of your time in the office would you say was devoted to judicial nominations? C) What other matters did you work on during your time in the Office of White House Counsel?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

The time I devoted to the judicial nomination and confirmation process varied but probably was about half my time when I worked in the Counsel's office. I also worked on a variety of ethics issues, legal policy matters such as victim compensation and liability issues, separation of powers issues, and records issues, among other matters.

2. A) Now that the ABA is no longer involved in the decision about whether or not to nominate someone for federal court vacancies, are there any other individuals or groups with whom the nominees are asked to meet as these choices are being made? B) In particular, have potential nominees been or are they now advised or sent to meet with or interview with individuals or groups outside of the government as part of the judicial selection process?

Response: No.

3. Did you or anyone else in the Office of White House Counsel seek advice or information or receive advice or information from any individuals or groups outside of the government when deciding on a judicial nominee? A) Were any White House officials from outside the Office of the White House Counsel involved in decisions on judicial selection? B) If so, who and from what offices? C) In particular, was Karl Rove involved in the judicial selection process, and if so, can you describe in detail his involvement?

Response: Outside groups and individuals – including Senators, Representatives, Governors, other state and local officials, local bar officials and lawyers, and members of interest groups – would often support or recommend candidates. That is traditional and appropriate. In addition, the Department of Justice conducts a thorough vetting process during which many individuals familiar with the candidate provide input regarding a candidate's qualifications and suitability for the federal bench. As Judge Gonzales previously has explained, judicial nomination recommendations are provided to the President by the judicial selection committee, which is chaired by Judge Gonzales and includes individuals from the White House and the Department of Justice. The President himself makes the decision in all cases to submit a particular judicial nomination to the Senate.

4. Did you work with others inside the government, including the Department of Justice and Senate Republicans and their staffs, to determine how to prepare the nominees or work to secure their confirmation?

Response: Yes, that is an important part of the work of the Counsel's office and the Department of Justice.

5. In your hearing testimony, you indicated that part of your responsibilities included "public liaison" work. That means working with groups from outside of the government. A) Did you have a regular meeting set up with outside groups or individuals? B) If so, please list the names of the outside groups or individuals with whom you regularly met, how often the meetings took place, and the nature of those meetings. C) If not, did you meet at any time with any outside groups or individuals about judicial nominations? D) Apart from groups or individuals involved in regular meetings, with which other outside groups or individuals have you met about judicial nominations? E) For each of these groups or individuals, please tell me how often you would meet with them and the nature of those meetings.

Response: We met with members of a wide variety of groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

6. In your hearing testimony you indicated there was a "team" that worked in Senator Hatch's office and Senator Frist's office on nominations. A) Who was on that team during the time you worked in the Office of the White House Counsel? B) How often would that team meet? C) Where did that team meet? D) What specifically was the work of that team?

Response: The people who worked on issues relating to judicial confirmations included the White House Counsel's office lawyers, staff of the White House Office of Legislative Affairs, other White House staff, Department of Justice lawyers and personnel, Members and staffs of the Senate Judiciary Committee, and Senate leadership Members and staffs, among others. As I understand it, previous Administrations of both parties operated in the same manner with respect to judicial nominations and confirmations. The White House and Department of Justice met often with Senate staffers in order to maintain communications regarding the status of individual judicial nominations and to discuss upcoming hearings, votes, or other issues. Meetings would occur in a variety of government rooms depending on convenience and availability.

7. At your hearing the subject of consulting on nominations to the D.C. Circuit came up. Did you or anyone involved in the judicial nominations process for President Bush ever discuss nominations to the D.C. District Court or the D.C. Circuit with any elected officials from the District of Columbia?

Response: I am aware that the Administration consults with Mayor Williams on a variety of issues affecting the District of Columbia, including local judges. I do not know whether he or other local elected officials have been consulted for vacancies on the D.C. Circuit Court of Appeals. I believe there has been consultation on certain D.C. District Court nominations.

8. President Clinton nominated several individuals to the circuit and district courts with no close ties to him or other Democrats but who were championed by Republican Senators because they were either registered Republicans or close friends of the Senator of the other party. For example, Judge Richard Tallman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gordon; Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator John Kyl, who struck the names of Democratic candidates; Judge William Traxler, who was put on the district court by President Reagan, was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond; Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Republican Senator Connie Mack. Please list the names of all of the circuit court nominations President Bush has made who were first recommended to you by a Democratic Senator.

Response: Recommendations for district and circuit nominees come to the Administration from many sources, and it is often difficult to identify the "first" recommendation of a particular candidate. I can say that there are numerous court of appeals nominees of President Bush who had the support of home-state Democratic Senators, including: Edith Brown Clement, Consuelo Callahan, Allyson Duncan, Dennis Shedd, Reena Raggi, Barrington Parker, Lavenski Smith, Steve Colloton, Michael Melloy, Carlos Bea, Richard Clifton, and Jay Bybee. We are proud of the strong support these court of appeals nominees received from the Democratic Senators in their home states.

9. I detailed the excellent credentials and experiences of Allen Snyder and Elena Kagan at your hearing. Why do you think you should be confirmed for a seat on the D.C. Circuit when Mr. Snyder and Ms. Kagan, about whom no objections of any substance were ever raised, were rejected by this Committee for that same position?

Response: I have met and think very highly of Mr. Snyder and Dean Kagan. The President has consistently stated that every judicial nominee deserves an up or down vote in the Senate, regardless of who is President. It is the Senate's decision whether to confirm or reject any individual nominee.

10. As you know there has been a lot of controversy surrounding the appointment of members to certain statutorily created bi-partisan boards and commissions. The White House gives a tortured interpretation to the statutes governing these bodies, claiming they permit the President to name not only the members of his political party, but also the members not of his political party, insisting that there is no requirement that the leadership of the political party opposite the President make these choices. Frankly, we find these contentions absurd and contrary to the letter and spirit of the law. A) Do you agree with the President's interpretation? B) What was your role in helping the President reach the conclusion that Democrats are not to pick nominees for Democratic seats?

Response: I am not familiar with any ongoing dispute of this sort.

11. Historian Richard Reeves said about Executive Order 13233 that, "[w]ith a stroke of the pen on November 1, President Bush stabbed history in the back and blocked Americans' right to know how Presidents [and Vice Presidents] have made decisions," and that the Order "ended more than 30 years of increasing openness in government." You testified at your hearing that you believed the "initial concern" by historians and archivists about Executive Order 13233 was "based on a misunderstanding." You indicated there were meetings with historians to discuss and explain the Order and that historians have found them useful. With which historians have you met and when did you meet with them?

Response: I do not have a full list of the individuals who attended such meetings. Professor Martha Kumar organized the groups that attended the meetings. They occurred about every six months while I was in the Counsel's office.

12. As you know, after Executive Order 13233 was promulgated, numbers of prominent historians and the major associations of historians, including the American Historical Association, and the Organization of American Historians, filed suit in federal court challenging the validity of the Order. Even after the meeting or meetings you held with them, they continued with the lawsuit. Indeed, one major plaintiff, the American Political Science Association, joined the suit after your meetings began. Their criticism continued as well. While the historians were complimentary of your personal demeanor in the initial meeting you had with them, they continued to be seriously concerned. For example, Robert Spitzer, president of the Presidency Research Group of the American Political Science Association said, "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . the situation continues to be deeply troubling." The late Hugh Graham, a Reagan historian and professor emeritus at Vanderbilt University, described the Executive Order as "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave." Your testimony about the historians seemed calculated to brush off this sort of criticism. A) Do you deny that the Order continues to be unacceptable to most historians? B) How can you reconcile what you told us at your hearing with the very real concerns that America's historians continue to have?

Response: I know some historians are not satisfied with the rules that apply to Presidential records. I believe their concern stems from the Presidential Records Act and the Supreme Court decision authored by Justice Brennan in Nixon v. GSA. I know some of them have expressed and continue to express concerns about the Order, but we respectfully believe that any continuing concerns in fact stem from the Act itself and the Supreme Court decision, not from the Order.

13. At your hearing, you testified that the Bush Administration's Executive Order 13233 ("Bush Order"), which you authored, was nothing more than an order that set forth "procedures" for complying with the Presidential Records Act ("PRA"). In fact, according to many scholars, journalists, and others, the Bush Order goes far beyond mere "procedures" and in effect significantly impedes the release of presidential records intended to be released under the PRA and in effect eviscerates important parts of the PRA, increasing government secrecy. Specifically they are concerned about the "demonstrated, specific need" language, even after the end of the 12-year period, about Sections 3(a)-(d) of the Bush Order which effectively provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public, about Sections 3(d) and 4 of the Bush Order, which require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances, about Section 3(d)(2) of the Bush Order which empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national

security would be affected by public release, about Section 10 of the Executive Order which permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability, about Section 11 of the Bush Order which allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to records under the PRA, and about Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. In light of these specific concerns, can you explain in detail the basis for your claim that the Order is procedural in nature, and is merely complying with the PRA?

Response: The Order faithfully implements the Presidential Records Act and Supreme Court case law. It establishes procedures to govern release of records consistent with the statute and the Supreme Court precedent. The Order does not set forth the circumstances under which an assertion of privilege should be made or would be successful. The issues identified in this question are either procedural or stem from the Act itself or court decisions on executive privilege.

14. At your hearing, you also testified that there was a "need" for the Bush Order to "establish procedures" under the PRA because the end of the 12-year period of repose for former President Reagan's records was coming to an end, that both the current president and the former president could assert privilege with respect to the records under Nixon v. GSA, and that "[n]o one really had a good idea how this was going to work." But the Congress specifically delegated to the National Archives and Records Administration ("the Archivist") the authority to adopt regulations, and after notice and comment, to adopt all rules necessary to carry out the PRA's provisions, which the Archivist did. A) In light of the existing regulations under the PRA, why did you and others at the White House deem it necessary to adopt the Bush Order, which occurred without any opportunity for public notice and comment? B) During the period of more than 6 months when the Bush White House was notified about the Reagan records but before the Bush Order, please describe what if any consultation occurred with the Archivist concerning any alleged need for additional regulations.

Response: As you noted, the 12-year period was coming to an end as President Bush took office. This was the first time that the Act's 12-year period had expired for records subject to the Act. The Order itself provides that it was issued to establish procedures to govern review of the records. We consulted often with the National Archives and Records Administration (NARA) during the drafting process, and Archivist Carlin testified to the Congress that NARA had unprecedented access and opportunity to share their experiences and views.

15. In his introduction at your hearing, Senator Cornyn mentioned that the two of you had worked on a case together. A) What was the case? B) In what capacity were you involved in it? C) How did you come to be involved in the case? D) Why did you choose to be involved? E) Have you helped prepare others for Supreme Court argument? F) If so, who, and for what cases? G) For each one, please explain how you became involved and why.

Response: He was counsel in Santa Fe Independent School District v. Doe, and I participated in a moot court session when he prepared for oral argument. I also submitted an amicus brief on behalf of my clients, Congressmen Largent and Watts. It is very common for lawyers who will be appearing before the Supreme Court to participate in moot court sessions prior to their arguments. Often, attorneys who have submitted amicus briefs are especially knowledgeable about the issues and will therefore participate in such moots. While I have participated in dozens of moot courts over many years, I do not have a list.

16. In your hearing testimony you mentioned pro bono work you had done, and that it proved you would not be a partisan or ideological judge. Please list all of the pro bono legal work you did while you were in private practice and explain how each project demonstrates your ability to be fair to all litigants.

Response: I have worked in public service for 11 of the 14 years since I graduated from law school. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work, including on the Elian Gonzales, Santa Fe, Good News Club, and Adat Shalom cases, as well as on a Florida school choice litigation matter. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to be balanced and fair. The American Bar Association evaluates the fairness of judicial nominees, among other considerations, and rated me "well-qualified" to be a judge on the D.C. Circuit.

17. On September 20, 2001, did you and others in the Administration present a proposal to Congressional staff that called for liability protection for the airline carriers involved in the September 11, 2001 attacks, including limitations on punitive damages against the air carriers, attorney fee caps on victims' attorneys and offsets of victim awards in court for any emergency or disaster relief payments to these victims?

Response: In the aftermath of September the 11th, many of the lawyers in the Counsel's Office were assigned to the myriad legal issues that arose out of the attack. Among other matters, I worked on liability and compensation issues involving the airlines and the victims of the attack and their families. I was involved in presenting an Administration

proposal on the liability issues. I believe the Administration proposal in many respects resembled the final legislation with respect to liability issues.

18. Did this proposal from the Administration, presented on September 20, 2001, to provide liability protection for the airline carriers involved in the September 11, 2001, attacks also contain any compensation program for the victims of the September 11, 2001 attacks?

Response: I believe the issue of victim compensation was initially separate from the issues of airline solvency and liability. The two issues were both addressed in the final bill.

19. During subsequent negotiations on this proposal to provide liability protection for the airline carriers involved in the September 11, 2001, attacks, did you initially oppose providing any compensation program for the victims of the September 11, 2001 attacks?

Response: On behalf of the Administration, Director Daniels expressed support for the final bill in a meeting in the Speaker's office on the night of September 20. I was present for that meeting. The Administration (and I as a representative of the Administration) supported compensation for the victims and families of the victims of the September 11th attacks. The Administration's general position was and has been that victims of terrorism should receive equal compensation and that families of wealthy victims usually should not receive more money than families of poor victims. The Administration has wanted these programs to be consistent with other federal compensation programs and has sought to ensure that they can be administered in a fair and expeditious manner.

20. In your hearing testimony, you explained that one of the reasons you want to be a judge is because you have a "commitment to protecting rights and liberties of the people." What in your record demonstrates a commitment to protecting the rights and liberties of all people?

Response: I have a strong commitment to public service and have spent 11 of the 14 years since I graduated from law school in public service. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to protect the rights and liberties of the people. The American Bar Association assesses the commitment to protecting the rights and liberties of all people when it evaluates judicial nominees, and the ABA concluded that I was "well-qualified" to be a judge on the D.C. Circuit. I have always tried to work hard and do my best for the public good, and I would continue to do so should I be confirmed to serve on the court of appeals.

21. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Charles Pickering. Pickering has called the fundamental "one-person one-vote" principle recognized by the Supreme Court under the Fourteenth Amendment "obtrusive." Fairley v. Forrest County, 814 F.Supp. 1327, 1330 (S.D. Miss. 1993). In order to redress serious problems of discrimination against African American voters in some cases, the courts (including the Supreme Court and the Fifth Circuit) have clearly recognized the propriety and importance of creating majority-black districts as a remedy under appropriate circumstances. Judge Pickering, however, has severely criticized this significant form of discrimination relief. In one opinion, he called it "affirmative segregation." Bryant v. Lawrence County, 814 F. Supp. 1346, 1351 (S.D. Miss. 1993). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? C) If so, did you express those concerns to your colleagues or to your superiors? D) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on voting rights. Was that your view? E) Why would you want to have someone with those views on the Fifth Circuit? F) Do you agree with Judge Pickering's views on voting rights as expressed above?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Judge Pickering addressed these questions at his hearings. I know that Judge Pickering received a well-qualified rating from the American Bar Association and is supported by many prominent African-Americans and Democrats in Mississippi. He has the strong support of both home-state Senators.

22. In two cases dismissing claims of race discrimination in employment, Pickering used identical language striking a similar theme. He wrote in both that "this case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority" and that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities." See Seeley v. City of Hattiesburg, No.2:96-CV-327PG (S.D. Miss., Feb. 17, 1998) (slip op. at 12); Johnson v. South Mississippi Home Health, No. 2:95-CV-367PG (S.D. Miss., Sept. 4, 1996) (slip op. at 10). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on employment discrimination. Was that your view? D) Why would you want to have someone with those views on the Fifth

Circuit? E) Do you agree with Judge Pickering's views on employment discrimination cases as expressed above?

Response: See response to question 21.

23. In a 1994 case in his courtroom, U.S. v. Swann, Judge Pickering has admitted that he engaged in *ex parte* communication with the Department of Justice, including one high-ranking official who was a personal friend, in order to reduce the sentence of a convicted cross-burner. It has been argued that Judge Pickering was just trying to address the disparate sentences received by the three defendants in the case, and that he believed Mr. Swann, who says [he] was not the "ringleader" in the cross burning, was being unfairly punished. In fact, all three of the defendants were found guilty, and it was Mr. Swann's wood, gasoline, truck and lighter that were used to build, douse, transport and ignite the cross on the lawn of an interracial couple. Mr. Swann, the only competent adult of the trio of perpetrators, was also the only defendant who rejected the plea offered by the government. He was convicted by a jury of his peers of all three counts brought by the Department of Justice, including one that required a five-year mandatory minimum sentence. This sentence was legislated by Congress and the judge had no discretion to depart from it. A) Were you or anyone else involved in his selection, nomination or hearing preparation aware of Judge Pickering's conduct in this case before he was nominated? B) If so, did you still recommend his nomination? If not, when did you become aware of it, and once you became aware of it did you recommend that he withdraw his nomination? C) Do you think it is in the public interest to have a judge on the bench who engaged in what several legal ethics experts have agreed was unethical behavior?

Response: See response to question 21.

24. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Priscilla Owen. She was the target of criticism from her conservative Republican colleagues. In FM Properties v. City of Austin, the majority calls her dissent "nothing more than inflammatory rhetoric." In Montgomery Independent School District v. Davis, the majority (which included your former boss, then-Justice Alberto Gonzales and two other Bush appointees) is quite explicit about its view that Owen's position disregards the law, saying that "nothing in the statute requires" what she says it does, and that, "the dissenting opinion's misconception . . . stems from its disregard of the procedural elements the Legislature established," and that the "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the board. . ." In In re Jane Doe, the majority includes an extremely unusual section explaining its view of the proper role of judges, admonishing the dissent joined by Justice Owen for going beyond its duty to interpret the law in an attempt to fashion policy, and in a separate concurrence, Justice Gonzales says that to the construe law as the dissent did "would be an unconscionable act of judicial activism." A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone who had been criticized by her own colleagues for misconstruing the law and engaging in judicial activism to

the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Owen, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit. Was that your view? D) Why would you want to have such an activist judge on the Fifth Circuit?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Justice Owen addressed these questions at her hearing. I know that Justice Owen received a unanimous well-qualified rating from the American Bar Association and is supported by three former Democrat Justices on the Texas Supreme Court, as well as more than a dozen past Presidents of the Texas State Bar. She has the strong support of both home-state Senators.

25. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Janice Rogers Brown. According to her questionnaire, her contact with the office began in the spring of 2001. Among the views that have made her nomination controversial was her statement that the Supreme Court's decisions 65 years ago to uphold humanitarian New Deal reforms – what she calls the "Revolution of 1937" – constituted a "disaster of epic proportions." Those 1937 decisions included rulings that upheld minimum wage laws, unemployment compensation laws, federal guarantees for collective bargaining, and the federal social security program. [Minimum wage laws – West Coast Hotel v. Parrish, 300 U.S. 379 (1937); federal unemployment compensation laws – Steward Machine Company v. Davis, 301 U.S. 548 (1937); collective bargaining guarantees – Jones and Laughlin Steel v. NLRB, 301 U.S. 1 (1937); federal social security system – Helvering v. Davis, 301 U.S. 619 (1937)] A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Brown, and I include you in that group, must have considered it in the public interest to have someone with those views on the D.C. Circuit, where she would be in a strong position to affect all of those programs. Was that your view? D) Why would you want to have someone with those views on the D.C. Circuit? E) Do you view the Supreme Court decisions she discussed as "disasters?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. Justice Brown and I were nominated at the same time for the same court. I also believe that Justice Brown addressed these questions at her hearing.

26. Justice Brown ruled in a dissenting opinion that any regulation constitutes a regulatory "taking" – hence requiring compensation – if it "benefit[s] one class of citizens [in that case, low income tenants] at the expense of another [in that case, landlords]." San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 126 (2002). Under that standard, virtually any law to protect certain citizens, such as environmental, health and safety, consumer protection, nursing home reform, or antidiscrimination standards, could be challenged. This of course was not just a

speech by Justice Brown; it was a dissenting opinion and a purported interpretation of the law. A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the DC Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

Response: See response to question 25.

27. Justice Brown has made some very radical statements in her opinions, dissents and speeches. For each of the statements below, please answer the following questions: A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the D.C. Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

> **"Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system permits them to extract...Big government is...[t]he drug of choice for multinational corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens."**
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> **"Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible." "A Whiter Shade of Pale," Speech to Federalist Society (April 20. 2000) ("Federalist speech").**
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> **"[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens." "Fifty Ways to Lose Your Freedom," Speech to Institute of Justice (Aug. 12, 2000)("IFJ speech").**
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> **"[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco...I would find the HCO [San Francisco Residential Hotel Unit Conversion and Demolition Ordinance] preempted by the Ellis Act and facially unconstitutional....Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the**

legitimacy of the government.... The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion." [Dissenting opinion in San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 120, 128-9 (Cal. 2002).]

Response: See response to question 25.

28. One of the nominees submitted during your tenure, recently given a recess appointment after his nomination failed on the Senate floor, is William Pryor. Among many other remarkable statements, Mr. Pryor praised as "sublime" and "brilliant" a 2001 Federal District Court decision, West Side Mothers v. Havemann, later reversed on appeal, that would deny patients a day in court to enforce their right to treatment in accord with Federal Medicaid standards – a right that has clearly existed dating back to the earliest days of the Medicaid program. That would include, for example, a large proportion of all Americans who must now reside in nursing homes. A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on this program. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you view the district court decision in West Side Mothers to be "sublime" or "brilliant?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Pryor addressed these questions at his hearing. I know that Judge Pryor received a qualified rating from the American Bar Association, has been elected and respected as Attorney General in Alabama, and is strongly supported by many Democrats in Alabama. He also has the strong support of both home-state Senators.

29. In a July 2000 speech Pryor stated: "I will end with my prayer for the next administration: Please God, no more Souters." Bill Pryor, "The Supreme Court as Guardian of Federalism," before the Federalist Society and Heritage Foundation (July 11, 2000). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you agree with Mr. Pryor that no more Supreme Court Justices like David Souter should be appointed? If not, why not?

Response: See response to question 28.

30. Mr. Pryor has criticized the Supreme Court's 7-1 ruling that the denial of admission to women by the Virginia Military Institute, a state-supported public university, violated the Equal Protection Clause. He said "[t]he Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on equal protection. Was that your view? D) Why would you want to have someone with those views on equal protection and equal treatment of women on the Eleventh Circuit? E) Do you agree with Mr. Pryor that the Supreme Court's decision in the VMI case represented the triumph of political correction over Constitutional principles?

Response: See response to question 28.

31. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Carolyn Kuhl. An *amicus curiae* brief that Kuhl co-authored when she served as Deputy Assistant Attorney General urged the Supreme Court to overturn Roe v. Wade, stating that: "the textual, historical and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, at 10 (July 15, 1985) (LEXIS pagination). The brief also asserted that the important principle of stare decisis should not stop the Court from overturning Roe. The brief claimed that "*[s]tare decisis* is a principle of stability. A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment." Id. at 10 (emphasis added). A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the Ninth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Kuhl, and I

include you in that group, must have considered it in the public interest to have someone with those views on the Ninth Circuit, where she would be in a strong position to affect the law on privacy and reproductive rights. Was that your view? D) Why would you want to have someone with those views on the Ninth Circuit? E) Do you agree with the views Judge Kuhl expressed in that brief? F) Do you believe Roe v. Wade is so flawed that it ought to be overturned?

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Kuhl addressed these questions at her hearing. I know that Judge Kuhl received a well-qualified rating from the American Bar Association and is supported by many prominent Democrats in California, such as Vilma Martinez. She also has the strong support of a very large number of prominent women judges and women lawyers in California, many of whom are Democrats.

32. Mr. Kavanaugh, in your work on judicial nominations in the White House Counsel's Office, I am sure you recall the February 2003 letter from the White House asserting that there was no "persuasive support in the history and precedent of judicial appointments" for our request for memos written by Mr. Estrada at the Justice Department. I found that letter to be completely inconsistent with the level of cooperation shown by other administrations toward such requests of Members of this co-equal branch. I also put into the Congressional Record excerpts of correspondence between President Reagan's Justice Department and the Senate Judiciary Committee demonstrating that the administration agreed to share legal memos written by and to Robert Bork and William Rehnquist during their judicial nominations—even though they had served for years as judges--and I also noted other examples in which legal memos were shared during nominations for lifetime or short-term posts, such as Brad Reynolds's nomination. A) Did you ever look at the correspondence between the Department of Justice and the Senate in the Bork, Rehnquist, Reynolds or other nominations? B) If you did examine that correspondence, then you must be aware that past administrations provided the Senate with numerous legal memos of nominees while your administration provided not a single one by Mr. Estrada. Even your administration provided the Senate EPW Committee with legal memoranda of Jeffrey Olmstead in connection with his short-term appointment. Please explain why the legal memos of an attorney in the White House Counsel's Office could be shared with the Senate but your administration refused to provide any legal memos by Mr. Estrada. C) We know that legal memos written by Carolyn Kuhl, when she was a legal advisor to the Attorney General and recommended that Bob Jones University be given tax exempt status despite its express policy of racial discrimination, were provided to Congress in the aftermath of that failed initiative. Please explain why her legal memos and those of her colleagues at the Justice Department could be shared with Congress but not any of the memos of Mr. Estrada. D) I am sure you will cite the letter from former Solicitors General. As you know, their policy preference to provide absolute protection to deliberations in their former office is not embodied in any statute or in the Constitution and, in fact, the disclosure to the Senate of numerous memos

written to Robert Bork and by him in the Solicitor General's Office (as well as other past disclosures) did not chill deliberations. As the Supreme Court noted in the Nixon tapes case, it is quite *unlikely* "that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure." U.S. v. Nixon, 418 U.S. 683 at 712 (1974); see also Clark v. United States, 289 U.S. 1, 16 (1933); McGrain v. Daugherty, 273 U.S. 135 (1927). The interest in candid deliberation does not create an absolute privilege against disclosure in response to a request of Members of a co-equal branch. What can you say to assure the Senate that you would give due respect to the prerogatives of the Senate and not just continue to favor maximizing this Administration's penchant for secrecy if you were confirmed?

Response: I believe that the Administration has addressed this issue in many letters to the Committee. Beyond that, it would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I know that Miguel Estrada received a unanimous well-qualified rating from the American Bar Association and was supported by many prominent Democrats and Hispanic organizations. I would faithfully follow the relevant Supreme Court precedent on the separation of powers and the prerogatives of the Executive Branch and the Senate.

33. Mr. Kavanaugh, you had significant responsibilities on judicial nominations in the White House Counsel's Office during much of the same period that Manuel Miranda worked for Senate Majority Leader Bill Frist's lead attorney on nominations and when Mr. Miranda worked as counsel to Senator Hatch on the Senate Judiciary Committee. You testified that during the years you worked on judicial nominations you met with Mr. Miranda and others on the Republican team "to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in." Mr. Miranda has asserted publicly that he took Democratic memos in part to find "information about when confirmation hearings would be held." A) From December 2001 through December 2002, did Mr. Miranda ever tell you when he thought Democrats would schedule hearings on the President's judicial nominees in advance of the public notice of hearings? B) Did he ever tell members of the White House team when he thought hearings would be scheduled or the likely timing of hearings throughout the year? C) Did other Republican Senate staffers provide you or your colleagues with such information or speculation? D) Did you ever inquire about the source of such speculation? How accurate was the speculation?

Response: See the response to questions 33-58 after question 58 below.

34. A) How often did you speak with Mr. Miranda from the time Senator Frist became the Majority Leader in late 2002 through May 2003, when you became staff secretary to the President? B) How often did you receive e-mail communications from him during this period? C) How often did you see him at meetings, either on the Hill or at the White House? Please provide the same information for the period December 2001 through December 2002.

35. You testified that Mr. Miranda did not ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee or any information that you believed or were led to believe was obtained or derived from Democratic files. A) Did Mr. Miranda ever discuss with you what the Democratic strategy on nominations was during the spring of 2003? B) Did he suggest to you or to others on your team that Democrats would filibuster any of the President's judicial nominees? C) Did you or your team have confidence that his speculations were accurate? D) Did you find, perhaps even in retrospect, that his intelligence was untoward or dubious?

36. One of Mr. Miranda's responsibilities during the period when your responsibilities overlapped was managing the Republican strategy during the floor fight on the nomination of Miguel Estrada to the court to which you are now nominated. A) Were you in daily contact with Mr. Miranda during this period? B) If you were not, which members of your team were responsible for or assisted with communications with him about the strategy for winning the confirmation of Mr. Estrada?

37. A) Did Mr. Miranda ever convey to you or any member of the White House staff the allegation that Mr. Estrada was being opposed because he was Latino, or similar words? B) Did you ever discuss this issue or allegation with Mr. Miranda or any other Senate staffer, including Senator McConnell's aide John Abegg, who was mentioned in the SAA report as providing at least one of the stolen computer files to Senator Hatch's chief nominations counsel, Rena Comisac, according to her statement? C) Did you ever discuss this issue or allegation with any Republican senate staffer or Senator?

38. A) Prior to the Bob Novak column published on February 9, 2003, did you hear that Democratic Senators had met in January regarding the decision to filibuster the nomination of Miguel Estrada? Mr. Novak has admitted writing a column published that day based on computer files that were stolen by others. B) Did you ever discuss the issue of Mr. Estrada's nomination or the filibuster with Mr. Novak? C) Did he ever indicate to you that he had a source or had seen a purported Democratic strategy memo on the Estrada filibuster? D) Did Mr. Novak ever speak with you or any of your colleagues in advance of the date that column was published about the decision to filibuster the Estrada nomination?

39. A) At any time from January 30th until November 14, 2003, did you ever hear that such a meeting occurred? B) Prior to November 14, 2003, did you hear that there was a computer file about any such meeting? According to reports, Senator Kyl's counsel Joe Matal received copies of some of the Democratic computer files from the Wall Street Journal on November 14, 2003. C) Were you or anyone at the

White House given copies of the purported Democratic computer files on November 14 or November 13 by staff of the Wall Street Journal or any other person?

40. A) Did you or anyone at the White House receive copies of any purported Democratic computer file, electronically or in hard copy, prior to November 14, 2003 or at any time since then? B) If your answer is "no," how do you know that no one on the White House staff saw such a memo? Mr. Gonzales wrote a letter in response to a letter of inquiry from Senator Leahy stating that the White House would not conduct an internal investigation to determine whether any of the stolen computer files were given to White House aides. C) Did you personally conduct any inquiry into whether any attorney or staff member of the White House received any of the stolen memos?

41. A) Please provide a list of the names of every staff member who worked on judicial nominations at the White House from December 2001 through December 2003, during the period that Mr. Miranda worked at the Senate and was stealing and reading Democratic computer files. Also, please indicate who from the Justice Department worked with you on nominations during this period.

42. According to the SAA report, Mr. Miranda directed that Jason Lundell provide computer files to the Executive Director of the Committee for Justice, Sean Rushton. You testified that you thought you "met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees." A) Please describe how you first met Mr. Rushton, how often you have met with him or spoken with him about nominations, and how often you have received e-mail communications from him about judicial nominations.

43. A) How often did you speak or meet with, or receive e-mail communications from, the leader of Committee for Justice, C. Boyden Gray, about judicial nominations issues? B) How often did you or members of the White House nominations team meet with or speak with either Mr. Rushton or Mr. Gray during 2003? The Committee for Justice has been a strong defender of Mr. Miranda's role in taking Democratic computer files, which is understandable I suppose since they received computer files at Mr. Miranda's direction according to Mr. Lundell. C) Please describe for the Committee any contacts you had with Mr. Gray, Mr. Rushton, or Mr. Lundell by phone, by e-mail, or in person during your work on judicial nominations.

44. A) Did you keep a telephone log, appointment book or any other document that makes any reference to Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Kay Daly (whose organization published some of the purported stolen computer files)?

45. Mr. Gray and Mr. Rushton's group, Committee for Justice, has held fundraisers with White House insiders like Karl Rove as well as members of the

Bush family, including the President's nephew. You testified that you had attended one of their fundraisers but you were not sure if you made a donation. A) Which fundraiser or fundraisers of theirs did you attend? B) Did you ever donate any money to this organization? C) Have you ever attended any other event sponsored or co-sponsored by this organization? Please be specific.

46. During the spring of 2003, the Committee for Justice began an attack ad campaign basically accusing Senate Democrats of opposing Mr. Estrada because he is Latino, an accusation that seems to be premised on Mr. Miranda's claims. A) Were you involved in any way in the creation of that ad or in any discussion about the benefits of any such ad campaign? B) Did you preview that ad before it was first aired? C) Did you ever discuss that ad, orally or in writing, with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? Did you ever discuss that ad with any other Republican Senate staffer or Senator?

47. During the spring of 2003 did you ever discuss the nomination of Priscilla Owen of Texas with Mr. Miranda? B) Did you ever discuss the Democratic or likely Democratic strategy with him on this nomination that was so important to the President, because she's from Texas, and to Mr. Rove, who was her state judicial election campaign strategist and fundraiser in the 1990s? C) Did you have any meetings with Mr. Miranda about this nomination? D) Did you have any e-mail communication about this nomination with him? E) Did you have any telephone conversations with him? F) Who on the White House staff was involved in the Owen nomination and floor strategy? G) Did you ever discuss, orally or in writing, Senator Kennedy's views on Justice Owen with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? With Mr. Novak? With Mr. Rove? Did you ever discuss this issue with any Republican in the Senate?

48. A) In April 2003, did you ever speak with any Republican in the Senate or any outside group or press about the issue of Democratic filibusters based on "substance as opposed to process?" B) Did you hear that or any similar phrase used by Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Rushton, Mr. Gray, or Ms. Daly?

49. A) Did you work with Mr. Miranda in his role in getting Majority Leader Frist to schedule a day of "constitutional debate" on the filibuster in March of 2003, when Vice President Cheney presided as President of the Senate? B) Did you discuss with Mr.Miranda, Mr. Abegg or any other Republican staffer strategies for overcoming the Democratic filibuster last spring? C) Were any outside organizations present at or involved in those discussions? D) Did you or any of your colleagues discuss that issue, orally or in writing, with Ms. Comisac or Mr. Dahl?

50. A) Were you involved in any way in the decision of Mr. Frist to hire Mr. Miranda as his chief aide on judicial nominations? B) Were you asked about

whether you thought he would do a good job by anyone on his staff ? C) Did you recommend him? D) Did Mr. Gray, Ms. Daly or any other leader of conservative groups commend Mr. Miranda's work on judicial nominations to you?

51. A) In the year 2002, when Mr. Miranda worked on the Judiciary Committee, did you have any communication with Mr. Miranda in 2002 about the nomination of Judge Dennis Shedd to the Fourth Circuit? B) Who on the White House staff was involved in the Shedd nomination, during the Committee consideration and the floor consideration? C) Which Senate staffers did you or White House staff work with on this nomination? D) Who worked on this nomination at the Justice Department? E) Did Mr. Miranda ever mention to you his views on the pace of consideration of the Shedd nomination? F) Did you ever have any communication, orally or in writing, about this matter with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly? G) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? H) Did you ever see any proposed questions for Judge Shedd that might be asked by Senate Democrats in advance of that hearing? I) Were you aware prior to Judge Shedd's hearing that there were concerns about Judge Shedd's civil rights record? How so?

52. A) From December 2001 through November 14, 2003, did you ever hear or learn that any Republican staffer claimed to have a Democratic mole or source or a "conscience stricken" Democrat who was providing Mr. Miranda or any other staffer with information about the hearing schedule or Democratic strategy? B) During this period did you ever hear a claim that there was a supposed computer glitch or security weakness that allowed Democratic computer files to be spied upon, read, stolen, printed or downloaded, prior to November 14, 2003?

53. A) Did you attend the nomination hearing for Miguel Estrada? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Who in the White House and at Justice worked on that nomination at that stage? E) Did any of them get that information? How do you know? F) Did you ever see or hear about any possible questions from Senate Democrats for Mr. Estrada that might be asked, in advance of that hearing?

54. A) Did you attend the first nomination hearing for Priscilla Owen? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Justice Owen that Senate Democrats might ask her in advance of that hearing?

55. A) Did you attend the nomination hearing for D. Brooks Smith? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Judge Smith that Senate Democrats might ask him in advance of that hearing?

56. During the winter of 2001 through the spring of 2002, did it come to your attention that Judge Charles Pickering's nomination was facing difficulty due to his legislative voting record on civil rights matters or his connection to the Mississippi Sovereignty Commission or his partner Carroll Gartin's ties to that Commission?

57. Mr. Miranda told the Los Angeles Times in a March 4 story that he believed that there was nothing wrong with him accessing the computer files of his opposing counsels on nominations and using them to help win what he calls the "judicial nominations war." In that story, he also noted that that trove of Democratic computer files he and Mr. Lundell located "was valuable information." In a March 5, 2004 Washington Times story, Mr. Miranda noted that he spied on and read the stolen computer files because he "had an obligation to learn everything [he] could possibly learn to defend [his] clients." He himself or through one of his proxies shared some of this valuable information with Mr. Novak and other columnists, as one of his primary responsibilities in Frist's office was dealing with the media and outreach to conservative groups and working with the White House, yet you are prepared to state unequivocally that you never saw or heard that Mr. Miranda had obtained Democratic computer files prior to his public admissions that he had done so?

58. Have you spoken with Mr. Miranda or received any written communication from him directly or through a third party about judicial nominations or the improper access of Democratic computer files between November 14, 2003 and today? B) Has the White House been approached or lobbied to hire him, as the Senate has?

Response to questions 33-58:

Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and

legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Kennedy

I. FOLLOW-UP ON QUESTIONS AT THE HEARING

A. THE DEMOCRATIC COMPUTER FILES

As you know, the questions surrounding the improper access to and dissemination of the Senate Democratic computer files have been referred for investigation by a special prosecutor. Since your office worked directly with both a key perpetrator and with other individuals and groups who appear to have received materials from the files, on the very subject of most of the files known to have been downloaded, it is to be expected that you and your office will be subjects of this investigation. We therefore need to be as sure as we can, before processing your nomination, that we have all of the information regarding your possible involvement in or knowledge of the matters under investigation.

You were asked a number of questions regarding this matter by Senators from both parties (see, e.g., pages 35-37, 97-100, 112-114 of the Transcript of the Hearing on the Nomination of Brett M. Kavanaugh, "hearing transcript"). In some cases the questions as asked were framed, or your answers were framed, in ways that restricted or limited them in some way, either by time frame (e.g., past, present, at, before or after a certain time), particular person (e.g., Rushton, Gray, Daly), a qualifier (e.g., "usually," "documents" vs. "information") or an ambiguous description (e.g., "that matter"), or otherwise. In some cases your answers were unresponsive even to the questions as asked.

Would you kindly review all of your testimony on this subject, and amplify each of your answers to provide and make clear that you are providing all of the information you have on the entire subject without regard to any restrictions or limitations or qualifiers in the original questions or your answers. In addition, where, on review you see that your answers were not fully responsive or were misleading in any way in view of your entire knowledge of the subject at any point in time, please provide fully responsive answers.

For example, when you were asked about the circumstances of your meetings with Manuel Miranda, you responded with what they "usually" were. In such a case, you should provide what the circumstances were in all instances, whether usual or unusual.

Similarly, you were asked two questions about whether you received documents or information that "appeared" to come from or that "you believed or were led to believe" came from Democratic files. Both answers were in the negative but were explained by almost identical statements, not responsive to the questions, that you were "not aware of that matter until I learned of it in the media." For present

purposes you should consider that you were asked: "Did Mr. Miranda (or anyone else) ever share, reference or provide you with any documents (or other facts, schedules, positions, plans or other information) that appeared to you (then or at any subsequent time, especially after you had become aware of the Republican access to Democratic files and had seen the files posted on the web or provided to the media and to groups or persons with whom you were in touch) to have been drafted or prepared by (or obtained or derived from the files, emails or other communications of) Democratic staff members of the Senate Judiciary Committee?

Similarly, you should re-frame your answer to the second question on page 37 of the hearing transcript to read its reference to "Associate White House Counsels" as including any interested White House staff, such as those in the Public Liaison or Legislative Affairs offices, to remove your own limitation to whether they were "aware" of the source of the materials and instead respond to the question asked, i.e., did they have access to the materials (or information), whether or not they were "aware" of the source.

As another example, you should review your answers to the questions regarding Boyden Gray on pages 113-114 of the hearing transcript, and remove your repeated limitation to "since I have been staff secretary," providing detailed information on your relationship to Mr. Gray throughout your White House employment.

In short, whether or not you believe the questions as asked should have elicited this information at the hearing, please fully disclose now, without standing on semantic limitations in the original questions or in this submission, everything you know, or in retrospect now realize or believe, about the circumstances surrounding the access to the Democratic files, the use and dissemination of the content or information derived from these files, and the availability of that content or information to you or anyone else in the White House, the Justice Department, the groups supporting the President's nominations, or anyone else outside the Democratic offices of the Judiciary Committee.

If this request is any way unclear, or leaves open any basis on which you might think that you need not provide everything you know on the entire subject, please let us know promptly, and we will clarify the request.

Response: Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. Also, to clarify one statement in your questions, I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past

Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

In addition to the above:

1. **Please provide your own conclusions as to the validity of Mr. Miranda's public statements as to his justification for his actions, their compliance with his ethical obligations, and the fact that he was operating in the interests of those who supported the nominations.**

Response: I am not familiar with all of Mr. Miranda's public statements regarding this issue, and it would not be appropriate in this context to comment on a matter under investigation.

2. **Since Boyden Gray has been publicly identified as a supporter of and spokesman for the White House on subjects relating to judicial nominations, please state whether you agree with his public defenses of Mr. Miranda, whether you or anyone at the White House have indicated to him that since he is so identified with the White House, he should desist from defending Mr. Miranda.**

Response: Mr. Gray is not an employee of the White House and does not speak on behalf of the White House. I am not familiar with particular public statements Mr. Gray may have made relating to Mr. Miranda.

3. **In view of Mr. Gonzales' refusal to investigate the subject, please state whether your (expanded) answer to the question on page 37 about whether "any other Associate White House Counsels had access" to the materials at issue is based on your own affirmative knowledge of what other White House staff knew or on your lack of knowledge of what other staff knew.**

Response: See my response to IA.

4. **Please state whether Mr. Miranda was ever involved in any of the moot courts or other meetings, conference calls, or conversations to prepare nominees for their hearings. If so, which ones?**

   a. **Did you ever meet with a nominee together with Mr. Miranda to prepare the nominee to testify before the Senate Judiciary Committee? If so, please describe that preparation and Mr. Miranda's role in it.**

   b. **Did Mr. Miranda ever directly or indirectly convey to any nominee, or to anyone involved in preparing any nominee, whether orally or in writing, any questions or areas of questioning that he suggested the nominee might be asked by any member of the Senate Judiciary Committee? If so, please describe the circumstances in which this occurred, and identify each nominee as to whose nomination Mr. Miranda's suggestion was made.**

Response: See my response to IA.

5. **Please describe any efforts you made, before or after your hearing, to review the materials and information you received from Mr. Miranda, other White House staff, the Justice Department, Mr. Gray, Mr. Rushton, Ms. Daly, or anyone else involved in judicial nominations, to determine whether anything they provided may have derived from the accessed Democratic files.**

Response: See my response to IA.

6. **Did Mr. Miranda ever tell you, suggest, or hint in any manner that he had a "source" or "mole" or other means of obtaining non-public information from the Democratic side? Did you ever hear that there was a disaffected Democratic staffer member or similar source providing such information?**

Response: See my response to IA.

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt toward Federalist Society members on the Administration's judicial nominations, you characterized the Society as "a group that brings together lawyers for conferences and legal panels. The Federalist Society does not take a position on issues. It does not have a platform." You said you were a member because it puts on "conferences and panels" where you can learn about issues and meet colleagues.

No reasonable person could think the Society is just a meeting place for lawyers. The Society's own website is much more candid than you were, describing it as "a group of conservatives and libertarians interested in the current state of the legal order." The Society decries, without attributing it to anyone in particular, the "orthodox liberal ideology which advocates a centralized and uniform society" and in pursuit of its goals has "created a conservative and libertarian intellectual network that extends to all levels of the legal community."

If, as a judge, your opinions merely followed and implemented the goals of the Society, would you still assert that you would not be "taking a position on issues" and not pursuing "a platform"?

Response: A judge should never attempt to follow or implement the goals of any organization. If confirmed as a judge, I would fairly and impartially interpret and apply the law.

C. PRYOR NOMINATION

Since responding to the questions on the Republican Attorneys General Association issue, have you reviewed your records and refreshed your recollections as to your role in preparing the nominee for questions on that subject? Please describe your role in more detail.

1. **You did not answer the questions I asked you on pages 134-135 of the hearing transcript, as to what if anything was done after the revelations in the media about the RAGA issue. Please do so in full now. Did you or anyone else in the White House or Justice Department check the issue out in more detail, have it investigated further, question the nominee about it, or otherwise follow up on the issue? Did any of you check with the RNC to determine who had the records that the nominee said they had? Please provide details on what was done, the results of any inquiry, and who received those results.**

Response: I believe Judge Pryor addressed these questions at his hearing. It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications.

2. **At any time before February 20, 2004, were you aware that Mr. Pryor was being considered for a recess appointment to the 11th Circuit? Were you aware that the recess which was going to be used was an intra-session recess of five business days surrounding a three-day holiday weekend? Were you aware that the appointment was to be made on the afternoon of the last business day of the recess? Were you aware that the shortest prior recess used for appointment of an Article III judge during an intra-session recess was a recess of 35 days? Did you express an opinion to anyone at the White House as to the validity or advisability of making such an unprecedented appointment? If so, without asking what your advice was, is there any reason we cannot assume that your advice had to have been either (a) that the appointment should be attempted, or (b) not followed.**

Response: It would not be appropriate in this context for me to discuss any internal Executive Branch communications on this matter. The United States Court of Appeals for the Eleventh Circuit has upheld the appointment of Judge Pryor.

3. **At your nomination hearing, I asked whether you assisted in preparing William Pryor to testify before the Senate Judiciary Committee. At that time, you indicated that you may have participated in a "moot court" session to prepare Mr. Pryor, but that you could not recall. Now that you have had additional time to review your work on nominations matters, please clarify whether you did in fact participate in a moot court preparation of Mr. Pryor.**

Response: I participated in moot court preparation for Judge Pryor.

4. **As you know, after William Pryor was nominated to the U.S. Court of Appeals for the Eleventh Circuit, several members of the Senate and the public expressed concern about extreme statements that Mr. Pryor had made, including his description of Roe v. Wade as "the worst abomination of constitutional law in our history." Do you agree with Mr. Pryor that Roe v. Wade is an "abomination of constitutional law"?**

Response: It would not be appropriate in this context for me to comment on the records of other nominees. Roe v. Wade is binding Supreme Court precedent. If confirmed, I would fairly and faithfully follow and apply all binding Supreme Court precedent, including Roe v. Wade.

5. **The Constitution gave the Senate a co-equal role in appointing federal judges to guarantee that the judiciary is independent, and does not simply reflect the political views of a particular President. The idea that federal judges should be independent of the other two branches of government is one of the most important aspects of our democracy. As I mentioned during your confirmation hearing, after the Supreme Court's 5 to 4 decision in Bush v. Gore, William Pryor stated that he had wanted the decision to be decided 5 to 4, so that President Bush "would have a full appreciation of the judiciary and judicial selection, so we can have no more appointments like Justice Souter." If all judges followed Mr. Pryor's view, the courts would be little more than an arm of the Executive Branch. Do you believe this is an appropriate view for a nominee to a federal court? Do you agree with Mr. Pryor's view about the role of federal judges?**

Response: I understand, respect, and fully appreciate the need for an independent Judiciary. I know how important an independent Judiciary is to our system of government, to the rule of law, and to the American people. It would not be appropriate in this context for me to comment on the records or statements of other nominees.

D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS

1. During your April 27, 2004, nomination hearing, you testified about your role in judicial nominations during the current Bush Administration and stated that you focused on "certain circuit court nominations" and on nominees from particular parts of the country.

a. Please note the month and year when you first began working on matters related to judicial nominations and, if you no longer have any role in matters related to nominations, the date on which your involvement in such matters ceased.

b. Which nominees did you work on, in any capacity?

c. With respect to each of the nominees listed in response, above, please describe your role in selecting, vetting, or recommending them for nomination to the federal courts of appeals, and please describe the role you played in their preparation for testimony or responses to written questions.

Response: I began working in the White House Counsel's Office in January 2001 and became Staff Secretary in July 2003. I began working on judicial nominations in January 2001. When I became Staff Secretary, I usually did not work on judicial nominations except to handle certain paperwork for the President.

I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

2. **During the hearing on your nomination, I asked what experience if any you have in labor law matters. Your answer noted that you have held several government positions, but did not identify whether you have any experience in labor law. Please clarify whether you worked on any cases or legal matters involving labor law claims, and if so, please identify the case and describe the nature of your work.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in labor law has been with respect to cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

3. **Please describe any legal experience you have involving the Americans with Disabilities Act. Please also describe any legal experience you may have involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act or any aspect of environmental law. In responding to this question, please identify the cases or legal matters on which you worked, and any role you played in drafting submissions or presenting oral argument to a court on these issues.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in disability and environmental law has been in cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

4. **In response to a question from Senator Schumer during the hearing on your nomination, you stated that you believed that you had attended a fundraiser for the Committee for Justice on at least one occasion. You could not recall whether you made a donation at that event, but indicated that you would check to confirm this fact.**

   a. **Please indicate whether you have ever attended a fundraiser for the Committee for Justice, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

   b. **Please state whether you have attended a fundraiser for the Coalition for a Fair Judiciary, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

Response: I attended one Friday happy hour hosted by the Committee for Justice in Washington, D.C. in the summer of 2003. Several hundred people attended. I believe I may have spent about $20 at the happy hour. Other than that, I have not attended any events for the Coalition for a Fair Judiciary or the Committee for Justice or contributed to them.

5. **You have testified that, as part of your work on judicial nominations, you coordinated with the White House Press Office and with outside organizations regarding nominees. As you know, Democrats who raised concerns about some of the Administration's most controversial nominees have been called anti-Black, anti-Latino, anti-Southern and anti-Catholic by some of these outside organizations.**

   a. **Did you play any role in encouraging conservative organizations and conservative media in these characterizations of Senators who opposed judicial nominees?**

   b. **Do you agree that such characterizations are unacceptable and mislead the public about the judicial nominations process?**

   c. **What if anything did you do to stop these White House supported organizations and surrogates from continuing to make these changes?**

Response: I spoke to and met with members of outside organizations who were interested in the judicial nomination and confirmation process. I have never encouraged anyone to portray Senators in the ways described in this question. No one in the Administration to my knowledge has ever made, suggested, or countenanced such charges.

II. OTHER ISSUES

The Office of the Counsel to the President plays a major role in decision-making with respect to access to Executive Branch materials and inquiries into allegations of improper activities by White House staff. Please provide a detailed description of your role in those activities, and specific responses to the questions below, answering any "yes" or "no" questions with a "yes" or "no" before providing any explanations. If any of your answers are classified, please separate the classified portions to the maximum extent possible, and provide a classified and unclassified version of such answers.

A. CIA LEAK INVESTIGATION

1. **Did you have any role in any activity relating in any way to the leak of information regarding Valerie Plame? If so, please detail your role.**

Response: No

2. **Did you personally question staff members or receive, review, or become familiar with evidence relating in any way to this matter? If so, please provide the details of what you did.**

Response: No

3. **Have you been questioned by the Special Prosecutor, the FBI, or anyone else about this matter?**

Response: No

4. **Were you involved in any internal investigation within the Executive Branch as to this matter? If so, please provide the details of what you did.**

Response: No

5. **As a result of anything you did, saw, read or heard, do you know who the person(s) was (were) who communicated information about Ms. Plame to the media? If so please provide the details of what you know.**

Response: No

6. **To the best of your knowledge, what efforts were made by your office or any other office in the White House to determine who disclosed the Plame information? Were you satisfied that all possible efforts were made to discover the facts? What other steps could have been taken that were not taken? Did you attempt to take those steps?**

Response: I do not have knowledge of this matter and these issues.

7. **Did you participate in the screening process conducted by the Counsel's office before materials on this subject requested by the Department of Justice were provided to the Department? Please describe that process and your role in detail.**

Response: No. I assumed my position as Staff Secretary in July 2003.

8. **What steps do you believe should have been or should be taken against anyone involved in disclosing the Plame information? Do you know whether such steps have been taken? If so, please provide the details of what steps have been taken and what other steps you believe should be taken.**

Response: I am not familiar with the facts relating to this matter and did not work on this matter.

B. BARRIERS TO ACCESS TO 9/11 INFORMATION

1. **Did you or anyone else in your office or, to the best of your knowledge, elsewhere in the White House, have any contact in 2001 or 2002 with (a) any member or staff of the Senate Judiciary Committee, or (b) any other Senator or Senate staff, with respect to the Committee's desire to investigate issues relating to the 9/11 attacks? If so, please provide details of what you did and what you know. What do you know about the efforts to deny authorization or funding for that investigation? What was your role and that of your office? If your office had nothing to do with that matter, who handled it for the White House?**

Response: I did not work on this matter.

2. **Did you or anyone else in your office or, to your knowledge, elsewhere in the White House have any role in the denial, delay or limitation of access to the materials and information requested by the Joint Intelligence Committees for their inquiry into 9/11 as described in the Appendix to their Report? In particular, did you or your office participate in any way in the decision to classify the fact that the President had received the PDB dated August 6, 2001? If either answer is yes, please provide details of what you know and what you did.**

Response: I did not work on this matter.

3. **Did you or your office have a role (a) in formulating or implementing the White House opposition to the establishment of the 9/11 Commission before September 2002, (b) in negotiating the details of the legislation establishing the Commission's mandate and structure once the White House agreed to its establishment, or (c) in considering, determining, and negotiating with regard to the White House responses to requests from the Commission for materials, interviews, and information? Please describe your own role in detail.**

Response: I did not work on this matter.

4. **Were you in any way responsible for the White House statements that it was impermissible for Ms. Rice to testify and for the White House to release the August 6th 2001 PDB? If so, please describe your role in detail.**

Response: I did not work on this matter.

5. **Do you see any meaningful distinctions between President Ford's public testimony before a House subcommittee in 1974 and President Bush's appearance before the 9/11 Commission which justify his refusal to testify in public?**

Response: I did not work on this matter.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

Response: The responsibility for reviewing background investigation files was performed by the Counsel and Deputy Counsel to the President, as well as attorneys in the Department of Justice. I therefore was rarely involved in that particular aspect of the judicial selection process.

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

Response: Yes.

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . . The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: I believe Judge Pickering addressed inquiries about this matter in his confirmation hearings. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a

confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black*, and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black*. Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" -- free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: On these kinds of ethics issues, I would faithfully follow all applicable statutes, court decisions, and policies. I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Response: It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Schumer

1. When the Supreme Court issues non-unanimous opinions, Justice Scalia and Justice Ginsburg frequently find themselves in disagreement with each other. Do you more frequently agree with Justice Scalia's position or Justice Ginsburg's?

Response: As an appeals court judge, I would faithfully apply the Supreme Court's decisions regardless of who authored any particular decision. I have great respect for all of the Justices on the current Court; eight of them were serving on the Court when I was a law clerk for Justice Kennedy. All of the Supreme Court Justices disagree with one another at times, and that is expected and understandable since the Supreme Court decides only the most difficult and complex cases.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of the hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that's about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

2. At your confirmation hearing, you testified that you "don't know in the vast, vast majority of cases" what nominees' positions are on choice "unless there has been a public record before." As you know, with numerous nominees there has been "a public record before." They have run or been active in anti-choice organizations, have sponsored anti-choice legislation, have worked for anti-choice causes, and in the instance of Justice Priscilla Owen as described by White House Counsel and then-Texas Supreme Court Justice Alberto Gonzales, engaged in "unconscionable judicial activism" on the anti-choice side of a case that came before her as a judge.

The record of Democratic Senators makes it patently clear that none of us has a litmus test when we vote on judges. We have voted for dozens who are

demonstrably anti-choice. Many, however, believe that this Administration has a litmus test when it comes to choosing judicial nominees.

a. Do you agree that based on the records of numerous judicial nominees, the White House had substantial reason to be confident that they are anti-choice?

b. Do you agree that based on Democratic Senators' records of voting for a substantial majority of the nominees whose records show them to be anti-choice, it is clear we do not have a litmus test?

c. At your hearing, you testified that you are "sure there are many" of President Bush's judicial nominees who are pro-choice. Please identify those judicial nominees of this Administration whose records provide substantial reason to believe they are pro-choice.

Response: I do not agree that "numerous nominees" have had a public record on abortion. I am aware of only a handful out of more than 200 judicial nominees who had any kind of record that would indicate what their personal views on abortion are. I cannot identify which of the more than 200 judicial nominees are pro-life or pro-choice (with the few exceptions of nominees who had taken public positions on the issue) because the President does not have a litmus test on this issue and the Administration does not ask judicial candidates their views on this issue.

3. If you are confirmed and, as a judge, you find yourself in the identical circumstances that Justice Scalia found himself in for Cheney v. U.S. District Court, will you recuse yourself?

Response: On recusal issues, I would faithfully follow all applicable statutes, court decisions, and policies, including 28 U.S.C. 455.

4. Over the last few years, progressive groups have been excoriated by the right wing for their role in the confirmation of federal judges. My view is that outside groups on both sides, representing the interests of millions of Americans, have an appropriate place in the nomination and confirmation process. But there seems to be a certain degree of denial on the Right when it comes to recognizing that outside groups on both sides are involved in the process. We all know that organizations such as the Committee for Justice, Coalition for a Fair Judiciary, and individuals such as C. Boyden Gray and Kay Daly have been active in the efforts to confirm President Bush's judicial nominees.

I want to be clear in asking this question, that I have no objection to the involvement of activist groups on the Right. My objection is to the hypocrisy of the criticism when the Right is engaged in conduct identical to what progressives are doing.

To set the record straight on the extent of their involvement, please describe the interaction, during your time in the White House Counsel's Office, between the

Administration and the below-listed outside groups and non-government employees regarding judicial nominations, including but not limited to their roles in identifying individuals for judicial nominations, advocating for or against their nominations, evaluating and vetting them, and developing strategies around their nominations and confirmations.

a. Committee for Justice (and officers and employees thereof)
b. C. Boyden Gray
c. Coalition for a Fair Judiciary (and officers and employees thereof)
d. Kay Daly
e. Sean Rushton
f. The Federalist Society (and officers and employees thereof)

Response: I agree that outside groups have a perfectly legitimate and appropriate role in expressing their views on the judicial nomination and confirmation process. Members of the Administration met with outside groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

5. You took over as White House staff secretary in May of 2003, just weeks before Administration officials leaked the identity of then-covert CIA operative Valerie Plame to retaliate for her husband's authoring an op-ed that criticized the Administration. As staff secretary, you control the flow of most paper to the President. Ms. Plame's name was leaked on or about July 13, 2003.

I want to be absolutely clear that I have no reason to believe you had anything to do with the leaking of Ms. Plame's name or that you know anything about who committed that crime. However, given that you have been nominated for such a high post and given the positions you have held in the White House, both in the counsel's office and as staff secretary, I believe we have a duty to get your responses to the following questions on the record.

a. What, if anything, do you know about the identity of the person or people who made Ms. Plame's name public?

Response: See the response to this series of questions after question g below.

b. Have you spoken with investigators and/or prosecutors working on the Plame case, regarding the Plame case?

c. Have you testified in the Grand Jury in the Plame case?

d. Have you been told that you are either a target or a subject of the investigation into the criminal leaking of Ms. Plame's identity.

e. **Before July 14, 2003, did you see any paper or electronic document submitted to the President (or otherwise) bearing Ms. Plame's name, identity, or otherwise referencing the wife of Ambassador Joe Wilson?**

i. **If so, please describe in detail what you saw.**

ii. **If so, have you informed the federal prosecutors investigating the case of what you saw?**

f. **Were you aware that anyone was discussing or considering making Ms. Plame's name (or the identity of a covert CIA operative) public before such occurred?**

g. **Were you aware of any other discussion or consideration of any other actions directed toward Ambassador Joe Wilson after publication of his op-ed that criticized the Administration?**

Response: I began my service as Staff Secretary in early July 2003. I am not familiar with the facts relating to this matter, and the answer to these questions is no.

Responses of Brett M. Kavanaugh to the
Written Questions of Senator Durbin

1. At your nomination hearing, you discussed your involvement in the judicial nomination process when you worked in the White House Counsel's office. You indicated that you were involved in both the selection side and the confirmation side, but you described only the confirmation side. Please provide details about your role in the selection side. What was the nature of your role in selecting judicial nominees for President Bush?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. In assisting with Illinois district court nominations, I worked with members of your staff, as well as staff who worked for Senator Fitzgerald. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

2. For the following judicial nominees, please indicate: (A) whether you recommended the nominee for the position to which he or she was nominated, and (B) the nature of your involvement in their selection and confirmation: Miguel Estrada, Charles Pickering, Priscilla Owen, William Pryor, Carolyn Kuhl, Janice Rogers Brown, William Myers III, Claude Allen, Terrence Boyle, D. Brooks Smith, Dennis Shedd, Michael McConnell, Jeffrey Sutton, John Roberts, Jay Bybee, Timothy Tymkovich, William Haynes, J. Leon Holmes, and Paul Cassell.

Response: It would not be appropriate in this context for me to disclose advice and recommendations that were provided to the President or Judge Gonzales. As I noted in response to Question 1, I participated in the meetings of a judicial selection committee that was responsible for making recommendations to the President. During my time, each of the nominees listed in your question was evaluated and discussed. As with prior Administrations, the White House Counsel's Office and Department of Justice attorneys

assist judicial nominees in the confirmation process, which included reviewing nomination paperwork and preparing for hearings. As part of my responsibilities, I assisted several judicial nominees in this manner, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

3. When you were helping select judicial nominees for President Bush, did you give preference to individuals who were members of the Federalist Society? Did you consider membership in the Federalist Society to be a positive factor for a potential nominee? Why?

Response: The President has selected judicial nominees based on their qualifications, including their intellect, integrity, and temperament, and whether they will fairly and strictly interpret the law. As far as I am aware, the majority of President Bush's judicial nominees have not been members of the Federalist Society.

4. In your capacity as Staff Secretary and Assistant to the President, have you worked on judicial nominations issues either formally or informally? If so, were you involved in the decision to give recess appointments to Charles Pickering and William Pryor? If you were, please describe the nature of your involvement and recommendations. If you no longer work on judicial nominations, please indicate the month you stopped working on this issue.

Response: I became Staff Secretary in early July 2003. As Staff Secretary, I perform traditional tasks assigned to that position, such as assisting with the President's signing of commissions, orders, and other documents, reviewing and clearing memoranda for the President, coordinating drafts of Presidential speeches, and helping to prepare the President's briefing books. In that office, I usually do not work on judicial nominations except with respect to coordinating paperwork. If asked by the President, Counsel, or other members of the staff for my opinion or advice, I provide it as appropriate. As I noted in response to Question 2, it would not be appropriate in this context for me to disclose recommendations or advice that were provided to the President or Judge Gonzales.

5. You and Justice Janice Rogers Brown were nominated together to the 11th and 12th seats on the D.C. Circuit. During the Clinton Administration, some Senate Republicans argued that there was no need for these seats to be filled because the workload did not warrant it. President Clinton nominated individuals to the 11th and 12th seats but those nominees were never given a hearing and vote. There is no evidence that the workload of the D.C. Circuit has increased since that time. In fact, since 1997 the number of appeals is down 27%, the number of pending cases is down 28%, and the number of written decisions per judge is down 14%. In this light, do you believe that it is advisable to fill these seats today? Was any consideration given by the Bush White House to not filling these seats? Please explain.

Response: Congress decides the appropriate number of seats on the federal courts of appeals. Congress historically has done this in consultation with the Judicial Conference of the United States. My understanding is that Congress established in the early 1980's that the D.C. Circuit should have 12 seats.

6. What role did you play in helping judicial nominees answer written questions submitted by Senators on the Judiciary Committee? Please provide examples.

Response: On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

7. You served as a law clerk to Supreme Court Justice Anthony Kennedy. In a December 2003 *Vanity Fair* article, a fellow law clerk of yours at the Supreme Court discussed your attitude about death penalty appeals. He said: "You'd kind of know instinctively how he'd come out, no matter what the petition was." What is your response to this statement? Without naming specific cases, were there any capital punishment cases you worked on in which you recommended that the death penalty not be administered?

Response: The statement is unattributed and inaccurate. I cannot respond to the remainder of the question because law clerks maintain the confidentiality of their work as Supreme Court clerks in perpetuity. It therefore would not be appropriate for me to disclose recommendations or advice I provided to Justice Kennedy on particular cases or matters.

8. At your hearing, Senator Kennedy asked whether you agreed with the statement from the Federalist Society's mission statement that "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Please provide a more direct and complete answer to the question than the one you gave Senator Kennedy at your hearing.

Response: I did not find political affiliation or ideology to correlate to whether one was a good law school professor. It is my impression and widely believed that most law school faculties are composed primarily of Democrats; for example, most of my professors at Yale Law School were Democrats, and many likely would describe themselves as liberal. I liked my law school professors and learned a lot from them and consider them mentors and in many cases friends.

9. One of the stated goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities do you believe need to be reordered within the legal system of America?

Response: At the federal level, Congress and the President determine what laws to pass based on their assessment of priorities and values. The courts must fairly interpret that law and not assume the role of legislators. As an appeals court judge, I would carefully follow the precedents of the Supreme Court and fairly interpret and apply the statutes passed by Congress.

10. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

A. As someone who had significant responsibility at the White House for carrying out this mandate, do you believe that President Bush has been successful in fulfilling this pledge?

B. How would you describe the judicial philosophy of Justices Scalia and Thomas?

C. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

D. Do you consider yourself to be a strict constructionist? Why or why not?

E. **Do you think that the Supreme Court's landmark decisions in *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade* are consistent with strict constructionism? Why or why not?**

Response: President Bush has stated that he seeks judicial nominees who will apply the law as written and not legislate from the bench. He seeks nominees who have demonstrated that they know the difference between personal opinion and the strict interpretation of the law. Almost all of President Bush's judicial nominees have been rated "Well Qualified" or "Qualified" by the American Bar Association and have been confirmed by the Senate.

If confirmed, I would fairly interpret and apply the law, carefully and strictly adhere to the text of the Constitution and of the statutes passed by Congress, and faithfully follow the binding precedents of the Supreme Court and D.C. Circuit. Beyond that, I would not attach any particular overarching label to my likely judicial approach.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of [the] hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. See Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg also specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

11. In the case *Rice v. Cayetano*, you were the counsel of record in an amicus brief arguing that the state of Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs. In a 1999 *Wall Street Journal* op-ed you wrote about *Rice v. Cayetano* entitled "Are Hawaiians Indians? The Justice Department Thinks So," you expressed considerable cynicism about the Clinton Administration's justification for filing a brief on behalf of the state of Hawaii. You wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."

A. Do you stand by your statement that the Clinton Administration filed a brief on behalf of Hawaii because "Hawaii is a strongly Democratic state," and that the Clinton Administration took "the politically correct position" in order to "support the state's system of racial separatism"?

B. Do you believe there are any instances in which the Ashcroft Justice Department has failed – in your words – "to put law and principle above politics and expediency"? If so, please provide specific examples.

Response: I wrote that op-ed in conjunction with my representation of a client and did so to advance the position of my client. As the article states, my client argued that Hawaiians could not be analogized to Native Americans for the purposes of justifying a racial voting qualification. The Department of Justice took the opposite view. The

Supreme Court agreed 7-2 with the position of my client. It would not be appropriate for me to state my agreement or disagreement with what I wrote as a lawyer for a client. That said, I usually do not think it appropriate or necessary to ascribe negative motives to decisions of government officials. The statement in this article could have been phrased differently; had it been phrased differently, it would have more effectively represented my client's interests. With respect to sub-part B of the question, the answer is no.

12. In your *Wall Street Journal* op-ed, you wrote that the position of the Clinton Administration was "to allow political correctness to trump the Constitution." You also wrote: "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe." Justices Ginsburg and Stevens were apparently "fooled" by the Justice Department because they dissented in this case and largely adopted the Justice Department's position. At your nomination hearing, however, you described Justice Ginsburg as "an excellent Justice." Do you believe that your *Wall Street Journal* op-ed was excessively harsh in its condemnation of the Clinton Administration and Supreme Court Justices who voted for that Administration's position?

Response: As I noted in response to Question 11, I believe the passage you quote would have more effectively supported my client's position had it been phrased differently.

13. One of your clients in the *Rice v. Cayetano* case was the Center for Equal Opportunity, an organization that opposes the use of affirmative action. The organization's mission statement refers to affirmative action as "racial preferences" and states: "CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting."

A. Do you believe that affirmative action constitutes a "racial preference"?

B. Do you share the desire of your former client to prevent the use of affirmative action in the contexts of employment, education, and voting?

Response: The Supreme Court has decided many cases on affirmative action programs and, if confirmed, I would faithfully follow those precedents. The Court has established detailed tests to assess whether affirmative action programs are race-based or race-neutral – and also whether they pass constitutional muster. My personal views or the views of my former clients on these or other issues would not affect how I would approach decisions as an appeals court judge. I would carefully and faithfully follow all precedent of the Supreme Court.

14. In the case *Santa Fe Independent School District v. Doe*, you wrote an amicus brief on behalf of Representatives J.C. Watts and Steve Largent in which you argued that the use of loudspeakers for student-led prayers at high school football games did not constitute an Establishment Clause violation of the First Amendment. The Supreme Court rejected your argument by a vote of 6-3, ruling that the prayer involved both perceived and actual endorsement of religion. Do you believe that the Supreme Court was wrong in reaching that decision?

Response: As a judicial nominee, it would not be appropriate for me to comment on whether a particular Supreme Court decision was correct, for the reasons set forth by Justice Ginsburg in her hearing, for example. See also response to question 10 above. As an appeals court judge, I would faithfully apply the Supreme Court's decision in the Santa Fe case, which resolved a question that had previously divided lower courts after the question had been left open in Lee v. Weisman (1992).

15. Other than the work you performed on behalf of J.C. Watts and Steve Largent in *Santa Fe Independent School District v. Doe*; in defense of a local ordinance that granted religious entities an exemption from the county's zoning restrictions; and on behalf of the American relatives of Elian Gonzalez, please describe all other pro bono legal work that you have performed as an attorney.

Response: I have worked in public service as a government lawyer for 11 of the 14 years since I graduated from law school. In private practice, I spent a significant amount of time doing pro bono and reduced-fee work. In addition to the cases you cited, for example, I worked on a religious freedom case in the Supreme Court known as Good News Club v. Milford Central School District. I also worked on school choice litigation in Florida for a reduced fee.

16. You indicate on your Senate questionnaire that you "went to Deland, Florida, in November 2000 to participate in legal activities related to the recount." Please describe these activities in more detail.

Response: Republican and Democratic lawyers observed the recount activities in Florida in 2000. I was part of a group of Republican lawyers that provided observers for the recount in Volusia County. The recount activities in Volusia County were relatively quick and uncontroversial.

17. You indicate on your Senate questionnaire that you were the Regional Coordinator for Pennsylvania, Maryland, Delaware, and the District of Columbia for a group called "Lawyers for Bush Cheney 2000." Please describe your activities

as Regional Coordinator.

Response: Among other activities, I would participate in weekly conference calls, communicate with the state directors for the states I was assigned about their efforts to recruit members for Lawyers for Bush-Cheney, and attend events held for Governor Bush.

18. On your Senate questionnaire, you stated: "In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit." Please provide more information about the meaning of that statement. Why were you not selected for the Fourth Circuit? Was the opposition of the Maryland Senators a factor in your not being selected?

Response: I met at length with Senator Sarbanes, and he indicated that my record made me a better nominee for the D.C. Circuit than for the Fourth Circuit since I had practiced primarily in Washington and as a government lawyer. He made it clear that he would not support a nominee for that seat on the Fourth Circuit unless the nominee was a Maryland lawyer, maintained an office in Maryland, and practiced regularly in the Maryland courts. He said that Senator Mikulski agreed with him about this.

SUBMISSIONS FOR THE RECORD

JOHN CORNYN

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FOR IMMEDIATE RELEASE
April 27, 2004

CORNYN INTRODUCES BRETT KAVANAUGH IN JUDICIARY COMMITTEE HEARING

WASHINGTON—*U.S. Sen. John Cornyn, Chairman of the Judiciary Committee's Constitution subcommittee, introduced Brett K. Kavanaugh, nominee for the U.S. Court of Appeals for the D.C. Circuit, at his nomination hearing in the Judiciary Committee on Tuesday.*

--Below is the text of Sen. Cornyn's introduction of Brett Kavanaugh as prepared--

Mr. Chairman and Ranking Member, I am privileged to introduce to the committee Brett Kavanaugh – a distinguished attorney and devoted public servant. I have known Brett for several years, and I have had the privilege of working with him on a case I argued to the US Supreme Court, so I have been able to observe his legal skills from up close. I have every confidence that Brett would be an exceptional jurist on the U.S. Court of Appeals for the D.C. Circuit. His distinguished academic and professional record confirms beyond all doubt that he possesses the intellectual ability to be a federal judge. His temperament and character demonstrate that he is well suited to the office. Indeed, I can think of no better evidence of his sound judgment than the fact that he has chosen to marry a good woman from the great state of Texas. Brett deserves the support of this committee, and the support of the United States Senate.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit court is currently vacant. And as you also know, Mr. Chairman, the D.C. Circuit is unique amongst the federal courts of appeals. Of course, the D.C. Circuit is an appellate court, not a trial court. Appellate judges do not try cases or adjudicate factual disputes – instead, they hear arguments on legal issues. But unlike the docket of other courts of appeals, the docket of the D.C. Circuit is uniquely focused on the operations of the federal government. Accordingly, attorneys who have experience working with and within the federal government are uniquely qualified to serve on that distinguished court.

Brett Kavanaugh is an ideal candidate for the D.C. Circuit. He has an extensive record of public service. For over a decade, he has held the most prestigious positions an attorney can hold in our federal government. After graduating from Yale College and Yale Law School, Brett served as a law clerk to three distinguished federal appellate judges, including U.S. Supreme Court Justice Anthony Kennedy. Brett has also served as an attorney in the Office of the Solicitor General, representing the United States government in cases before the U.S. Supreme Court. He has served as a federal prosecutor in the Office of Independent Counsel under the Honorable Kenneth Starr. He has personally argued civil and criminal cases in the U.S. Supreme Court and federal courts of appeals throughout the country. And he has been called upon for his wisdom and counsel by the President of the United States – first through his service as Associate Counsel and Senior Associate Counsel to the President, and now as Staff Secretary, one of the President's most senior trusted advisers.

Mr. Chairman, I can think of few attorneys of any age who can boast this level of experience with the inner workings of the federal government. It is no wonder, then, that the American Bar Association has rated Brett Kavanaugh "well qualified" to serve on the D.C. Circuit – "the gold standard by which judicial candidates are judged," according to leading Senate Democrats on this very committee.

Ordinarily, a nominee possessing such credentials and experiences would have little difficulty receiving swift confirmation by the United States Senate. Unfortunately, as observers of this committee well know, we are not living under ordinary circumstances today. I hope that the distinguished nominee before the committee today will receive fair treatment. His exceptional record of public service in the federal government will serve him well on the D.C. Circuit bench. His wisdom and counsel have been trusted at the highest levels of government. Yet I fear that it is *precisely* Brett's distinguished record of experience that will be used against him. I sincerely hope that that will not happen – after all, it would be truly perverse to use one's record of service against a nominee, especially with respect to a court that is so much in need of jurists who are knowledgeable about the inner workings of the federal government.

Indeed, many successful judicial nominees have brought to the bench extensive records of service in partisan political environments. I have often said that, when you place your hand on the Bible and swear an oath to serve as a judge, you change – you learn that your role is no longer partisan, your duty is no longer to advocate on behalf of a particular party or client, but rather to serve as a neutral arbiter of law. The American people understand that when your job changes, you change – and that people are fully capable of putting aside their personal beliefs in order to fulfill professional duty.

That's why this body has traditionally confirmed nominee after nominee with clear records of service to one particular party or political philosophy. Ruth Bader Ginsburg served as General Counsel of the ACLU. Of course, it's difficult to imagine a more ideological job than General Counsel of the ACLU. Yet she was confirmed by overwhelming margins of the United States Senate – first by unanimous consent to the D.C. Circuit, and then by a vote of 96-3 to the U.S. Supreme Court. Stephen Breyer was the Democrats' Chief Counsel on the Senate Judiciary Committee, before he too was easily confirmed to the 1st Circuit and then to the U.S. Supreme Court. Byron White was the second most powerful political appointee at the Justice Department under President Kennedy, when the Senate confirmed him to the Supreme Court by voice vote. Liberal activist Abner Mikva was a Democrat member of Congress when he was confirmed to the D.C. Circuit by a majority of the Senate. Indeed, as many as 42 of the 54 judges who have served on the D.C. Circuit came to the bench with political backgrounds – including service in appointed or elected political office. All received the respect of an up-or-down vote on the floor of the United States Senate, and all received the support of at least a majority of Senators, as our Constitution demands.

So historically, this body and this committee have exercised the advice and consent function seriously and appropriately, by emphasizing legal excellence and experience – and not by punishing nominees simply for serving their political party. It would be tragic for the federal judiciary, and ultimately harmful to the American people who depend on it, to establish a new standard today, and to declare that any attorney who takes on a political client is somehow disqualified from confirmation – no matter how talented, how devoted, or how fit for the federal bench they may truly be.

Brett Kavanaugh is a skilled attorney who has demonstrated his commitment to public service throughout his life and career. He happens to be a Republican, and he happens to be close to the President. This is a Presidential election year, but the rigorous fight for the White House should not spill over to the judicial confirmation process. Last year, it was wrong for close friends of the President like Texas Supreme Court Justice Priscilla Owen to be denied even the basic courtesy and Senate tradition of an up-or-down vote, simply to score political points against the President. This year, it would be terribly wrong for Brett to be denied confirmation – or at least an up-or-down vote – simply because he has ably and consistently served his President, his party, and his country.

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News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

April 27, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nomination of

BRETT M. KAVANAUGH

TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

I am pleased to welcome to the Committee today members, guests, and our nominee, Mr. Brett Kavanaugh, who has been nominated by President Bush to be a United States Circuit Judge for the District of Columbia Circuit. We also welcome members of his family. I would note his father, Mr. Ed Kavanaugh, long-time President of the CTFA, is a great individual whom we all respect. Welcome to you all.

Before we turn to the nomination, I want to tell members of the Committee that I remain hopeful that we can continue to complete the work of the Committee on both legislation and nominations. I was disappointed that we were not able to accomplish more at our markup last week. Earlier this month we did report five district judges and two circuit judges. I do appreciate the Committee's efforts in that regard.

I remain concerned about the executive calendar and floor action. I remain hopeful that an accommodation on nominees can be reached and that floor action can be scheduled for those judges. The Senate has confirmed only four judges this year – all District court judges. By comparison, in the last Presidential election year of 2000 – with a Democratic President and a Republican Senate – seven judges had been confirmed by this point in the year, including five Circuit court judges. Furthermore, we are way behind the pace of that election year, which saw a total of 39 judges confirmed. And we remain well behind President Clinton's first term confirmation total of 203.

So while we have made some progress in reporting nominees to the full Senate, the work of confirming judges remains. We presently have twenty-nine judges on the Executive Calendar. Five Circuit nominees remain from last year on the executive calendar in addition to the six reported this year. Eighteen district nominees are available for Senate confirmation, including two holdovers from the last session. But we are making progress, and I thank all members for their support and ask for their continued cooperation.

Today we will consider the nomination of Mr. Brett M. Kavanaugh. He is an outstanding nominee, who has been nominated to the Circuit Court of Appeals for the District of Columbia. He comes to us with a sterling resume and a record of distinguished public service. Mr. Kavanaugh currently serves as Assistant to the President and Staff Secretary, having been

appointed to that position by President George W. Bush in 2003. He previously served in the Office of Counsel to the President, as an Associate Counsel and Senior Associate Counsel.

After graduating from Yale Law School in 1990, Mr. Kavanaugh served as a law clerk for three appellate judges: Justice Anthony M. Kennedy of the Supreme Court, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit. He served for one year as an attorney in the Office of the Solicitor General, where he prepared briefs and oral arguments.

Mr. Kavanaugh served in the Office of Independent Counsel, under Judge Starr, where he conducted Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. He also was responsible for briefs and arguments regarding privilege and other legal matters that arose during investigations conducted by the Office. Mr. Kavanaugh was part of the team that prepared the 1998 report to Congress regarding possible grounds for impeachment of the President of the United States.

In addition to his extensive public service, Mr. Kavanaugh was also in private practice. As a partner at the distinguished firm of Kirkland & Ellis he worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation.

Mr. Kavanaugh received his law degree from Yale Law School, where he was a Notes Editor for the Yale Law Journal. He is a *cum laude* graduate of Yale College, where he received his B.A. degree.

The American Bar Association has rated Brett Kavanaugh as "Well Qualified." Let me remind everyone what that rating means. According to guidelines published by the American Bar Association Standing Committee on Federal Judiciary, "To merit a rating of 'Well Qualified,' the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

I want to turn now to a few of the arguments which I have heard raised by a number of Mr. Kavanaugh's opponents and address some of the concerns I expect to hear today.

First, is that Mr. Kavanaugh is too young and inexperienced to be given a lifetime appointment to the federal bench, particularly to the important D.C. Circuit Court of Appeals. There are many examples of judges who were appointed to the bench at an age similar to Mr. Kavanaugh, who is 39 years old, and have had illustrious careers. For example, all three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39 and all have been recognized as distinguished jurists. Justice Kennedy was appointed to the 9th Circuit when he was 38 years old; Judge Kozinski was appointed to the 9th Circuit when he was 35 years old; and Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.

I think many of my colleagues would agree that age is not a factor in public service, other than the constitutional requirements. I would note that many in this body began their service in

their 30's if not barely age 30. Through successful re-elections we have been benefited from a life-time of service from such members.

With regard to judicial experience, I would reiterate that Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials with extensive experience in the appellate courts, both as a clerk and as counsel, having argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

As I have pointed out with previous nominees, a number of highly successful judges have come to the federal appellate bench without prior judicial experience. On this particular court, the D.C. Circuit, only three of the nineteen judges confirmed since President Carter's term began in 1977 previously had served as judges. Furthermore, President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.

Opponents will attempt to portray Mr. Kavanaugh as a right-wing ideologue who pursues a partisan agenda. I believe this allegation is without merit and a careful scrutiny of his record will demonstrate otherwise. He is an individual who has devoted the majority of his career to public service, not private ideological causes. Within his public career he has dedicated his work to legal issues, always working carefully and thoroughly in a professional manner.

In short, Mr. Kavanaugh is a person of high integrity, of skilled professional competence, and outstanding character. He will be a great addition to the federal bench and I look forward to hearing his testimony and responses.

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Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

April 27, 2004

PRINTABLE VERSION

Statement of Senator Patrick Leahy
On the Nomination of Brett Kavanaugh
April 27, 2004

Today we are considering the nomination of yet another controversial nomination to a U.S. Court of Appeals, this time to the extremely important D.C. Circuit Court of Appeals. This is arguably the most important court in the nation, with the exception of the Supreme Court, and nominations to it deserve the most careful scrutiny we can give. They also deserve the utmost seriousness of purpose from the President who sends these nominations up to the Senate, as well as rigorous consideration and a respect for the stature of the judges who have served there over the years.

While I see that Mr. Kavanaugh is a well-educated young man who has had a series of prestigious jobs, some legal, some political, with prominent conservatives, I have serious doubts about whether this job is right for him and whether he is right for this job.

This is not his first involvement with judicial selection. During his time in the White House Counsel's Office he served as the President's point man on judicial nominations, bringing us such nominees as Charles Pickering, Priscilla Owen, Miguel Estrada, William Pryor, Carolyn Kuhl and Janice Rogers Brown. Nor is this Mr. Kavanaugh's first involvement with politics. He has built quite a political resume having served four years with the Office of Independent Ken Starr in his pursuit of the Clintons, even helping Mr. Starr write his notorious report to Congress. But whether those experiences add up to the quality and quantity of experience usually associated with the D.C. Circuit remains to be seen.

I look forward to hearing from Mr. Kavanaugh on those and other issues of concern to me about his nomination.

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WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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(202) 638-2269 FAX (202) 638-5936

April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: NAACP OPPOSITION TO THE NOMINATION OF BRETT KAVANAUGH TO THE DC CIRCUIT COURT OF APPEALS

Dear Senators Hatch and Leahy:

On behalf of the National Association for the Advancement of Colored People (NAACP), our nations oldest, largest and most widely recognized grassroots based civil rights organization, I would like to express our opposition to the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia.

Mr. Kavanaugh served on the staff of the White House Judicial Selection Committee as Associate Counsel. As such, Mr. Kavanaugh was responsible for overseeing efforts initiated by President George W. Bush, to pack our nations Courts with extreme right-wing judicial nominees. Clearly inherent to the President's judicial selection process should be the impetus to select nominees that maintain the judicial temperament and integrity necessary to temperate our nations laws as intended by it's crafters, instead of legislating from the Bench. Rather than focusing on nominees that would earn the respect of the American people by maintaining an ideological balance on the U.S. Circuit Court, Brett Kavanaugh focused on right-wing extremist candidates that would seek to employ judicial activist strategies to eviscerate civil rights laws. This disregard for judicial balance and intent of law is clearly

demonstrated in nominees such as Caroline Kuhl, Priscilla Owen, Charles Pickering, William Pryor, Janice Rogers Brown, and Claude Allen. Kavanaugh's actions to fill the U.S. Court system with such extremist Jurist is deeply disturbing to the NAACP, as well as all other Americans that believe our Courts should reflect the sensibilities and values of the American people.

The NAACP is opposed to the nomination of Brett Kavanaugh to the D.C. Circuit Court of Appeals based on the troubling extremist characteristics demonstrated by the nominees he sought to confirm. One nominee, Judge Charles Pickering, demonstrated affection for segregationist policies, his continued insensitivity to racial justice issues, civil rights, voting rights and equal employment protections clearly demonstrates how woefully unqualified he is to serve in this crucial position. As an example, records show Pickering, as a state legislator, supported electoral measures to disenfranchise African Americans by supporting redistricting plans that locked over 40% of the population of Mississippi out of the electoral process. During his confirmation hearing, when asked by members of the Senate why he supported such a racially discriminatory redistricting plan, he simply stated "they" don't vote anyway.

The NAACP opposed Alabama Attorney General William Pryor's nomination to the Eleventh Circuit Court of Appeals because of his opposition to electoral protections under the Voting Rights Act of 1965, and his opposition to equal opportunity programs like affirmative action. William Pryor played a major role in perpetuating the racial segregation of Alabama's three highest State courts, all three courts of which, to this day, have no African American representation whatsoever by convincing a federal court to reject a historic settlement. Finally, William Pryor opposed affirmative action, as he indicated, "I would wholeheartedly support" Alabama's adoption of California's Proposition 209, which banned the use of equal opportunity programs in state hiring, contracting and school admission decisions.

The NAACP opposed Janice Rogers Brown's nomination because her record demonstrated a disdain for affirmative action, a disregard for racial discrimination, and a tremendous lack of experience to serve on the D.C. Circuit Court of Appeals. Brown authored a majority decision that makes it extremely difficult to conduct any sort of meaningful affirmative action program in California. In fact, Brown expanded

Proposition 209, by prohibiting California cities from requiring that their contractors conduct meaningful outreach to minority and women owned subcontractors. The NAACP opposed the nomination of Claude Allen to the United States Court of Appeals for the Fourth Circuit because his views would jeopardize the civil rights and civil liberties protections of African Americans and other racial and ethnic minorities. His stated opposition to the Martin Luther King, Jr. holiday and certain electoral protections under the Voting Rights Act and other social issues during his tenure with former North Carolina Senator, Jesse Helms are adverse to civil rights for African Americans and other racial and ethnic minorities.

The United States Court of Appeals for the District of Columbia is considered the second most powerful court in our country. The Supreme Court's limited caseload means that the D.C. Circuit often provides the determinative legal review of federal agency action involving labor relations, voting rights, affirmative action, clean air standards, health and safety regulations, consumer privacy and campaign finance. Nominees to all courts, including the D.C. Circuit Court, should have superior qualifications.

As such, we urge you in the strongest possible terms to oppose the confirmation of Brett Kavanaugh to the U.S. Court of Appeals for the District of Columbia and urge the Bush Administration to nominate men and women that represent the values, diversity and judicial temperament that will be respected by the American people, as we experienced with President Bush's nomination, and the U.S. Senate's confirmation of Judge Roger Gregory to the U.S. Court of Appeals to the Fourth Circuit.

Thank you for your careful consideration of this crucial matter. Should you have any questions or concerns, please contact me, or my Bureau Counsel, Crispian Kirk, at (202) 638-2269.

Sincerely,

Hilary O. Shelton
Director

New York's Senator

CHARLES E. SCHUMER

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FOR IMMEDIATE RELEASE
April 27, 2004

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REMARKS ON THE NOMINATION OF BRETT KAVANAUGH TO DC CIRCUIT COURT OF APPEALS

US Senator Charles Schumer issued the following statement at the Judiciary Committee's markup of the nomination of Brett Kavanaugh to the DC Circuit Court of Appeals:

Mr. Chairman, I want to welcome Brett Kavanaugh, his parents, and his fiancee, to today's hearing. Something tells me this won't be the easiest or most enjoyable hearing for them or for us, but I know that he appreciates what an important position he has been nominated to and how important this process is and I know how proud his family is of him.

Mr. Chairman, it's really unfortunate that we have to be here yet again on a controversial nomination. It's unfortunate because it's so unnecessary. We have offered time and time and time again to work with the Administration to identify well-qualified mainstream conservatives for these judgeships, especially on the DC Circuit. Instead, the White House insists on giving us extreme ideological picks. In this instance, the nomination seems to be as much about politics as it is about ideology.

While the nominations of William Pryor, Janice Rogers Brown, and Priscilla Owen may be among the most ideological we've ever seen, the nomination of Brett Kavanaugh is among the most political in history. In short, this nomination appears to be judicial payment for political services rendered.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first rate. He clerked for two prestigious circuit court judges and a Supreme Court justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile, controversial issues in his short career.

From the notorious Starr report, to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles including the Victims' Compensation Fund, to controversial judicial nominations, if there's been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there's no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-Right's political lawyer. Where there's a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics.

If President Bush truly wanted to unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush really wants to change the tone in Washington ought to take a look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the DC Circuit is not just a drop of salt in the partisan wounds, it's the whole shaker.

There is much that many of us find troubling about this nomination and I look forward to hearing the nominee address our myriad concerns. I'd like to take just a moment to lay out two areas that will be central to this discussion.

First, for the first two years of the Administration, when the Administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations battles. He spoke frequently at public events defending the President's decisions to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-the-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizeable majority of the American people when I say that we do not want ideologues on the federal bench - whether too far Left or too far Right.

Judges who bring their own agendas to the Judiciary are inclined to make law, not interpret law as the Founding Fathers intended. We want fair and balanced judges, in the real sense of those words.

Nonetheless, this Administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's office, Brett Kavanaugh played a major role in selecting these judges, prepping them for hearings, and defending their nominations at public events. In the course of defending the Administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges.

The five criteria he cites are:

1. Extraordinary intellect;
2. Experience;
3. Integrity;
4. Respect in the legal community and the nominee's home state community; and,
5. Commitment to interpreting law, not making law.

I don't think I'm stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges.

But in the same public discussions of the President's judicial nominations where he has cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim -- it just doesn't hold water.

If ideology did not matter, we would see nominations scattered across the ideological spectrum. There would be roughly equal numbers of Democrats and Republicans with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, with a few outliers at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That's not the case with the nomination's Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1-10, with 10 being very liberal and 1 being very conservative, there's a huge number of 1's with some 2's and 3's thrown in and only a smattering of 4's and 5's.

Of course ideology has played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last three years, I have been trying to get us to talk honestly about our differences over these judicial nominees. We have pretty much stopped citing minor personal pecadillos in nominees' histories as pretexts for stopping nominations that we really oppose on ideoligical grounds. The process is better for the honesty we have brought to it.

I hope we can continue having an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it's possible that the President who has made the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age, he has an extraodinary resume and that he has achieved in every job he has held.

But there are serious questions as to why, at 39, having never tried a case, and with a record of service almost exclusively to highly partisan political matters, he is being nominated to a seat on the second most important court in America.

Why is the DC Circuit so important?

The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands a cases a year brought by Americans seeking to vindicate their rightsAll the other federal appellate courts handle just those cases arising from within its boundaries. So, for example, the Second Circuit, where I'm from, takes cases coming out of New York, Connecticut, and Vermont.

But the DC Circuit doesn't just take cases brought by residents of Washington, DC. Congress has decided there's value in vesting one court with the power to review certain decisions of administrative agencies.

We've given plaintiffs the power to choose the DC Circuit – and in some cases we've forced them to go to the DC Circuit – because we've decided, for better or worse, that when it comes to these administrative decisions one court should decide what the law is for the whole nation.

When it comes to regulations adopted under the Clear Air Act by the EPA, labor decisions made by the NLRB and rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by the judges on the DC Circuit.

To most, it seems like this is the Alphabet Soup Court, since virtually every case involves an agency with an unintelligible acronym. EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so on.

The letters that comprise this Alphabet Soup are what make our government tick.

They are the agencies that write and enforce the rules that determine how much "reform" there will be in campaign finance reform.

They determine how clean water has to be for it to be safe for our families to drink.

They establish the rights workers have when negotiating with corporate powers.

The DC Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And, in so doing, it directly impacts the daily lives of *all* Americans more than any other court in the country, with the exception of the Supreme Court.

There's a lot at stake when considering nominees to the DC Circuit, how their ideological predilections will impact the decisions coming out of the court, and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the DC Circuit votes break down on ideological lines with amazing frequency. The divide happens in cases with massive national impact.

So we have a real duty to closely scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who are of equally high intellectual ability, but who have much more signficant judicial, legal, and academic experience to recommend them for this post.

It's clearly an honor and a compliment that despite his relative lack of experience, this Administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second-highest court in the land is at stake, the Administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question, "Who has the broadest and widest experience for the job?" He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Allen Snyder or Elena Kagan (now the dean of Harvard Law School), two moderate and extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course, we would have.

But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has a demonstrated history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not his political patrons, if confirmed to this powerful lifetime post.

Brett Kavanaugh is the youngest person nominated to the DC Circuit since his mentor, Ken Starr. If you go through the pre-judicial appointment accomplishments of the 9 judges who currently sit on the DC Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high level Executive Branch posts including heading the antitrust division at DOJ and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard Law Schools, was the Chairman of Amtrak's board of directors, and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a state judge and as a federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and five years as a federal district court judge.

Judge Randolph spent 22 years with federal and state attorneys general offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both federal and state governments, including a stint as the Corporation Counsel for DC, and several years on DC's equivalent of a state supreme court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of the Legal Services Corporation.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing trial and Unabomber trial while in a senior position at the Department of Justice.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the 9 current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had signficiant additional experience, non-partisan experience, to help persuade us that they merited confirmation.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position proving his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time, and different experience, we would have greater comfort imagining Mr. Kavanaugh on this court. Suffice to say, on the record before us, Mr. Kavanaugh faces a serious uphill battle. I look forward to hearing his answers to the difficult questions he will face.

○

FOIA Marker

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Counsel's Office, White House

Rao, Neomi

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W	20	24	3	3	10166	23029	6124	6323

Folder Title:

[Brett Kavanaugh]: DC Circuit Facts

Date Filed	Case Number	Case Name	Panel	Majority Author	Majority Author Party	Majority2	Majority2 Party	Concur	Concur Party	Dissent	Dissent Party	Dissent in Part	Dissent in Part Party	Concur in Part, Dissent in Part	Concur in Part, Dissent in Part Party	Tally
8/15/2003	02-7040	Akinseye v. District of Columbia	KLH, ARR, MBG	Henderson	R	Randolph	R			Garland	D					RR v. D
10/31/2003	02-7016	WMATA v. Georgetown University	HTE, ARR, MBG	Edwards	D	Garland	D			Randolph	R					DD v. R
3/5/2004	02-5266	United We Stand America, et al v. IRS	DBS, KLH, DST	Tatel	D	Sentelle	R			Henderson	R					DR v. R
5/7/2004	03-5093 & 03-5094	Judicial Watch, Inc. v. DOJ	KLH, ARR, JWR	Rogers	D	Henderson	R			Randolph	R					DR v. R
5/14/2004	03-5169	National Wrestling Coaches Ass'n v. Dept. of Ed.	HTE, KLH, SFW	Edwards	D	Henderson	R			Williams	R					DR v. R
5/14/2004	02-1358	Public Util. Comm'n of California v. FERC	DBS, ARR, JWR	Randolph	R	Sentelle	R							Rogers	D	RR v. D
7/9/2004	03-7044	Barbour v. WMATA	DBS, MBG, JGR	Garland	D	Roberts	R			Sentelle	R					DR v. R
7/23/2004	02-1294	Honeywell Int'l Inc. v. EPA	DBS, ARR, JWR	PC (Sentelle)	R			Randolph	R					Rogers	D	RR v. D
7/23/2004	03-3060, et al	United States v. Delgado-Garcia	DBS, ARR, JWR	Sentelle	R			Randolph	R	Rogers	D					RR v. D
7/23/2004	02-3110	United States v. Earle	DHG, KLH, SFW	Ginsburg	R	Williams	R			Henderson	R					RR v. R
7/27/2004	02-5342	McDonnell Douglas Corp. v. USAF	DHG, HTE, MBG	Ginsburg	R	Edwards	D							Garland	D	RD v. D
8/3/2004	03-3118	United States v. Riley	JWR, DST, MBG	Garland	D	Tatel	D							Rogers	D	DD v. D
8/27/2004	03-7128	United States ex. rel. Totten v. Bombardier Corp. et al.	JWR, MBG, JGR	Roberts	R	Rogers	D			Garland	D					RD v. D
10/8/2004	03-5169	National Wrestling Coaches Ass'n v. Dept. of Ed. (Pet. for rehearing en banc)	Full Court except DST	PC	PC	Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts	D, R, R, R, D, D, D, R			Williams, Ginsburg (did not write)	R, R					4 R, 4 D v. 2 R
12/21/2004	03-3100	United States v. Mellen	DHG, KLH, JGR	Roberts	R	Ginsburg	R					Henderson	R			RR v. R
1/7/2005	02-1294	Honeywell Int'l Inc. v. EPA (Pet. for panel rehearing)	DBS, ARR, JWR	PC (Sentelle)	R	Randolph	R							Rogers	D	RR v. D
1/21/2005	02-3010	United States v. Rashad	DHG, ARR, JWR	Ginsburg	R	Rogers	D			Randolph	R					RD v. R
1/28/2005	02-7106, et al	People for the Ethical Treatment of Animals v. Gittens	DHG, ARR, JWR	Randolph	R	Ginsburg	R							Rogers	D	RR v. D
1/28/2005	04-5026	Taucher v. CFTC	HTE, KLH, JGR	Roberts	R	Henderson	R			Edwards	D					RR v. D
2/4/2005	01-1072 & 04-1084	Rainbow/PUSH Coalition v. FCC	KLH, JWR, DST	Henderson	R	Tatel	D			Rogers	D					RD v. D
2/4/2005	04-5252	United States v. Philip Morris USA Inc.	DBS, DST, SFW	Sentelle	R			Williams	R	Tatel	D					RR v. D
2/8/2005	05-5016 & 05-5081	Seegars, et al. v. Ashcroft	DBS, DST, SFW	Williams	R	Tatel	D			Sentelle	R					RD v. R
2/25/2005	03-1323 & 03-1357	Federated Logistics and Opers. v. NLRB	DBS, KLH, DST	Sentelle	R	Tatel	D					Henderson	R			RD v. R

Date Filed	Case Number	Case Name	Panel	Majority Author	Majority Author Party	Majority2	Majority2 Party	Concur	Concur Party	Dissent	Dissent Party	Dissent in Part	Dissent in Part Party	Concur in Part, Dissent in Part	Concur in Part, Dissent in Part Party	Tally
3/15/2005	04-1037	Amer. Lib. Ass'n v. FCC	HTE, DBS, JWR	Edwards	D	Rogers	D			Sentelle	R					DD v. R
3/18/2005	04-15145	Select Milk Producers, Inc. v. Veneman	HTE, KLH, ARR	Edwards	D	Randolph	R			Henderson	R					DR v. R
3/22/2005	03-7174	Salazar v. WMATA	DBS, DST, SFW	Tatel	D	Sentelle	R			Williams	R					DR v. R
5/31/2005	04-5057	AFL/CIO v. Chao	HTE, JWR, JGR	Rogers	D	Edwards	D							Roberts	R	DD v. R
6/28/2005	04-7034 & 04-7035	APCC Servs., Inc. v. Sprint Comms. Co.	DHG, DBS, ARR	PC (Randolph)	R					Ginsberg	R	Sentelle (concur in judgm't)	R			Rv. R
7/5/2005	04-7128, et al.	Brewers & Maltsters, Local No. 6 v. NLRB	DHG, DBS, JWR	Rogers	D	Ginsburg	R					Sentelle	R			DR v. R
7/5/2005	03-7143	Smith v. District of Columbia	DHG, HTE, DST	Tatel	D	Edwards	D			Ginsberg	R					DD v. R
7/15/2005	03-1361, et al.	Commonwealth of Massachusetts v. EPA	DBS, ARR, DST	Randolph	R					Tatel	D	Sentelle (concur in judgm't)	R			R v. R (dissent in part, concur in judgm't) v. D (dissent)
7/15/2005	04-5171 & 04-5172	Pigford v. Johanns	DBS, KLH, JWR	Henderson	R	Sentelle	R							Rogers	D	RR v. D
7/15/2005	04-5352	Shays v. FEC	HTE, KLH, DST	Tatel	D	Edwards	D			Henderson	R					DD v. R
7/22/2005	04-3021	United States v. Jackson	HTE, JWR, JGR	Rogers	D			Edwards	D	Roberts	R					DD v. R
7/22/2005	01-3103	United States v. Pollard	DBS, KLH, JWR	Sentelle	R	Henderson	R							Rogers	D	RR v. D
7/26/2005	04-7116	Goldring v. District of Columbia	DBS, KLH, JWR	Henderson	R	Sentelle	R			Rogers	D					RR v. D
11/2/2005	04-5301	Lee v. DOJ (Pet. for rehearing en banc)	Full Court except JRB and TBG	PC	PC	Ginsburg, Sentelle, Henderson, Randolph	R, R, R, R			Edwards (did not write), Rogers, Tatel, Garland	D (did not write), D, D, D					4 R v. 4 D
12/2/2005	03-1361, et al.	Commonwealth of Massachusetts v. EPA (Pet. for rehearing en banc)	Full Court except KLH and MBG	PC	PC	Ginsburg, Sentelle, Randolph, Brown	R, R, R, R			Rogers, Tatel, Griffith (did not write)	D, D, R (did not write)					4 R v. 2 D, 1 R
1/20/2006	04-1366 & 04-1403	Detroit Newspaper Agency v. NLRB	KLH, HTE, SFW	Edwards	D	Williams	R			Henderson	R					DR v. R
2/24/2006	03-3066	United States v. Valdes	KLH, HTE, SFW	Williams	R	Edwards	D			Henderson	R					RD v. R
2/28/2006	04-5418	NLRB v. Cooper Tire & Rubber Co.	KLH, JRB, TBG	Brown	R	Henderson	R			Griffith	R					RR v. R (dissent in part, concur in judgm't)
3/28/2006	04-7203	Boehner v. McDermott	DHG, DBS, ARR	Randolph	R	Ginsburg	R			Sentelle	R					RR v. R
5/2/2006	04-5350	Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach	DHG, JWR, TBG	Rogers	D	Ginsburg	R			Griffith	R					DR v. R

D.C. CIRCUIT JUDGES WITH PRIOR EXECUTIVE/LEGISLATIVE POSITIONS

Name	Prior Executive/Legislative Position
Charles Duell	U.S. Commissioner of Patents
Louis E. McComas	U.S. Sen.*; U.S. Rep.
Charles Henry Robb	AAG*
Josiah A. Van Orsdel	AAG*
Constantine Joseph Smyth	Spec. Asst. to AG*
Duncan Lawrence Groner	USA
Harold Montelle Stephens	AAG*
Justin Miller	Spec. Asst. to AG
Henry White Edgerton	Spec. Asst. to AG
Frederick M. Vinson	U.S. Rep.*
Thurman Wesley Arnold	AAG*
Bennett C. Clark	U.S. Senator*
James McPherson Proctor	Spec. AAG
David L. Bazelon	AAG*
Charles Fahy	SG; Asst. SG
George Thomas Washington	Asst. SG*; Acting SG; Spec. Asst. to AG
John Anthony Danaher	Counsel, Republican Senatorial Cmte.*; U.S. Senator
Warren E. Burger	AAG*
J. Skelly Wright	USA
Edward A. Tamm	Deputy Dir., FBI
Spottswood W. Robinson III	U.S. Commission of Civil Rights
George E. MacKinnon	Spec. AAG; USA; U.S. Rep.
Malcolm R. Wilkey	AAG; USA
Patricia M. Wald	AAG*
Abner Mikva	U.S. Rep.*
Harry T. Edwards	Chair, National RR Passenger Corp.*
Robert H. Bork	Acting AG; SG
Antonin Scalia	AAG
Kenneth W. Starr	Counselor to the AG*
Lawrence H. Silberman	Ambassador; DAG; Undersec'y of Labor
James L. Buckley	Undersec'y for Security Assistance, State Dept.; U.S. Senator
Douglas H. Ginsburg	AAG*; DAAG
Clarence Thomas	Chair, EEOC*; Asst. Sec'y for Civil Rights, Dept. of Educ.; LA, Sen. John Danforth
A. Raymond Randolph	Deputy SG; Special Counsel, U.S. House Cmte. on Ethics/Cmte. on Standards of Official Conduct
David Tatel	Dir., Office of Civil Rights, U.S. Dept. of Health, Education, and Welfare

Merrick Garland	Principal Assoc. DAG*; DAAG
John G. Roberts	Principal Deputy SG; Counsel to the Pres.; Spec. Asst. to AG
Thomas B. Griffith	Legal counsel, U.S. Senate

* Indicates position when nominated to the D.C. Circuit

Abbreviations:

AAG	Assistant Attorney General
AG	Attorney General
DAAG	Deputy Assistant Attorney General
DAG	Deputy Attorney General
LA	Legislative Assistant
SG	Solicitor General
USA	U.S. Attorney

SUPREME COURT JUSTICES WITH PRIOR EXECUTIVE/LEGISLATIVE POSITIONS

Name	Prior Executive/Legislative Position
John Jay	Sec'y of Foreign Affairs*
John Rutledge	Member, Continental Congress
James Wilson	Member, Continental Congress
William Paterson	U.S. Senator
Oliver Ellsworth	U.S. Senator*
John Marshall	Sec'y of State*; U.S. Rep.; U.S. Minister to France
Gabriel Duvall	U.S. Comptroller of the Treasury*; U.S. Rep.
Joseph Story	U.S. Rep.
Smith Thompson	Sec'y of the Navy*
John McLean	U.S. Postmaster Gen.*; U.S. Rep.
Henry Baldwin	U.S. Rep.
James Moore Wayne	U.S. Rep.*
Philip Barbour	Speaker of the House; U.S. Rep.
Roger Taney	Treasury Sec'y; AG; Acting Sec'y of War
John McKinley	U.S. Senator*; U.S. Rep.
Levi Woodbury	U.S. Senator*; Treasury Sec'y; Sec'y of Navy
Nathan Clifford	U.S. Minister to Mexico; AG; U.S. Rep.
Salmon P. Chase	Treasury Sec'y*; U.S. Sen.
William Strong	U.S. Rep.
Stanley Matthews	U.S. Senator*
Lucius Lamar	Sec'y of Interior*; U.S. Sen.; U.S. Rep.
Howell Jackson	U.S. Senator
Edward Douglass White	U.S. Senator*
Joseph McKenna	AG*; U.S. Rep.
William Rufus Day	Sec'y of State; Asst. Sec'y of State
William H. Moody	AG*; Sec'y of Navy; U.S. Rep.; USA
Charles Evan Hughes	Sec'y of State (prior to nom. as Chief Justice); Spec. Asst. to AG
Willis Van Devanter	AAG
Mahlon Pitney	U.S. Rep.
James C. McReynolds	AG*
William Howard Taft	President; Sec'y of War; SG
George Sutherland	U.S. Sen.; U.S. Rep.
Edward Terry Sanford	AAG; Spec. Asst. to AG
Harlan Stone	AG*
Owen Josephus Roberts	Spec. USA
Hugo Black	U.S. Senator*
Stanley F. Reed	SG*
William O. Douglas	Chair, SEC*
Frank Murphy	AG*
James F. Byrnes	U.S. Sen.*; U.S. Rep.
Robert H. Jackson	AG*; SG; AAG
Harold Hitz Burton	U.S. Senator*
Frederick M. Vinson	Treasury Sec'y*; U.S. Rep.
Tom C. Clark	AG*; AAG
Byron R. White	DAG*
Arthur J. Goldberg	Sec'y of Labor*
Abe Fortas	Undersec'y of the Interior
Thurgood Marshall	SG*

Warren E. Burger	AAG
William H. Rehnquist	AAG*
John Paul Stevens	Assoc. Counsel, U.S. House Subcmte. on the Study of Monopoly Power
Antonin Scalia	AAG
Clarence Thomas	Chair, EEOC; Asst. Sec'y for Civil Rights, Dept. of Educ.; LA, Sen. John Danforth
Stephen G. Breyer	USSC Commissioner; Chief Counsel, U.S. Senate Judiciary Cmte.; Special Asst. to AAG
John G. Roberts	Principal Deputy SG; Assoc. Counsel to the Pres.; Spec. Asst. to AG
Samuel Alito	USA; DAAG; Asst. to SG

* Indicates position when nominated to the U.S. Supreme Court

Abbreviations:

AAG	Assistant Attorney General
AG	Attorney General
DAAG	Deputy Assistant Attorney General
DAG	Deputy Attorney General
LA	Legislative Assistant
SG	Solicitor General
USA	U.S. Attorney

Rao, Neomi J.

From: Jamil.N.Jaffer@usdoj.gov
Sent: Friday, May 05, 2006 7:36 PM
To: Kavanaugh, Brett M.
Cc: Kristi.R.Macklin@usdoj.gov; Dixton, Grant; Rao, Neomi J.; Gerry, Brett C.
Subject: DC Circuit Analysis

Attachments: DC Circuit Dissents (07.25.03 - 05.05.06).xls

DC Circuit Dissents (07.25.03 ...

All,

Below are the results of the D.C. Circuit analysis. The analysis looked at all opinions filed by the court between July 25, 2003 and May 5, 2006 (based on the D.C. Circuit's opinion release sheets available on the D.C. Circuit's website).

Of the 40 panel cases with dissents, 18 cases could be said to involve a party line split as to the outcome. Of the three en banc cases with dissents, only 1 involved a party line split.

As such, only 19 out of 657 cases - or less than three percent (2.89%) - could be said to be the subject of party line splits on the D.C. Circuit.

The underlying data is below and (in additional detail) in the attached Excel spreadsheet. Let me know if you have questions on this.

Total cases decided: 657

Dissents: 43 (6.54%)

Dissent Analysis:

43 cases with dissents (40 panel cases, 3 en banc cases)

Of the 40 panel cases:

Number of cases	Type of Decision	Percentage (of the 40 panel cases)
4 cases	2 Reps v. 1 Rep	10%
1 case	2 Reps v. 1 Rep (part. diss., conc. in judgm't)	2.5%
1 case	2 Dems v. 1 Dem	2.5%
1 case	1 Rep. v. 1 Rep. (part. diss., conc. in judgm't) v. 1 Dem (diss.)	2.5%
11 cases	2 Reps v. 1 Dem	27.5%
6 cases	2 Dems v. 1 Rep	15%
13 cases	1 Rep, 1 Dem v. 1 Rep	32.5%
3 cases	1 Rep, 1 Dem v. 1 Dem	7.5%

Of the 3 en banc cases:

Number of cases (of the 3 en banc cases)	Type of Decision	Percentage
1 case	4 Reps, 2 Dems v. 1 Rep	33%
1 case	4 Rep v. 4 Dems	33%
1 case	4 Reps, 4 Dems v. 2 Reps.	33%

<<DC Circuit Dissents (07.25.03 - 05.05.06).xls>>

Best,

JJ
Jamil N. Jaffer
Counsel
United States Department of Justice - Office of Legal Policy
(202) 307-0120 (direct)
(202) 514-2424 (fax)
Jamil.N.Jaffer@usdoj.gov

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Counsel's Office, White House

Rao, Neomi

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Folder Title:

[Brett Kavanaugh]: Kavanaugh - 2006

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	Brett M. Kavanaugh	19	N.D.	P5;
002	Draft	Brett M. Kavanaugh	20	05/17/2006	P5;
003	Email	FW: Myth/Fact Issue... - To: Neomi Rao - From: Grant Dixton	1	05/11/2006	P5;
004	Handwritten Note	Other Qs	4	N.D.	P5;
005	Handwritten Note	Brett Strategy Call	2	04/27/2006	P5;
006	Handwritten Note	Kavanaugh - Moot [with attachment]	3	05/07/2006	P5;
007	List	General Executive Power	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material
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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	List	Kavanaugh Moots - WHCO	3	N.D.	P5;
009	List	Kavanaugh Moots - WHCO	3	N.D.	P5;
010	List	BK Moots: 180 EEOB	5	N.D.	P5;
011	List	Brett Kavanaugh: Potential Moot Topics	3	N.D.	P5;
012	Handwritten Note	Meeting re: Brett	1	04/28/2006	P5;
013	Draft	Brett M. Kavanaugh	16	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

RESTRICTION CODES

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Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	Brett M. Kavanaugh	19	N.D.	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/6/2018 by erg

May 5, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. Our past experiences as Attorneys General include extensive involvement in the selection of judges combined with a comprehensive knowledge of and familiarity with our federal court system. From that vantage point, we can each state with certainty that Mr. Kavanaugh is an outstanding nominee to the federal bench.

Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. His academic credentials are superlative, having graduated from Yale University and from Yale Law School. He followed these achievements by clerking for Supreme Court Justice Anthony Kennedy. Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table—namely a warm personality, a strong work ethic, and a good character.

We believe that Mr. Kavanaugh possesses each characteristic of an outstanding nominee to the U.S. Court of Appeals for the D.C. Circuit, including academic and professional credentials and integrity. We therefore urge this Committee and the Senate to move quickly to confirm Mr. Kavanaugh to the federal bench. America would be well served by Mr. Kavanaugh's prompt confirmation.

Sincerely,

William P. Barr, Attorney General under
President George H.W. Bush, 1991-1993

On behalf of:

Griffin B. Bell, Attorney General under
President Carter, 1977-1979

Edwin Meese, III, Attorney General under
President Reagan, 1985-1988

Dick Thornburgh, Attorney General under
Presidents Ronald Reagan and George H. W. Bush,
1988-1991

John Ashcroft, Attorney General under
President George W. Bush, 2001-2005

cc: The Honorable Patrick J. Leahy

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	Brett M. Kavanaugh	20	05/17/2006	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/6/2018 by erg

106TH CONGRESS
1ST SESSION

S. RES. 44

Relating to the censure of William Jefferson Clinton.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1999

Mrs. FEINSTEIN (for herself, Mr. BENNETT, Mr. MOYNIHAN, Mr. CHAFEE, Mr. KOHL, Mr. JEFFORDS, Mr. LIEBERMAN, Mr. SMITH of Oregon, Mr. DASCHLE, Ms. SNOWE, Mr. REID, Mr. GORTON, Mr. BRYAN, Mr. MCCONNELL, Mr. CLELAND, Mr. DOMENICI, Mr. TORRICELLI, Mr. CAMPBELL, Mr. WYDEN, Mrs. LINCOLN, Mr. KERRY, Mr. KERREY, Mr. SCHUMER, Mr. DURBIN, Mrs. MURRAY, Mr. WELLSTONE, Mr. BREAUX, Ms. MIKULSKI, Mr. DORGAN, Mr. BAUCUS, Mr. REED, Ms. LANDRIEU, Mr. KENNEDY, Mr. LEVIN, Mr. ROCKEFELLER, Mr. ROBB, Mr. INOUYE, and Mr. AKAKA) submitted the following resolution; which was referred to the Committee on Rules and Administration

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RESOLUTION

Relating to the censure of William Jefferson Clinton.

Whereas William Jefferson Clinton, President of the United States, engaged in an inappropriate relationship with a subordinate employee in the White House, which was shameful, reckless and indefensible;

Whereas William Jefferson Clinton, President of the United States, deliberately misled and deceived the American people, and people in all branches of the United States Government;

Whereas William Jefferson Clinton, President of the United States, gave false or misleading testimony and his actions have had the effect of impeding discovery of evidence in judicial proceedings;

Whereas William Jefferson Clinton's conduct in this matter is unacceptable for a President of the United States, does demean the Office of the President as well as the President himself, and creates disrespect for the laws of the land;

Whereas William Jefferson Clinton fully deserves censure for engaging in such behavior;

Whereas future generations of Americans must know that such behavior is not only unacceptable but also bears grave consequences, including loss of integrity, trust and respect;

Whereas William Jefferson Clinton remains subject to criminal actions in a court of law like any other citizen;

Whereas William Jefferson Clinton's conduct in this matter has brought shame and dishonor to himself and to the Office of the President; and

Whereas William Jefferson Clinton through his conduct in this matter has violated the trust of the American people: Now, therefore, be it

Resolved, That—

(1) the United States Senate does hereby censure William Jefferson Clinton, President of the United States, and does condemn his wrongful conduct in the strongest terms;

(2) the United States Senate recognizes the historic gravity of this bipartisan resolution, and trusts and urges that future congresses will recognize the importance of allowing this bipartisan statement of censure and condemnation to remain intact for all time; and

(3) the Senate now move on to other matters of significance to our people, to reconcile differences between and within the branches of government, and to work together—across party lines—for the benefit of the American people.

○

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	FW: Myth/Fact Issue... - To: Neomi Rao - From: Grant Dixton	1	05/11/2006	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

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Responses of Brett Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit
to the Written Questions of Senator Durbin

1. **A draft January 25, 2002 memorandum to the President from then-White House Counsel Alberto Gonzales recommends that the President reject then-Secretary of State Colin Powell's recommendation that the President reconsider his determination that the Geneva Conventions do not apply to the conflict with the Taliban and Al Qaeda. The memorandum also states that the Geneva Conventions' "strict limitations on questioning of enemy prisoners" are "obsolete."**

   A. **At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in writing the draft memorandum and any previous and/or subsequent drafts, and your involvement in shaping the conclusions and recommendations of such memoranda.**

Response: I had no involvement in writing the draft memorandum or in writing any previous or subsequent drafts. I had no involvement in shaping the conclusions or recommendations of such memorandums.

   B. **When did you first learn about such memoranda's conclusions and recommendations? When did you first review any such memoranda?**

Response: I was not aware of this draft memorandum until news stories about it appeared in 2004, and I did not review it until some time later in 2004.

   C. **Do you agree with the draft January 25, 2002 memorandum's conclusions and recommendations? Please explain.**

Response: As an executive branch official and as a judicial nominee, it would not be appropriate for me to discuss my agreement or disagreement with conclusions or recommendations in this draft memorandum to the President.

2. **On February 2, 2002, the President issued a memorandum stating, among other things, that the Geneva Conventions do not apply to the conflict with Al Qaeda and do not apply to Al Qaeda and Taliban detainees.**

   A. **At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in drafting the memorandum and shaping the policy reflected therein.**

Response: I had no involvement in drafting the memorandum. I had no involvement in shaping the policy reflected in it.

B. When did you first learn about the policy reflected in the memorandum? When did you first review the memorandum?

Response: I was not aware of this memorandum until after news stories about it appeared in 2004, and I did not review it until some time later in 2004.

C. The memorandum states, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with Geneva." How do you define "humane treatment"?

Response: I had no role in drafting the memorandum and was not aware of it until after news stories about it appeared in 2004. As an executive branch official not involved in this issue and as a judicial nominee, it would not be appropriate for me to attempt to define terms in this memorandum.

D. Has the White House provided any guidance to the U.S. Armed Forces regarding the meaning of humane treatment? Please explain.

Response: I have not been involved in this issue in the course of performing my responsibilities at the White House, and I do not have personal knowledge regarding the scope or intended scope of this memorandum. I do not have personal knowledge of other memorandums or guidance, if any, that may apply to these kinds of cases.

E. The directive to treat all detainees humanely applies only to the U.S. Armed Forces. Are U.S. personnel other than members of the U.S. Armed Forces required to treat all detainees humanely? Please explain.

Response: See response to 2D.

F. The President's memorandum states, "our values" call for us to treat detainees humanely, including those who are not legally entitled to such treatment. It also states that the U.S. Armed Forces shall treat detainees humanely "as a matter of policy." Which detainees is the United States not legally required to treat humanely? Can the President determine, as a matter of policy, that U.S. personnel are not required to treat detainees humanely? Please explain.

Response: See response to 2D.

3. On August 1, 2002, the Justice Department's Office of Legal Counsel (OLC) issued an opinion entitled, "Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A ("OLC torture memo").

A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the OLC torture memo.

Response: I was not aware of and had no meetings, briefings, and/or other discussions about the August 1, 2002, memorandum before I read news stories about the memorandum in the summer of 2004.

B. When did you first learn about the OLC torture memo? When did you first review it?

Response: I first learned about the August 1, 2002, memorandum in 2004 after news stories about it.

C. Do you believe that the OLC torture memo's analysis of the torture statute is correct? Please explain.

Response: The Administration has repealed the August 1, 2002, memorandum, and I agree with that decision. As I stated at my hearing, I do not agree with the legal analysis in the memorandum, including its analysis of the definition of torture.

4. The OLC torture memo concludes that the torture statute does not apply to interrogations conducted under the President's Commander-in-Chief authority.

A. Do you agree with this conclusion? Please explain.

Response: I do not agree with the legal analysis or conclusions in the August 1, 2002, memorandum. I am not aware of any claim that there are constitutional deficiencies in 18 U.S.C. 2340-2340A, or that there are applications of that statute that would be unconstitutional. The President has a responsibility under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress.

B. In your opinion would the torture statute be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief? Please explain.

Response: The President has a constitutional duty under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress. I am not aware of a claim that 18 U.S.C. 2340-2340A is unconstitutional, or that there are applications of that statute that would be unconstitutional. If such a claim were made, it would be analyzed under the three-part framework set forth by Justice Jackson in his concurring opinion in *Youngstown Steel* and followed by the Supreme Court since then. In referring to what is called category 3, Justice Jackson explained that "when the President takes measures incompatible with the expressed or

implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

5. The OLC torture memo argues that in order for abuse to constitute torture under the torture statute, "The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Do you agree with this conclusion? Please explain.

Response: The Administration has repealed the August 1, 2002, memorandum, and I agree with that decision because I believe the legal analysis in the memo is flawed, including with respect to the definition of torture.

6. The Justice Department has acknowledged that OLC has also issued at least one opinion on the legality of specific interrogation techniques. According to media reports, OLC issued one such opinion in August 2002, during the same time frame as the OLC torture memo. It reportedly authorizes the use of specific abusive interrogation methods, including mock execution and "waterboarding" or simulated drowning.

A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about this and/or other OLC opinions dealing with interrogation policies and practices.

Response: To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

B. When did you first learn about OLC's analysis of specific abusive interrogation techniques?

Response: To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

C. Do you believe that OLC's analysis of the legality of specific interrogation techniques is correct? Please explain.

Response: To the extent any such memorandum or analysis exists, I have not been involved in

preparing it, nor have I reviewed or discussed it.

D. In your opinion, is it legally permissible for U.S. personnel to torture a detainee?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148.

E. In your opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

F. In your opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

G. In your opinion, is it legally permissible for U.S. personnel to physically beat a detainee? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

H. In your opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully

apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

7. **Beginning in 2001, the President has authorized the National Security Agency (NSA) to eavesdrop on Americans in the United States without court approval. The President has stated that this warrantless surveillance program is reviewed every 45 days, and that this review includes the Counsel to the President.**

   A. **During this time period, you have served as Associate Counsel to the President, Senior Counsel to the President, and Assistant to the President and Staff Secretary. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the NSA surveillance program, and your involvement, if any, in shaping the program and the legal justification for the program.**

   B. **When did you first learn about the President's authorization of the program?**

Response: I did not learn of the existence of this program until after a *New York Times* story about it appeared on the Internet late on the night of Thursday, December 15, 2005. I had no involvement in meetings, briefings, or other discussions in shaping the program or the legal justification for the program. Since December 16, 2005, the President has spoken publicly about the program on numerous occasions, and I have performed my ordinary role as Staff Secretary with respect to staffing the President's public speeches.

8. **One premise of the NSA surveillance program appears to be that FISA is unconstitutional to the extent it conflicts with the President's authorization of the program. For example, a Justice Department memo issued on January 19, 2006 entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" states: "Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation B to defend the United States against foreign attack."**

   A. **Do you believe FISA is unconstitutional to the extent it conflicts with the President's authorization of the NSA program? Please explain.**

Response: The question of FISA's interaction with the Authorization for the Use of Military Force and the President's Article II authority is being analyzed by the Committee and is the

subject of litigation in the federal courts. As a judicial nominee, it would not be appropriate for me to provide an analysis of that question.

B. Can Congress place any limits on the President's exercise of his Commander-in-Chief power? For example, can the President, pursuant to his Commander-in-Chief power, authorize actions that would otherwise violate the War Crimes Act of 1996, 18 U.S.C. 2441, if he determines such actions are necessary to combat a terrorist threat?

Response: The President has a constitutional duty under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress. I am not aware of any claim that the War Crimes Act of 1996 either is unconstitutional on its face or could be unconstitutional as applied. Any such claim would be analyzed under category 3 of the three-part framework set forth by Justice Jackson in his concurring opinion in *Youngstown Steel* and subsequently followed by the Supreme Court. In this category, the President's authority is at its "lowest ebb."

9. **According to recent press reports, a concerted effort has been made by the Bush White House to utilize presidential signing statements to bypass and manipulate laws passed by Congress, without resorting to vetoes. President Bush has issued over 750 such statements "a record high" and is the first president since Thomas Jefferson to serve so long in office without issuing a single veto. Phillip Cooper, a scholar on executive power, has said: "There is no question that this administration has been involved in a very carefully thought-out, systemic process of expanding presidential power at the expense of the other branches of government. This is really big, very expansive, and very significant."**

A. Please describe in detail the role you have played in this effort.

Response: Signing statements are generally drafted and reviewed by Department of Justice attorneys, Office of Management and Budget (OMB) attorneys, White House attorneys, and other Administration attorneys whose agencies are affected by a bill's provisions. This process is usually coordinated by OMB. After the signing statement has been drafted and cleared through the OMB process, it comes to the Staff Secretary's office for White House senior staffing and Presidential review and signature. As Staff Secretary since July 2003, I would have staffed nearly all signing statements before they were reviewed and signed by the President.

Like Presidents before him, President Bush has issued signing statements to identify legislative provisions that pose traditional Executive Branch concerns with respect to certain constitutional requirements -- for example, the Recommendations Clause, Presentment Clause, Opinions Clause, and Appointments Clause.

B. Please provide a list of all signing statements you have drafted or reviewed.

Response: In my capacity as Staff Secretary, I would have reviewed nearly all Presidential signing statements since July 2003 to ensure that drafts of them were staffed to the White House senior staff and cleared by the Counsel's office, among other offices.

10. Do you know Jack Abramoff? Please describe any meetings, discussions, or other interactions between you and Mr. Abramoff from 2001 to the present.

Response: No. None.

11. Concerns have been raised about your lack of legal experience regarding the issues that are litigated before the D.C. Circuit. According to a report by the Federal Judicial Center, half of the D.C. Circuit docket involves administrative appeals, and of those appeals, over 70% come from the Environmental Protection Agency, Federal Energy Regulatory Commission, and Federal Communications Commission. In addition, the D.C. Circuit ranks first among all circuit courts in the country in the percent of National Labor Relations Board cases heard by the court.

Please identify all cases or matters on which you have worked involving the Environmental Protection Agency, Federal Energy Regulatory Commission, Federal Communications Commission, and National Labor Relations Board, and briefly describe the nature of your work in each case or matter. Please give specific information; Senator Kennedy asked you a similar written question in 2004 which you declined to answer with specificity. You do not need to identify cases in which you worked as a law clerk.

Response: In private practice, I represented Verizon and worked on the "open access" issue. This issue involved the question whether cable companies must allow consumers to obtain the Internet Service Provider of their choice when the cable company provides high-speed Internet access – in other words, whether cable companies should have the same regulatory regime as traditional telephone companies with respect to broadband access. I worked on this issue in connection with FCC regulation of the subject and also on an antitrust suit that was filed in the Western District of Pennsylvania. *See also* Fight for Internet Access Creates Unusual Alliance, *New York Times* (August 12, 1999).

For Verizon, I also worked on statutory and regulatory issues arising out of the Telecommunications Act of 1996.

As Staff Secretary to the President since July 2003, I have helped coordinate the speechwriting process with the speechwriters and relevant policy offices. The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President also has made a variety of public decisions and policy proposals related to those subjects that also have come through the Staff Secretary's office for

review and clearance. The Staff Secretary's Office also helps review and clear final drafts of the President's Budget, which has sections dealing with energy, labor, communications, and environmental policy.

12. **You have spent your entire legal career working for either President Bush or Ken Starr. You co-authored the Starr Report. You worked for President Bush's 2000 campaign and went to Florida to participate in President Bush's recount activities. The federal judge recusal policy set forth at 28 U.S.C. 455 requires federal judges to disqualify themselves "in any proceeding in which his impartiality might reasonably be questioned." Many people believe your impartiality will reasonably be questioned in any case involving policies of President Bush or matters litigated by the Republican Party.**

If confirmed, would you be willing to disqualify yourself in all cases involving a challenge to a policy of the George W. Bush Administration?

If confirmed, would you be willing to disqualify yourself in all cases in which the Republican Party was a party (including *amicus*) before the court?

Response: If confirmed, I would carefully examine recusal obligations under 28 U.S.C. 455 and all other applicable laws and rules, and I would consult precedents and my colleagues as appropriate. I have a full appreciation for the importance of statutory recusal obligations and understand that I may have to recuse from certain cases. At this point, without knowing the facts, circumstances, and parties involved in a particular case and before I have done the work and research necessary, I cannot identify the particular cases that might require or justify recusal.

13. **At their nomination hearings, Chief Justice John Roberts, Jr. and Justice Samuel Alito, Jr. testified in opposition to the use of foreign legal opinions and international norms. Chief Justice Roberts testified that he opposed the use of foreign law because it "allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution." Justice Alito testified that "I don't think foreign law is helpful in interpreting the Constitution." Do you agree with these statements? Why or why not?**

Response: As a general matter, I do not think foreign law is a useful guide for interpreting the United States Constitution. If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would follow the precedents of the Supreme Court. To the extent that the Supreme Court has used or uses foreign law to help resolve particular questions or issues, I would be bound to follow that Supreme Court precedent, and I would do so fully and faithfully.

14. **Justice Kennedy, for whom you once served as a law clerk, has cited foreign legal opinions and international norms in some of his opinions. Do you believe it was**

inappropriate for him to cite foreign legal opinions and international norms in his opinions in *Lawrence v. Texas* (which struck down state sodomy laws) and *Roper v. Simmons* (which struck down state death penalty laws for children)? Why or why not?

Response: The cases cited in this question are precedents of the Supreme Court. If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would follow these precedents fully and faithfully. As a nominee to a court of appeals, it would not be appropriate for me to express my agreement or disagreement with the results or reasoning of these decisions.

15. **The American Bar Association recently downgraded their rating of your nomination from "Well Qualified" to "Qualified," but it did not provide an explanation for its decision.**

A. **Based on information the ABA may have provided to you, and based on your extensive experience working with the ABA when you helped evaluate judicial nominees in the White House Counsels' office, what do you believe is the basis for the ABA's lowering of their rating of your nomination?**

B. **According to a May 3, 2006 article in the *Washington Post*, a White House spokesperson said that the ABA's revised rating of your nomination "resulted from changes in the ABA panel's personnel, not from new findings." Do you agree with this assertion? If so, please explain the basis for that belief and set forth the exact changes in the ABA panel's personnel that led to the lower rating of your nomination.**

Response: The American Bar Association provided an explanation of its most recent "qualified/well-qualified" rating on Monday, May 8, 2006, in written and oral testimony to the Committee. I am aware that all 42 individual reviews conducted by ABA Committee Members over three years have found that I am well-qualified or qualified to serve on the D.C. Circuit.

16. **Many of the written answers you submitted in November 2004 were evasive or nonresponsive. Other judicial nominees have provided direct and candid answers to some of these same questions. Please submit more responsive and complete answers to the following written questions I sent to you in 2004: Questions 3, 10A, 10B, 10D, 10E, 13A, and 13B.**

Response:

3. Membership in the Federalist Society is not a necessary qualification to be a judicial nominee, and preference is not given to members of the Federalist Society. As far as I am aware, the majority of President Bush's judicial nominees have not been members of the Federalist Society.

10A: President Bush has sought to appoint judges who will interpret the law and not legislate from the bench. He has successfully appointed two Supreme Court Justices and numerous court of appeals and district court judges who have stated their agreement with this general judicial approach.

10B: In books, articles, and cases, Justice Scalia has explained his judicial philosophy as one primarily of original meaning and textualism. Justice Thomas also has explained his judicial philosophy in a variety of constitutional and statutory cases since he assumed his seat on the Supreme Court.

10D: If confirmed, I would seek to adhere to the following judicial philosophy: I would interpret the law as written and not impose my own policy preferences; I would exercise the judicial power prudently and with restraint; I would follow Supreme Court precedent fully and faithfully; and I would maintain the absolute independence of the Judiciary. Strict constructionism does not have a single defined meaning as I understand the term; strict constructionism is sometimes defined to mean interpreting the law as written.

10E: If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*. There has been public debate in the last three decades about the reasoning and results of the latter two cases, including in the dissents in those two cases. Both cases have been reaffirmed by the Supreme Court – *Miranda* was reaffirmed in *Dickerson v. United States* and *Roe v. Wade* was reaffirmed in *Planned Parenthood v. Casey*. Issues relating to or arising out of those two cases continue to come before the courts, and as a judicial nominee, it would not be appropriate for me to describe my agreement or disagreement with the two cases.

13B: The Supreme Court has decided a number of cases with respect to affirmative action. If confirmed, I would follow those precedents fully and faithfully. I do not have any agenda with respect to affirmative action, or any other issues, that I would seek to advance as a judge if I am confirmed.

17. In early May 2004, following your first hearing before the Senate Judiciary Committee, you were sent written followup questions from several members of the Committee. You did not submit answers to these questions until late November 2004, after the presidential election. Why did you wait seven months to answer these questions?

Response: After my hearing in April 2004, my understanding was that no further action would occur on my nomination that year and that I should submit written answers to the follow-up written questions before the end of the Congressional session so that the record of my 2004 hearing would be complete were I to be re-nominated in 2005. I met that timeline and submitted the answers in November 2004 before the end of the Congressional session. There was an

apparent miscommunication or misunderstanding, for which I take responsibility, and I was pleased to have the opportunity to appear at the hearing on May 9, 2006, to answer additional questions from the Members of the Committee.

18. Would you be willing to come before the Senate Judiciary Committee and testify at a second hearing?

Response: Yes, during the week of May 1, I told Chairman Specter and Senator Schumer that I would be pleased to appear at a second hearing, and I was happy to have the opportunity to do so on May 9.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Other Qs	4	N.D.	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Brett Strategy Call	2	04/27/2006	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
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FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Kavanaugh - Moot [with attachment]	3	05/07/2006	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Freedom of Information Act - [5 U.S.C. 552(b)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	General Executive Power	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Freedom of Information Act - [5 U.S.C. 552(b)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	Kavanaugh Moots - WHCO	3	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	Kavanaugh Moots - WHCO	3	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	BK Moots: 180 EEOB	5	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	Brett Kavanaugh: Potential Moot Topics	3	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

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May Judicial Coalition—Kavanaugh

Last Updated
5/5/2006 2:30 PM

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
30	1 OPL Conservative Conference Call 4:30pm	2 12:00-12:30pm BK Courtesy Call w/ Sen. Schumer (D-NY) **RNC Memo "leak"**	3 Former Colleagues Letter of Endorsement 2:00-2:30pm BK Courtesy Call w/ Sen. Brownback (R-KS) 3:15 pm-3:45pm BK Courtesy Call w/ Sen. Graham (R-SC)	4 **POTUS Nat'l Day Prayer** Former Solicitors General Letter Yale Law School Alum Letter Judges Stapleton and Becker Letter of Endorsement WSJ Editorial	5 Former Attorneys General Letter	6
7	8 **POTUS Judges Assoc. (TBD Press)** WH Judicial Coalition Briefing Indian Treaty Room 2:30pm National Religious Broadcasters Call 4pm OPL Conference Call 4:30pm	9 **2pm Senate Committee Hearing**	10 **RNC Gala**	11 TBD Press Event **Senate Committee Vote (T)**	12	13
14	15 OPL Conservative Conference Call 4:30pm	16 **TBD BK Courtesy Calls**	17	18	19	20 **Possible Radio Address (TBD)**
21	22 **Senate Floor Debate this week (T)** OPL Conservative Conference Call 4:30pm	23	24	25	26	27
28	29 **Memorial Day**	30 OPL Conservative Conference Call 4:30pm	31	1	2	3

Rao, Neomi J.

From: Brown, Jamie E.
Sent: Tuesday, May 09, 2006 10:26 AM
To: (BJones@rnchq.org); (Elisebeth.C.Cook@usdoj.gov); (MRhoades@rnchq.org); Dixton, Grant; Dunne, Dianna L.; Goeglein, Tim; Healy, Erin E.; Jennings, Jeffery S.; Kristi Remington (Kristi.L.Macklin@usdoj.gov); Mamo, Jeanie S.; Perino, Dana M.; Rachel Brand (Rachel.Brand@usdoj.gov); Rao, Neomi J.; Rethmeier, Blain K.; Sinatra, Nicholas A.; Taylor, Sara M.
Subject: FW: KAVANAUGH/REID/A Closer look

From: Stewart, Don (Cornyn) [mailto:Don_Stewart@cornyn.senate.gov]
Sent: Tuesday, May 09, 2006 10:16 AM
Subject: KAVANAUGH/REID/A Closer look

A Closer Look: Brett Kavanaugh's Legal Credentials

"It's beyond difficult to take Brett Kavanaugh's opponents seriously when after three years it is clear that they still haven't reviewed even basic facts about his record."
-U.S. Sen. John Cornyn (R-Texas)

The Minority Leader's Accusation

The Minority Leader told reporters recently that the D.C. Circuit nominee's **legal experience "is nonexistent."** Sen. Reid also said: **"I'm not sure he's ever been in a courtroom."** (5/2/06)

Since Mr. Kavanaugh was first nominated to the federal bench in July 2003, Democrats have had **ample opportunity to examine his resume and record**. The Minority Leader's flippant remark not only underscores his apparent lack of knowledge about Mr. Kavanaugh's experience—it also demonstrates that **Democrat opposition has little to do with Kavanaugh and everything to do with opposition to the President's judicial nominees generally**.

The Facts

Brett Kavanaugh is a dedicated public servant and accomplished attorney who has briefed, filed, and argued numerous cases before the highest federal appellate courts in the nation. His academic record, legal experience, and professional reputation are all of exceptional quality. A sample Brett Kavanaugh's legal experience and academic accomplishments include:

- *Three* prestigious federal appeals court clerkships, including as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court
- Attorney, Office of the Solicitor General of the United States
- Partner, Kirkland and Ellis LLP
- Argued and briefed appellate matters before the U.S. Supreme Court, the U.S. Courts of Appeals for the D.C., Eighth, and Eleventh Circuits, and the Appellate Division of the New Jersey

Superior Court

- Argued motions, filed briefs and tried cases before the U.S. District Court for the District of Maryland, the federal Judicial Panel on Multidistrict Litigation, the Circuit Court for Baltimore City, and the U.S. District Court for the Eastern District of Arkansas
- Filed amicus briefs with the U.S. Supreme Court in Good News Club v. Milford Central School, 533 U.S. 98 (2001), and Lewis v. Brunswick, No. 97-288
- Filed briefs and conducted oral arguments on behalf of America Online (AOL) in a series of class-action lawsuits in a number of federal district courts around the country
- Legal Counsel to the President of the United States
- Associate Counsel, Office of Independent Counsel
- Yale Law School, J.D. (Notes Editor, *Yale Law Journal*)
- Authored scholarly articles for the Georgetown Law Journal and Yale Law Journal
- Taught as a guest lecturer at various law schools

http://cornyn.senate.gov

Rao, Neomi J.

From: Sinatra, Nicholas A.

Sent: Monday, May 08, 2006 11:40 AM

To: Morton Intern, James B.; Brian; Brown, Jamie E.; Danny D; Dixton, Grant; Elisebeth Cook; Goeglein, Tim; Healy, Erin E.; Kristi Remington; Perino, Dana M.; Rao, Neomi J.; Sara Taylor; Scott; Sinatra, Nicholas A.

Subject: Agenda for Judicial Briefing Today

Here is the agenda for the Briefing today. Please drop me a note if you plan to attend if you have not done so already. I would like to have a good head count for the layout of the room. thx Nick

THE WHITE HOUSE
WASHINGTON

Judicial Coalition
White House Briefing
Monday, May 8, 2006
2:30 p.m. – 3:30 p.m.
EEOB Indian Treaty Room

Agenda

2:30 p.m. – 2:35 p.m.	The Honorable Tim Goeglein Special Assistant to the President and Deputy Director of Public Liaison
2:35 p.m. – 2:50 p.m.	The Honorable Karl Rove Deputy Chief of Staff and Senior Advisor
2:50 p.m. – 3:10 p.m.	The Honorable Harriet Miers Counsel to the President
3:10 p.m. – 3:30 p.m.	The Honorable Jamie Brown Special Assistant to the President for Legislative Affairs

Livingston ?

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Meeting re: Brett	1	04/28/2006	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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This Document was withdrawn on 7/6/2018 by erg

Rao, Neomi J.

From: Kavanaugh, Brett M.
Sent: Wednesday, May 03, 2006 10:04 AM
To: 'Kristi.R.Macklin@usdoj.gov'; Brown, Jamie E.; Rao, Neomi J.; Dixton, Grant; Kelley, William K.
Subject: Per Cornyn question, list of courts/states in which I have argued in court

I am confirming that there are no more, but I have this ...

Supreme Court of the United States
Fifth Circuit
D.C. Circuit
New Jersey
Maryland
District of Columbia
Texas
Alabama
Missouri
New York
Massachusetts

May Judicial Coalition—Kavanaugh

Last Updated
5/1/2006 8:30 PM

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
30	1 OPL Conservative Conference Call 4:30pm	2 12:00-12:30pm BK Courtesy Call w/ Sen. Schumer (D-NY) **RNC Memo "leak"**	3 Former Colleagues Letter of Endorsement 2:00-2:30pm BK Courtesy Call w/ Sen. Brownback (R-KS) 3:15 pm-3:45pm BK Courtesy Call w/ Sen. Graham (R-SC)	4 **POTUS Nat'l Day Prayer** **Senate Committee Vote (T)** TBD Editorials	5	6
7	8 **POTUS Judges Assoc. (TBD Press)** WH Judicial Coalition Briefing Indian Treaty Room 2pm National Religious Broadcasters Call 4pm OPL Conservative Conference Call 4:30pm	9 Former Solicitors General Letter (T) **TBD BK Courtesy Calls**	10 **RNC Gala**	11 TBD Press Event Former Attorneys General Letter (T)	12	13 **Possible Radio Address (TBD)**
14	15 OPL Conservative Conference Call 4:30pm	16 **TBD BK Courtesy Calls**	17	18	19	20 **Possible Radio Address (TBD)**
21	22 **Senate Floor Debate this week (T)** OPL Conservative Conference Call 4:30pm	23	24	25	26	27
28	29 **Memorial Day**	30 OPL Conservative Conference Call 4:30pm	31	1	2	3

May Judicial Coalition—Kavanaugh

Last Updated
4/29/2006 4:30 PM

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
30	1 OPL Conservative Conference Call 4:30pm	2 Former Colleagues Letter of Endorsement Schumer (WH, Senate or RNC) Memo	3 TBD Press Event Former Attorneys General Letter Former Solicitors General Letter	4 POTUS Nat'l Day Prayer Senate Committee Vote (T) 930 Leonard - to target media outlets.	5	6
7 open or closed press	8 POTUS Judges Event WH Judicial Coalition Briefing Indian Treaty Room 2pm National Religious Broadcasters Call 4pm OPL Conservative Conference Call 4:30pm	9 RPC mtg -	10	11	12	13 Radio Address?
14	15 Senate Floor Debate This week (T) OPL Conservative Conference Call 4:30pm	16	RNC Gala	18	19	20
21	22 OPL Conservative Conference Call 4:30pm	23	24	25	26	27
28	29 Memorial Day	30 OPL Conservative Conference Call 4:30pm	31	1	2	3

May

Last Updated
4/29/2006 4:30 PM

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
30	1 OPL Conservative Conference Call 4:30pm National Religious Broadcasters Call 4pm	2 Former Colleagues Letter of Endorsement **(WH, Senate or RNC) Memo**	3 TBD Press Event Former Attorneys General Letter Former Solicitors General Letter	4 **POTUS Nat'l Day Prayer** **Senate Committee Vote (T)**	5	6
7	8 **POTUS Judges Event** WH Judicial Coalition Briefing EEOB 350 TBD Time OPL Conservative Conference Call 4:30pm	9	10	11	12	13
14	15 **Senate Floor Debate This week (T)** OPL Conservative Conference Call 4:30pm	16	17 **RNC Gala**	18	19	20
21	22 OPL Conservative Conference Call 4:30pm	23	24	25	26	27
28	29 **Memorial Day**	30 OPL Conservative Conference Call 4:30pm	31	1	2	3

Positive TPs for groups

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the District of Columbia Circuit

- Throughout his career as an appellate lawyer, a government lawyer, and an Assistant to the President, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.

- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the majority of his 16 years of practice to public service.

    - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.

    - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

    - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.

    - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appellate courts throughout the country.

    - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.

    - Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- The American Bar Association has consistently rated Mr. Kavanaugh "Well Qualified" or "Qualified" to serve on the D.C. Circuit.

- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editors of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh regularly offers his legal expertise and personal time to serving his community.
    - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.
    - At the request of the Democratic Mayor of Miami, Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service's decided to return him to Cuba.
- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.
    - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality."
    - William P. Barr, Vice President and General Counsel of Verizon and former Attorney General, wrote, "Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. … In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor."
    - According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."
    - Pamela Harris, Washington, D.C. attorney and Yale Class of 1990, wrote, "At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries."

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the DC Circuit

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

- ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

- ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts:

- The President selects judicial nominees. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees.

  - ✓ The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

- Democratic senators had positive things to say about President Bush's first group of nominees at the time of their nomination.

  - ✓ Senator Leahy said on an NPR radio broadcast that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work."

  - ✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations."

Brett Kavanaugh – Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.

- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

  - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).

  - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.

  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.

  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

- ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.

- ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.

- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.

  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).

- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.

  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.

  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.

  - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."

  - ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective

discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Rao, Neomi J.

From: Kristi.R.Macklin@usdoj.gov
Sent: Tuesday, May 02, 2006 10:25 AM
To: Brown, Jamie E.; Dixton, Grant; Rao, Neomi J.
Cc: Elisebeth.C.Cook@usdoj.gov
Subject: RE: Leahy's remarks

The legislative clerk read the nomination of Michael Ryan Barrett, of Ohio, to be United States District Judge for the Southern District of Ohio.

[Page: S3789] GPO's PDF
The PRESIDING OFFICER. The Senator from Vermont is recognized for 5 minutes.

Mr. LEAHY. Mr. President, I assume the opponents of these nominations would want to be recognized, or the Republican majority supporting him.
I understand there are three Republicans to speak on the judges and one Democrat is allowed to speak.

No one is here, so I will speak.

I will support this nominee, Michael Barrett. He has the support of his home State Senators. I have also heard from both Democrats and Republicans in Ohio. That makes it worth supporting. In fact, the nomination of such consensus nominees is an indication of what should be done in States, and would lead to the confirmation of more judges. In January 2001, we were following a shutdown of judges going through. As the distinguished Presiding Officer knows, the Republicans were determined to block virtually all of President Clinton's judges for a long period of time. I became chairman and for 17 months moved a record number of judges for President Bush, 100. Actually, since 2001, while the Republican majority has not moved President Bush's judicial nominees anywhere near as fast as I did, we have still moved 238. That includes two Supreme Court Justices, and 43 circuit court judges. However, we do have some that create problems.

Unfortunately, as demonstrated by the recent withdrawals of several nominees, all too often this White House seems more interested in rewarding cronies and picking political fights than in selecting lifetime appointments after thorough vetting. Sadly, the Republican Senate has proceeded to rubber stamp these important nominations and failed in its role as a constitutional check on the President.

The controversial nominations of Judge Terrence Boyle and Brett Kavanaugh are contemporary cases in point. With the extreme right-wing and special interest groups agitating for a fight over judicial nominations, the Republican leader of the Senate is answering their demands by seeking to force Senate debate on these controversial nominees. Rather than focus on proposals to end the subsidies to big oil and rein in gas prices, rather than devote our time to immigration reform legislation, rather than completing a budget, the Republican leader came to the floor last week to signal a fight over controversial judicial nominations is in the offing. Such a controversial maneuver serves only to divide and distract us from America's real problems.
During this President's administration, gas prices have more than doubled and undocumented immigrants have doubled, but judicial vacancies have been cut in half from the time when Republicans in the Senate were stalling President Clinton's judicial nominations. Despite the real problems that confront Americans with respect to security, health insurance, rising health costs, rising energy costs, and spiraling deficits and debt, some would rather pick an election year fight over judicial nominations.

In fact, I mentioned Judge Boyle. I contrast his nomination to the nomination of Michael Barrett. Michael Barrett, as I said, will go through easily. I will support him. I will vote for him, as I told the distinguished Senator, the former Lieutenant Governor of Ohio, now senior Member of the U.S. Senate, Mr. DeWine.

But you take somebody like Judge Boyle. Here is somebody who has violated every judicial ethic you can think of. He ruled on multiple cases involving corporations in which he held investments. In at least one instance--this is chutzpah beyond all understanding--he was presiding over a case involving General Electric, and while doing

that, he bought stock in General Electric; then, 2 months later, he ruled in favor of General Electric.

Now, in the first year of law school you might get an example like this because it is so clear-cut and easy to understand. This is amazing--amazing--not withstanding all the other conflicts of interest he had in other cases. Whether or not it turns out that Judge Boyle broke Federal law or canons of judicial ethics, these types of conflicts of interest have no place on the Federal bench.

This is not the first judicial nominee to engage in these kinds of apparent ethical lapses. Less than two months ago, the President withdrew the nomination of Judge James Payne to the Court of Appeals for the 10th Circuit after information became public about that nominee's rulings in a number of cases in which he appears to have had conflicts of interest. Those conflicts were pointed out not by the administration's screening process or by the ABA, but by journalists.

During the last few months, President Bush also withdrew the nominations of Judge Henry Saad to the Court of Appeals for the 6th Circuit and Judge Daniel P. Ryan to the Eastern District of Michigan.
And we saw the arrest of another Bush administration official and former judicial nominee to the Court of Appeals for the 4th Circuit, Claude Allen, who had earlier withdrawn as a nominee and more recently resigned his position as a top domestic policy adviser to the President. When we are considering lifetime appointments of judicial officers who are entrusted with protecting the rights of Americans, it is important to be thorough. Unfortunately, all too often this White House seems more interested in rewarding cronies.

They add to the long list of nominations by this President that have been withdrawn. Among the more well known are Bernard Kerik to head the Department of Homeland Security and Harriet Miers to the Supreme Court.
It was, as I recall, reporting in a national magazine that doomed the Kerik nomination. It was opposition within the President's own party that doomed the Miers nomination.

Over the weekend we heard that this administration's former FDA director is under investigation and its political director testified, again before a federal grand jury. Of course, Mr. Libby remains under indictment, and Messrs. Safavian, Scanlon, Abramoff and a number of House Republicans are caught up in another criminal probe.

In light of this long list of failures of the White House to fulfill its commitments to the American people to be above reproach and its lackluster vetting process, it is more important than ever that the Senate and the Senate Judiciary Committee afford nominees the kind of careful scrutiny that will yield enough information to decide on a nominee's fitness for an important appointment. In Judge Boyle's case, not only were his answers to the committee's questions evasive, but he failed to produce even the unpublished opinions he issued from the bench.

I am also concerned that the Senate Judiciary Committee is being required to consider the nomination of Brett Kavanaugh to the United States Court of Appeals for the DC Circuit without a complete record.
The Democratic members of the committee have twice asked for another hearing in connection with his nomination. Mr. Kavanaugh failed to provide meaningful and substantive responses to many of the questions posed to him at his first hearing and he delayed for seven months before providing evasive and incomplete answers to written questions.

In addition, a new hearing is warranted because several troubling issues have come to light since his initial nomination. As Associate White House Counsel and staff secretary, Mr. Kavanaugh has served in the inner circle of the White House at a time when many controversial policies and decisions were being considered. Senators have not had a chance to question him about his role in connection with those matters.
For example, what was Mr. Kavanaugh's role in connection with the warrantless spying on Americans? What was his involvement in the policies affecting detainee treatment and interrogation? What was his involvement in connection with military tribunals, torture, and rendition of prisoners to other countries? Given the scandals now plaguing the White House, it is important to know whether Mr. Kavanaugh has had a role in connection with the actions of Jack Abramoff, Michael Scanlon, David Safavian, the matters being investigated in connection with the Plame matter, and many other matters.

The wall of secrecy that the administration has maintained is no environment in which

carefully to consider an administration insider for a lifetime appointment to an important Federal judicial position.

I see the distinguished Senator from Ohio is in the Chamber. I urge people,

[Page: S3790] GPO's PDF
do not just do a rubberstamp just because it is a member of your party who nominated these people. I think of the concern I heard from Republicans in this body when I objected to a judicial nominee to the Court of Appeals for the Fourth Circuit, Claude Allen. Nobody said a word when he got arrested for fraud. But I bet you they breathed a sigh of relief that I blocked it before.

I yield the floor.

-----Original Message-----
From: Jamie_E._Brown@who.eop.gov [mailto:Jamie_E._Brown@who.eop.gov]
Sent: Tuesday, May 02, 2006 10:21 AM
To: Macklin, Kristi R; Grant_Dixton@who.eop.gov; Neomi_J._Rao@who.eop.gov
Subject: RE: Leahy's remarks

Attachment stripped. Can you please send as e-mail text?

-----Original Message-----
From: Kristi.R.Macklin@usdoj.gov [mailto:Kristi.R.Macklin@usdoj.gov]
Sent: Tuesday, May 02, 2006 10:07 AM
To: Dixton, Grant; Rao, Neomi J.; Brown, Jamie E.
Subject: FW: Leahy's remarks

fyi

From: Best, David T
Sent: Tuesday, May 02, 2006 10:06 AM
To: Macklin, Kristi R
Subject: Leahy's remarks

Leahy's remarks prior to the vote yesterday afternoon regarding Kavanaugh and Boyle. (ethics problems.)

Committee TPs - Sent 2 May 06

Brett Kavanaugh: ABA Rating

Issue: The American Bar Association (ABA) downgraded Mr. Kavanaugh's rating from Well Qualified/ Qualified to Qualified/Well Qualified. This demonstrates that he should not be confirmed.

Talking Points:

- The American Bar Association (ABA) has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- Mr. Kavanaugh **is highly qualified to serve on the D.C. Circuit**—he has a distinguished record of public service and private sector experience comparable to each of the sitting judges of that court.

  - As Assistant to the President and Staff Secretary, Mr. Kavanaugh has served at the highest levels of the Executive Branch. He previously served as Senior Associate Counsel and Associate Counsel to the President.

  - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.

  - Mr. Kavanaugh also served as Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.

- **Mr. Kavanaugh's extraordinary range of experience and credentials most closely resemble those of now-Chief Justice John Roberts** and Judge Merrick Garland, who was nominated by President Clinton.

Brett Kavanaugh – Executive privilege

Allegation: Brett Kavanaugh has changed his position on executive privilege. While working for Independent Counsel Kenneth Starr during the Clinton Administration, Brett Kavanaugh argued for a narrow interpretation of the privilege. As Associate White House Counsel, however, he strongly asserted executive privilege for the Bush Administration in a variety of cases, including in his work drafting Executive Order 13233, which limits public access to presidential records.

Facts:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
  - ✓ Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield records regarding the pardons issued by Bill Clinton at the end of his presidency and to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.
- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel (OIC) was consistent with his work on Executive Order 13233.
  - ✓ On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation.
  - ✓ The federal courts of appeals agreed with the Independent Counsel's position in those cases.
  - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
  - ✓ The President of the American Bar Association, in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he is too young and lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal appellate courts, and a proven commitment to public service.**

- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.

- **Mr. Kavanaugh's illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.**

  - ✓ Mr. Kavanaugh has specialized in appellate law and has argued before the U.S. Supreme Court and state and federal appellate courts throughout the country.

  - ✓ Mr. Kavanaugh has extensive public service as Assistant to the President and Staff Secretary, Senior Associate Counsel to the President, and as a special prosecutor.

  - ✓ Mr. Kavanaugh practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.

  - ✓ Kavanaugh served as a law clerk to U.S. Supreme Court Justice Anthony Kennedy, and to Court of Appeals Judges Alex Kozinski and Walter Stapleton.

- Prior to his appointment to the U.S. Court of Appeals for the First Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is hardly a requirement for appointment to the federal bench.

  - ✓ Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.

  - ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the D.C. Circuit.**

Brett Kavanaugh – Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.

- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

  - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).

  - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.

  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.

  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

- ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.

- ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.

- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not address when an assertion of executive privilege should be made or would be successful.

  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).

- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.

  - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."

  - ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

  - ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message. A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech.
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**
- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program. The program provided children in failing public schools with access to a high-quality education.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents**.
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials.** All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida. The Florida Supreme Court declined to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, *regardless* of whether they were religious or nonsectarian.
- **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population.** The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.
- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his clients in the Florida litigation.

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled President Clinton's sexual encounters with Monica Lewinsky.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment.

- **The Independent Counsel's report never stated that President Clinton should have been impeached. The report explained that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

  - ✓ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

    - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

    - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **The U.S. Senate already has confirmed numerous judicial and other nominees who worked for Independent Counsel Ken Starr. Nearly all of these nominees were confirmed either unanimously or by voice vote.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the U.S. Court of Appeals for the Eighth Circuit on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.

- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.

- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed for a seat on the U.S. District Court for Northern District of Georgia on June 16, 2004, by a vote of 97-0. He was previously confirmed to be the U.S. Attorney for the Northern District of Georgia, by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003, by a voice vote.

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- ✓ Kevin Martin served as Associate Independent Counsel and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
  - ✓ In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr. Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious."
- **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

- ✓ The Special Division of the U.S. Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

- ✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

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Draft	Brett M. Kavanaugh	16	N.D.	P5;

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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- Positive talkers
- committee talkers

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the nominations of Priscilla Owen and Janice Rogers Brown.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

- Judges Priscilla Owen and Janice Rogers Brown were confirmed once given an up-or-down vote by the full Senate.

Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.
  - ✓ The federal courts of appeals agreed with Mr. Kavanaugh's position in those cases.
  - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
  - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges**. *See* Section 2(b).
  - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
  - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings."

Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2171 (1998).

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **In his three successive ratings by the ABA, Kavanaugh has received two ratings of "well qualified" and one of "qualified." In those three reviews, all 42 of the individual ratings by the members of the committee have been "well qualified" or "qualified" ratings.**

  - ✓ He has practiced law in the private and public sectors for 16 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

  - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 13 years, to public service.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.

  - ✓ Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.

  - ✓ Mr. Kavanaugh's legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

- ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.

- ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

- ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- ➢ **Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

  - ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald**.

- ➢ Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy

- ➢ In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

  - ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

  - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

  - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

- ➢ **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996
Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997
Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney's energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

- **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**
  - ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).

- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**
  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.
  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.* at 2171.
  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.

- **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Brett Kavanaugh – Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.

- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

  - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).

  - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.

  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.

  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

- ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.

- ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.

- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.

  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).

- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.

  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.

  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.

  - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."

  - ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective

discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
  - ✓ **In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
  - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious." See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➢ **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➢ **The U.S. Senate has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.

✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.

✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed for a seat on the United States District Court for Northern District of Georgia on June 16, 2004, by a vote of 97-0. Prior to that he was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote.

✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human

Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.

✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

✓ Rod Rosenstein served as Associate Independent Counsel from 1995-1997 and was confirmed to be the U.S. Attorney for the District of Maryland on July 1, 2005, by voice vote.

✓ Kevin Martin served as Associate Independent Counsel from XXXX to XXXX and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
  - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents**.
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools**. A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

- ➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

- ➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program.** ***See Zelman v. Simmons-Harris*****, 536 U.S. 639 (2002).**

  - ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

  - ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

- ➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Defense of Ken Starr

Allegation: Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr "an American hero," written that Starr's "record is one of extraordinary accomplishment and integrity," and praised Starr for "consistently perform[ing] with the highest skill and integrity." This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh's right-wing views.

Facts:

➢ **Many have expressed that the public criticism directed at Independent Counsel Kenneth Starr was vicious and unwarranted.**

✓ The Washington Post editorial page said of Judge Starr:

- "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

- "The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service." Editorial, Wash. Post, Oct. 20, 1999, at A28.

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr's integrity were belied by the fact that President Clinton's attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

- Rotunda stated: "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself." *Id.*

✓ In a prescient editorial published shortly after Judge Starr's appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: "If Starr's investigation turns up no evidence of wrongdoing, he

may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution." Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*, PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➢ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.**

✓ The Washington Post editorial page said, upon Judge Starr's appointment, "he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno's own short list of likely candidates for independent counsel when she picked Mr. Fiske." Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr's appointment as Independent Counsel, Mark Gitenstein, former chief Democratic counsel to the Senate Judiciary Committee, said: "Starr was a good, fair judge, and I think he will be fair in this proceeding." Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative … but he's wholly undevious and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.

✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.

➢ **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**

✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.

✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

➢ **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**

- ✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:
  - The creation of a "protective function privilege" that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).
  - The claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).
  - The claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

➢ **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).
- ✓ The Independent Counsel's report detailed substantial and credible information that may have constituted grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.

➢ **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

- ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
- ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- ➢ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

  - ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that ''it is clear that the President lied when he testified before the grand jury.''

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

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  - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.
- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **The U.S. Senate already has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.
- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.
- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed for a seat on the United States District Court for Northern District of Georgia on June 16, 2004, by a vote of 97-0. Prior to that he was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Rod Rosenstein served as Associate Independent Counsel from 1995-1997 and was confirmed to be the U.S. Attorney for the District of Maryland on July 1, 2005, by voice vote.

- ✓ Kevin Martin served as Associate Independent Counsel from XXXX to XXXX and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.

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Rao, Neomi

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[Brett Kavanaugh]: Kavanaugh - ABA (American Bar Association)

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Email	RE: ABA Written Statement on Kavanaugh - To: Neomi Rao, et al. - From: Brett Kavanaugh	1	05/08/2006	P5;
002	Briefing	ABA Testimony	1	N.D.	P5;
003	Report	Problems...	3	N.D.	P5; P6/b6;
004	Report	Problems...	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - ABA (American Bar Association)

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RESTRICTION CODES

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Rao, Neomi J.

From: White House Communications [WhiteHouseCommunications@WhiteHouse.Gov]
Sent: Monday, May 08, 2006 8:02 PM
To: Rao, Neomi J.
Subject: SETTING THE RECORD STRAIGHT: The ABA Finds Brett Kavanaugh Is "Indeed Qualified To Serve On The Federal Bench"
Attachments: 5.8.06 Kavanaugh.pdf

Setting The Record Straight:

The ABA Finds Brett Kavanaugh Is "Indeed Qualified To Serve On The Federal Bench"

"In 42 votes cast in the three ABA reviews, all 42 found Mr. Kavanaugh to be well qualified or qualified to serve on the DC Circuit. The ABA itself says that even the lowest of the three ratings is, in its words, 'a very high standard.'"

–White House Deputy Press Secretary Dana Perino
May 8, 2006

***The Associated Press*: "ABA Downgrades Rating For White House Aide From Well-Qualified To Qualified."**
(Laurie Kellman, "ABA Downgrades Rating For White House Aide From Well-Qualified To Qualified," *The Associated Press*, 5/8/06)

But According To ABA Review Panel Chairman Stephen Tober, Kavanaugh Is "Indeed Qualified To Serve On The Federal Bench." TOBER: "This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. ... A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the federal bench." (Stephen L. Tober, Committee On The Judiciary, U.S. Senate, Testimony, 5/8/06)

Tober Himself Notes That "There Is No Bright-Line Litmus Test As To Whether A Nominee Is 'Well Qualified' Or 'Qualified.'" TOBER: "It is, at its most basic, the difference between the 'highest standard' and a 'very high standard.'" (Stephen L. Tober, Committee On The Judiciary, U.S. Senate, Testimony, 5/8/06)

According To The ABA's "Backgrounder," A "Qualified" Rating Means The Committee Believes A Nominee Will Be Able To Perform "All Duties And Responsibilities" Of A Federal Judge. TOBER: "The Backgrounder also makes clear that '(t)he rating of 'Qualified' means that the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge.'" (Stephen L. Tober, Committee On The Judiciary, U.S. Senate, Testimony, 5/8/06)

Sen. Arlen Specter (R-PA): "[The ABA Rating Is] Just A Shading. ... He's Got A Very Strong Record."
(Laurie Kellman, "ABA Downgrades Rating For White House Aide From Well-Qualified To Qualified," *The Associated Press*, 5/8/06)

Brett M. Kavanaugh Is Superbly Qualified For The D.C. Circuit

Throughout His Career, Brett Kavanaugh Has Demonstrated Legal Excellence And The Fair-Minded Temperament To Serve As A Federal Appellate Judge. Kavanaugh has an extraordinary range of experience in the public and private sectors. He has dedicated the majority of his 16 years of practice to public service as an appellate lawyer, a government lawyer, and an Assistant to the President.

Kavanaugh Now Serves As Assistant To The President And Staff Secretary. He is responsible for coordinating virtually all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on numerous constitutional, legal, and ethical issues.

Prior To His Service In This Administration, Kavanaugh Was A Partner At The Law Firm Of Kirkland & Ellis, Where His Practice Focused On Appellate Matters. Kavanaugh also served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of difficult constitutional issues presented during that investigation. Kavanaugh specialized in appellate law and has extensive experience in the Federal appellate courts, both as a law clerk and as counsel. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appellate courts throughout the country.

Kavanaugh Clerked For U.S. Supreme Court Justice Anthony Kennedy, As Well As Judge Alex Kozinski Of The Ninth Circuit And Judge Walter Stapleton Of The Third Circuit. Prior to his Supreme Court clerkship, Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

The American Bar Association (ABA) Has Consistently Rated Kavanaugh "Well Qualified" Or "Qualified" To Serve On The D.C. Circuit. The ABA has rated Brett Kavanaugh qualified to serve on the D.C. Circuit on three separate occasions. In other words, 42 out of 42 ABA individual ratings found that Mr. Kavanaugh is either Well Qualified or Qualified to serve on the D.C. Circuit. And the majority of those 42 raters found Mr. Kavanaugh to be Well Qualified to serve on the D.C. Circuit.

Kavanaugh Has Impeccable Academic Credentials. He received his B.A. cum laude from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the *Yale Law Journal*.

Kavanaugh Has Offered His Legal Expertise And Personal Time To Serving His Community. While in private practice, Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland, against the attempt to stop construction of a synagogue in the county. Kavanaugh also represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service decided to return him to Cuba.

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Rao, Neomi J.

From: Kavanaugh, Brett M.
Sent: Tuesday, May 09, 2006 11:52 AM
To: Miers, Harriet; Kelley, William K.; Rao, Neomi J.
Subject: Ed Whelan post on National Review ...

Kavanaugh and the ABA

[Ed Whelan 05/09 11:38 AM]
In advance of this afternoon's hearing, I have a few comments on the ABA's statement yesterday on Brett Kavanaugh's nomination to the D.C. Circuit. (I have a copy of the statement but have not been able to locate an online link.) These comments supplement my earlier post, which explained (as the ABA's statement also does) the modest nature of the change in Kavanaugh's ABA rating.

1. Kavanaugh's latest rating—overall "qualified"—consists of a "substantial majority" of the ABA committee finding him "qualified" and a minority finding him "well qualified". As the ABA statement explains, the difference between "well qualified" and "qualified" is "the difference between the 'highest standard' and a 'very high standard'". Specifically, the "qualified" rating "means that the nominee meets the Committee's *very high standards with respect to integrity, professional competence and judicial temperament* and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

Thus, what is most significant about the committee's recent rating is that all the members of the committee have found that Kavanaugh, at the very least, meets these "very high standards". No noise about the modest change in Kavanaugh's rating from "substantial majority well qualified, minority qualified" to "substantial majority qualified, minority well qualified" should obscure the ABA's bottom line.

2. It seems to me unfair to Kavanaugh for the committee to have made public a handful of anonymous negative statements without also disclosing some of the much larger universe of very positive statements that underlie the ABA's rating.

3. As this Washington Times article makes clear, there are serious reasons to question the objectivity and fitness of Marna Tucker, the new D.C. Circuit representative on the ABA committee who led the supplemental investigation of Kavanaugh:

> Washington divorce lawyer Marna S. Tucker, a registered Democrat, conducted the most recent interview of Mr. Kavanaugh and delivered testimony on behalf of the ABA over the telephone yesterday for the Judiciary Committee hearing today.
>
> Ms. Tucker has donated more than $10,000 to Democratic candidates and causes, according to Federal Election Commission records at www.politicalmoneyline.com, a Web site that tracks campaign contributions. She has never given to Republicans, according to the site.
>
> The Washington Post described her as a "prominent liberal" in 1991 and the following year noted her friendship with Hillary Rodham Clinton, now a Democratic senator from New York.

Ms. Tucker also is a founding member and board director of the National Women's Law Center, an organization committed to abortion rights and other liberal causes.

The fact that Ms. Tucker is a divorce lawyer is striking. I can't think of a specialty that has less relation to the work of the D.C. Circuit. It is bizarre that, with all the attorneys in D.C. who have practices that relate to the D.C. Circuit, the ABA would pick a divorce lawyer to be the D.C. Circuit representative.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	RE: ABA Written Statement on Kavanaugh - To: Neomi Rao, et al. - From: Brett Kavanaugh	1	05/08/2006	P5;

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[Brett Kavanaugh]: Kavanaugh - ABA (American Bar Association)

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OA Num.:
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NARA Num.:
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American Bar Association
Standing Committee on Federal Judiciary*

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Chair (At Large)	Thomas Z. Hayward, Jr.	Thomas Z. Hayward, Jr.	Stephan L. Tober (First Circuit, 2003-04)
First	Stephan L. Tober	**Manuel San Juan**	Manuel San Juan
Second	Lorna G. Schofield	Lorna G. Schofield	Lorna G. Schofield
Third	Charisse R. Lillie	Charisse R. Lillie	**Roberta D. Liebenberg**
Fourth	E. Osborne Ayscue, Jr.	**D. Alan Rudlin**	D. Alan Rudlin
Fifth	Judy Perry Martinez	Judy Perry Martinez	**Kim J. Askew**
Sixth	Randall D. Noel	Randall D. Noel	Randall D. Noel
Seventh	Harold S. Barron	Harold S. Barron	Harold S. Barron
Eighth	Doreen D. Dodson	**Charles M. Thompson**	Charles M. Thompson
Ninth	Raymond Charles Marshall	Raymond Charles Marshall	Raymond Charles Marshall
	C. Timothy Hopkins	C. Timothy Hopkins	**Max A. Hansen**
Tenth	James B. Lee	James B. Lee	James B. Lee
Eleventh	Laveeda Morgan Battle	Laveeda Morgan Battle	**Teresa Wynn Roseborough**
D.C. Circuit	Pamela A. Bresnahan	Pamela A. Bresnahan	**Marna S. Tucker**
Federal Circuit	Sheila Slocum Hollis	Sheila Slocum Hollis	**John Payton**

* Names in bold signify new members from previous year.

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STATEMENT

of

STEPHEN L. TOBER

on behalf of the

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF BRETT MICHAEL KAVANAUGH

TO BE JUDGE OF THE UNITED STATES COURT OF APPEALS
for the
THE DISTRICT OF COLUMBIA CIRCUIT

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

May 8, 2006

I. Statement of Stephen L. Tober

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober. I am a practicing lawyer in Portsmouth, New Hampshire, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. I am submitting this written statement for the hearing record to present the Standing Committee's supplemental peer review evaluation of the nomination of Brett Michael Kavanaugh to serve on the United States Court of Appeals for the District of Columbia Circuit. This statement is divided into two sections. In this first section, I am pleased to summarize the Standing Committee's general investigative procedures and present an overview of the investigation of the nominee. In the second section, I will explain the process in this particular matter and the reasons for the Standing Committee's rating.

After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Qualified" for the appointment. A minority found him to be "Well Qualified."

A. Procedures Followed By the Standing Committee

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures. A more detailed description of the Committee's procedures is

contained in the Committee's booklet (commonly described as our *Backgrounder*), *Standing Committee on Federal Judiciary: What It Is and How It Works (2005).*

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, knowledge of the law, breadth of professional experience, courtroom experience, character, integrity, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Pamela Bresnahan conducted the original formal investigation in 2003, and updated her report in 2005, as the District of Columbia Circuit representative on the Standing Committee. Marna Tucker, who succeeded Attorney Bresnahan as the District of Columbia Circuit representative on the Standing Committee in August 2005, subsequently conducted a further supplemental evaluation of the nominee.[1]

The investigator starts his or her investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications,

[1] Marna Tucker was joined by Federal Circuit representative John Payton for the interview of the nominee.

including professional experience, significant cases handled and major writings. The investigator makes extensive use of the questionnaire during the course of the investigation. In addition, the investigator examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer-review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the investigator will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Standing Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the investigator takes whatever additional steps are necessary to reach a fair and accurate assessment of the

nominee.

Upon completion of the investigation, the investigator submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the investigator then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portion of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire committee, composed of fourteen "circuit" members and the Chair. After carefully considering the formal report and its attachments, each member independently submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified" or "Not Qualified." An investigator who is not a current member of the Standing Committee would not vote.

I would like to re-emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given a full opportunity to explain the matter and to provide any additional information

bearing on it. If the information cannot be shared with the nominee, it is not included in the formal report and is not considered by the Committee in reaching its evaluation.

B. The Investigation of the Nominee

The Standing Committee has issued three evaluations on the nomination of Brett Kavanaugh. This is due to the fact that Mr. Kavanaugh has been nominated once (2003) and re-nominated twice (2005 and 2006). It is the established practice of the Standing Committee to conduct a further investigation on any nominee who is re-nominated, and the extent and scope of that further investigation is often influenced by the length of time that has passed from the date of the original evaluation and rating. Whenever a supplemental evaluation is performed, copies of all previous confidential formal reports on the nominee are reproduced, and presented to every member of the Standing Committee for review before they vote, alongside the new formal report. Thus, it is important that every supplemental evaluation performed goes back to the end-date of the original formal report, and brings the investigation forward from that point. That is what occurred here.

Concern has been raised that the most recent rating from the Standing Committee somehow results solely from a "change in personnel" on the Committee. In fact, such is not the case. Indeed, no less than six members who served on the Standing Committee before August, 2005,[2] and who continue to serve today, changed their votes on this nominee from "Well Qualified" to "Qualified" between the rating issued on February 16,

[2] Appointments to the Standing Committee are made by the incoming ABA President, and according to the ABA Constitution, all new appointments to this committee begin their service at the conclusion of the ABA Annual Meeting, which is generally in August of each year.

2005, and the rating issued April 3, 2006.

There are at least three general reasons to support the most recent rating given to this nominee. First, there was a wider universe of individuals contacted during the supplemental evaluation, than during the initial formal report or its update. The Standing Committee generally requires, at a minimum, 40 to 60 contacts with judges, lawyers and others in any nomination it is reviewing, although an evaluator is certainly free to do more. In 2003 there were 55 such contacts regarding Mr. Kavanaugh. In 2006, there were 91 such contacts. Nineteen more judges and seventeen more lawyers with potential knowledge about Mr. Kavanaugh were contacted, and not all of the original 55 contacts were summarily repeated. Thus, in 2006 a larger group of individuals was given the opportunity to share with the Standing Committee knowledge of the nominee's integrity, professional competence, and potential for judicial temperament.

Second, some individuals who may have had no contact with the nominee in 2003 were now individuals who had crossed paths with him. Some in public service or in the practice of law in 2003 were now no longer active, having been replaced in some measure by others. And, simply put, events and times had moved on, creating new and different developments and landscapes in which the professional qualifications of the nominee could be viewed, that were not present in 2003 or even 2005.

Third, it should be pointed out that with both earlier ratings issued by the Standing Committee, there was a "minority Qualifed" as part of the vote. The official rating by the Standing Committee has always been and remains the majority rating, yet nonetheless it is important to underscore that some members of the 2003 and 2005 Standing Committee considered this nominee to be "Qualified."

The Standing Committee takes most seriously its responsibility to conduct an independent, non-political, non-ideological examination of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is "Well Qualified" or "Qualified." The *Backgrounder* makes clear that "(t)o merit a rating of 'Well-Qualified,' the nominee must be at the top of the legal profession in his or her legal community; have outstanding legal ability, breadth of experience and the highest reputation for integrity; and either demonstrate or exhibit the capacity for judicial temperament."

The *Backgrounder* also makes clear that "(t)he rating of 'Qualified' means that the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

It is, at its most basic, the difference between the "highest standard" and a "very high standard." Our rating is not the result of tallying the comments - pro and con - about a particular nominee. Nor is it about politics or ideology or empirical data. Rather, in making our evaluation, we draw upon our previous experiences, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment.

From the outset in 2003, even with an earlier rating of "Well Qualified" for this nominee, there were considerations arising from confidential interviews and other background information that act to explain the thread of "Qualified" running through the Standing Committee evaluations. The 2003 confidential record makes it clear that there

were then-present concerns regarding this nominee's breadth of professional experience. It was noted that he had never tried a case to verdict or judgment; that his litigation experience over the years was always in the company of senior counsel; and that he had very little experience with criminal cases. Indeed, it is the circumstance of courtroom experience that fills the transcripts that make the record before the Court of Appeals, and concerns were expressed about the nominee's insight into that very process. Nonetheless, a substantial majority saw other overriding factors that supported a rating of "Well Qualified."

The additional interviews conducted in 2006 expanded upon those earlier concerns. One judge who witnessed the nominee's oral presentation in court commented that the nominee was "less than adequate" before the court, had been "sanctimonious," and demonstrated "experience on the level of an associate." A lawyer who had observed him during a different court proceeding stated: "Mr. Kavanaugh did not handle the case well as an advocate and dissembled." Other lawyers expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law.

Further, the 2006 interviews raised a new concern involving his potential for judicial temperament. Unlike the earlier 2003 final report and 2005 updated report, the recent supplemental evaluation contained comments from several interviewees with more recent experience with the nominee, which caused them to characterize the nominee as "insulated." One interviewee suggested that much of his concern about the nominee being insulated was due, understandably, to the nominee's current position as Staff Secretary to the President. However, this interviewee remained concerned about the

nominee's ability to be balanced and fair should he assume a federal judgeship. And another interviewee echoed essentially the same thoughts: "(He is) immovable and very stubborn and frustrating to deal with on some issues." Both issues—his professional experience and the question of his freedom from bias and open-mindedness—were brought up (along with others) with the nominee during his 2006 interview, and he was provided a full opportunity to address them in detail as part of our supplemental evaluation material.

This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. When taken in combination with the additional concern over whether this nominee is so insulated that he will be unable to judge fairly in the future, and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context. A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the federal bench.

Thank you for the rather unique opportunity to present these remarks.

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FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - ABA (American Bar Association)

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Judge	Rating[1]
Wald, Patricia McGowan (1979-1999)	WQ
Mikva, Abner Joseph (1979-1994)	WQ
Edwards, Harry Thomas (1980-present)	WQ[2]
Ginsburg, Ruth Bader (1980-1993)	EWQ
Bork, Robert Heron (1982-1988)	EWQ
Scalia, Antonin (1982-1986)	Q/WQ
Starr, Kenneth Winston (1983-1989)	Q/NQ[3]
Silberman, Laurence Hirsch (1985-present)	Q/NQ
Buckley, James Lane (1985-present)	Q/NQ
Williams, Stephen Fain (1986-present)	Q/NQ[4]
Ginsburg, Douglas Howard (1986-present)	Q
Sentelle, David Bryan (1987-present)	WQ/Q
Thomas, Clarence (1990-1991)	Q
Henderson, Karen LeCraft (1990-present)	WQ
Randolph, Arthur Raymond (1990-present)	Q (sm) / WQ (min)
Rogers, Judith Ann Wilson (1994-present)	WQ
Tatel, David S. (1994-present)	WQ
Garland, Merrick B. (1997-present)	WQ
Roberts, John Glover Jr. (2003-2005)	WQ
Brown, Janice Rogers (2005-present)	Q (m) / NQ (min)
Griffith, Thomas Beall (2005-present)	Q (m) / NQ (min)

[1] The ABA ratings do not appear to be available online prior to the 101st Congress. These ratings have been drawn from publicly-available sources such as news and journal articles and confirmed using OLP internal sources where available.

[2] Some sources indicate that Judge Edwards received a mixed WQ/Q rating. However, the letter from the ABA stated WQ(sm)/EWQ(min).

[3] Some sources indicate that Judge Starr received a mixed Q/NQ rating. OLP sources indicate that he received at least a substantial majority Q rating.

[4] OLP could not confirm this rating through its internal sources.

TELECONFERENCE:

PRESENTATION OF AMERICAN BAR ASSOCIATION'S

EVALUATION OF BRETT KAVANAUGH,

NOMINEE TO BE A CIRCUIT JUDGE ON THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

- - -

MONDAY, MAY 8, 2006

United States Senate,

Committee on the Judiciary,

Washington, D.C.

The Conference Call began at 2:05 p.m. in Room SD-240, Dirksen Senate Office Building.

Mr. Jensen. For Chairman Specter's office, we have Peter Jensen, Greg Nunziata, Michael Thorpe, Frank Scaturro and Danny Fisher. And if staff could go through quickly and say who's on the call.

Senator Schumer. Hello; this is Chuck Schumer. I just got on the call, Senator Schumer.

Mr. Jensen. Hello, Senator Schumer. This is Peter Jensen with Chairman Specter. We're just going through and doing a couple housekeeping items. There is a court reporter here. We are going to keep a transcript or a transcript will be made that hopefully will be available later this afternoon--

Senator Schumer. Okay.

Mr. Jensen. --for Members. The Chairman has said that written questions--

Senator Schumer. Yes, I am at an airport, and those are some F-16s. Sorry.

[Laughter.]

Senator Schumer. Syracuse Hancock; it's both a commercial airport and a military.

Mr. Jensen. Members will be allowed to submit written questions to the ABA. The Chairman will not delay the vote if those questions are not submitted. He announced at the last markup that he intends to vote on the nomination this Thursday. That's still the plan. And Mike O'Neill is joining us as well. He just walked in. Just going through a couple of housekeeping items, and Senator Schumer is on the call as well.

Mr. O'Neill. Hi, Senator Schumer.

Senator Schumer. To make it clear, there has been no agreement that there will be a vote on Thursday, and we don't know what kind of questions we'll have until after the hearing.

Mr. Jensen. Right, well, the Chairman announced that--one other thing: please state who is speaking for the benefit of the court reporter before you say anything.

Senator Schumer. Right.

Mr. Jensen. The Chairman did announce that he intends to hold the vote. I guess that's something that will be worked out later, but just so you know, individual Members can submit written questions to the ABA, but his intent is not to delay the vote until those questions are answered.

Mr. Meyer: Hey, Pete, this is John Meyer. Can I make a quick suggestion, which is that my understanding is that Senator Schumer's time is limited before he has to get on the flight, so why don't we go straight to that, and then, we can go through sort of the roll call of who's on after he leaves and before staff--

Senator Schumer. That would be very helpful. Are there any of my colleagues on the line? I don't want to--

Mr. Flug: No, as far as we know, the hearing has not been called to order as a formal hearing. This seems to be some form of informal conference call among staff.

Senator Schumer. No, no, I just wanted to make sure.

Mr. O'Neill. Although there is a transcript being made. This is Mike O'Neill being made of this.

Mr. Flug. That doesn't make it a hearing.

Mr. O'Neill. So it is on the record.

Senator Schumer. Right.

Mr. Tober. This is Steve Tober. I spoke, and I understood, that this was going to be a hearing by phone with a transcript. And I turned down the opportunity to

simply have an informal chat of an investigative nature, given the role that this Committee plays in this important process. If this is not within the parameters of what I thought this was going to be, then, this is not something that, you know, necessarily we are going to proceed with.

I was under the full impression that every Senator would be given the opportunity to be present by phone for a hearing.

Mr. O'Neill. That is correct, Steve. Every Senator was given the opportunity to be present by phone, and we are taking an official Committee transcript of the phone call.

Mr. Jensen. Which will be made a part of the record.

Senator Schumer. This is Senator Schumer. I think that is what everybody envisioned. There will be a transcript. Everybody can ask questions, and the transcript will be made available this afternoon.

Mr. Tober. Okay; well, on that basis, I am willing to proceed.

Senator Schumer. Great. No, no, no, this is not informal. I expect everything will be recorded and made public.

Mr. Tober. And if I may, Pete, with your indulgence, let me proceed, because I don't want the Senator to leave us from the airport.

Mr. Jensen. Let us go ahead and get started with Steve. I believe he has some remarks.

Senator Schumer. Then let me--go ahead.

Mr. Tober. Thank you, Senator. Steve Tober speaking.

And before I begin my remarks, I would like to request of somebody, I guess Pete or whomever, that the written statement that we previously submitted to you and to Senator Leahy's office earlier today be made part of this record and that its availability on our Website, which will be this afternoon, will be made known during the public hearing tomorrow. So that is our opening request.

And with that, let me make the following remarks.

Mr. O'Neill. That is fine. We will do that, Steve.

Mr. Tober. Thank you. The Standing Committee has issued three evaluations--

Mr. Flug. Excuse me for one minute, because I'm still concerned about the nature of this proceeding. Was this publicly announced?

Mr. O'Neill. Yes, this was publicly announced, and yes, sitting right behind me, Jim, is a court reporter transcribing everything.

Mr. Jensen. And, Jim, this is consistent with what was done for the Greg Van Tatenhove nomination in November of last year, in which we held this teleconference de facto hearing in which we kept a transcript like we're doing now

which was later made a part of the hearing record.

Mr. Paris. This is Jeremy Paris from Senator Leahy's office. I just want to interpose that that was meant to be an exception to the general rule meant to accommodate the schedules--we were getting out of session--and particularly the request of Senator McConnell, who was close to the nominee. And we, you know, we think that a return to the typical practice would be better.

I'll defer to the Senators who are on the call.

Senator Sessions. Let me join on that. The Van Tatenhove matter was something to which we accommodated the end of the session need but was not something we wish to engage in as a regular practice. The reason that I have been willing to do this today is that this is not a not qualified finding, and should it ever be a not qualified finding, we would obviously hope and expect to be called to testify before the Committee. Should I proceed?

Mr. Jensen. Yes.

Mr. Flug. I would like to know that we have some attendings who are not part of the staff. Are the White House and the Justice Department and the press on this call?

Mr. Jensen. I don't know about the press.

Mr. O'Neill. I mean, I don't know.

Mr. Jensen. It was--the call information was

circulated via the Committee's distribution list, and I believe there are Department of Justice and White House members on that.

Mr. Flug. And the press list got it, too?

Mr. Jensen. I don't believe so, but this will be a public transcript that's made available to the record, made available to the public so--

Mr. Flug. I don't think it can be a hearing if it is not publicly announced and the public allowed to attend.

Mr. O'Neill. We understand that, Jim. But the hearing is on the record, and the transcript will be made available to everyone.

Mr. Jensen. Okay; so, Steve, please proceed.

Mr. Tober. I will. Let me say again, I think, hello to Senator Sessions and Senator Schumer. You both on line?

Senator Schumer. Yes.

Senator Sessions. I am, Jeff Sessions.

Mr. Tober. Hi there, sir.

Let me go back and start over. The Standing Committee has issued three evaluations on the nomination of Brett Kavanaugh. This is due to the fact that Mr. Kavanaugh has been nominated once and renominated twice. It is the established practice of the Standing Committee to conduct a further investigation on any nominee who is renominated, and the extent and the scope of that further investigation

is often influenced by the length of time that has passed from the date of the original evaluation and rating.

Whenever a supplemental evaluation is performed, copies of all previous confidential formal reports on the nominee are reproduced and are presented to every member of the Standing Committee for review before they vote, alongside the new formal report. Thus, it is important that every supplemental evaluation performed goes back to the end date of the original formal report and brings the investigation forward from that point. And that is what has occurred here.

Concern has been raised that the most recent rating from the Standing Committee somehow results solely from a change in personnel on the Committee. In fact, that is not the case. Indeed, no less than six members who served on the Standing Committee in 2005 and who continue to serve today changed their votes on this nominee from well qualified to qualified between the rating issued on February 16, 2005, and the rating issued on April 3, 2006.

There are at least three general reasons to support the most recent rating given to this nominee. First, there is a wider universe of individuals contacted during the supplemental evaluation than during the initial formal report or its update. The Standing Committee generally requires at a minimum 40 to 60 contacts with judges,

lawyers, and others, in any nomination it is reviewing, although an evaluator is certainly free to do more.

In 2003, there were 55 such contacts regarding Mr. Kavanaugh. In 2006, there were 91 such contacts: 19 more judges and 17 more lawyers with potential knowledge about Mr. Kavanaugh were contacted, and not all of the original 55 contacts were summarily repeated. Thus, in 2006, a larger group of individuals was given the opportunity to share with the Standing Committee knowledge of the nominee's integrity, professional competence, and potential for judicial temperament.

Second, some individuals who may have had no contact with the nominee in 2003 are now individuals who had crossed paths with him. Some in public service or in the practice of law in 2003 were now no longer active, having been replaced in some measure by others, and simply put, events and times had moved on, creating new and different developments and landscapes in which the professional qualifications for the nominee could be viewed that were not present in 2003 or even 2005.

Third, it should be pointed out that with both earlier ratings issued by the Standing Committee, there was a minority qualified as part of the vote. The official rating by the Standard Committee has always been and remains the majority rating. Yet, nonetheless, it is

important to underscore that some members of the 2003 and 2005 Standing Committee considered this nominee to be qualified.

The Standing Committee takes most--

Senator Schumer. Mr. Tober?

Mr. Tober. Yes.

Senator Schumer. It's Senator Schumer.

Mr. Tober. Yes.

Senator Schumer. I have a few quick questions. You know, I have to get on my plane to come to Washington.

Mr. Tober. Go right ahead, sir. I'll be happy--

Senator Schumer. Could I do those? I mean, we all have the--I know you're reading it, and I'm glad you are. But could I just ask a few quick questions? Would that be all right with everybody, not only on behalf of myself but some of my colleagues, okay?

Mr. Tober. Go right ahead, Senator.

Senator Schumer. Great; okay.

First, this is to Mr. Tober and any of the others. I am correct in assuming you have no objection to appearing before the Committee tomorrow at 2:00.

Mr. Tober. I have no objection. We thought this would resolve the need to do so.

Senator Schumer. But all things being equal, would it not be better to proceed in the conventional fashion and

have live testimony so people could ask you questions?

Mr. Tober. Senator, if it is the will of the Senate Judiciary Committee to have me present along with Ms. Tucker and Mr. Payton and anybody else, we will certainly do whatever we can to make arrangements.

Senator Schumer. Well, that was the view of the minority, and it was scotched. And the only reason I can think of is, again, some do not want this report to be made as public and you to answer questions as fully as you do, and I just officially am renewing the request that you be allowed to appear. We don't have to have a debate on that right now, but I think that would be right.

So let me go on to my third question. How unusual is it for the ABA to downgrade its rating? Do you know how many times it has happened and how many times for a circuit court nominee?

Mr. Tober. We have reevaluated renominations on a few occasions. When you say downgraded, we changed our rating, for example, on Judge Payne; I am sure you are familiar with that circumstance.

Senator Schumer. Yes.

Mr. Tober. We did a reevaluation of Judge Ryan. That did not change. It came out again as not qualified. We are presently in the process of doing another one. Historically, I would have to defer to the staff to give

you the exact number, Senator. It is not an unusual thing. It is not something that is commonplace.

Senator Schumer. Right.

Mr. Tober. But this isn't the first time it's happened.

Senator Schumer. Got it; okay.

And the final question I had was this: on May 3, there was an article in the Washington Post where a White House spokesperson said the ABA's downgraded rating of the nomination, quote, resulted from changes in the ABA's panel's personnel, not from new findings. Your statement, your testimony states unequivocally this is not true; that at least six reviewers changed their votes based on new information.

Do you have any reason to know why the White House might have thought this was a personnel change? Could there have been a misunderstanding or something?

Mr. Tober. Senator, I wouldn't dare speak for anybody else, never mind the White House. I can only speak for what I know, and what I know is that this rating that was issued by this Committee was based on the substance of this information before this Committee based on the supplemental evaluation and the original report that was also provided.

Senator Schumer. Right; I understand that. All right; so, look, those are my--I mean, I think the report

speaks for itself, and I just want to thank all of you at the ABA and my colleagues from Senator Specter's office for arranging this. But I do believe that what makes the greatest sense is to have Mr. Tober, Ms. Tucker, and the others appear before us so that we can answer questions, and I do not see any reason on God's green earth why we couldn't do that.

Mr. Tober. Pete?

Mr. Jensen. Yes.

Mr. Tober. Let me go back to--

Mr. Jensen. Yes, why don't you go ahead and finish.

Mr. Tober. Okay.

Senator Schumer. Okay; I am going to sign off, and I thank everybody, and I'll see everyone in Washington, God willing, in a few hours.

Mr. Tober. Thank you, Senator.

Senator Schumer. Okay; great, bye.

Mr. Tober. Senator Sessions, I think I am reading for you now, sir.

The Standing Committee takes most seriously its responsibility to conduct an independent, non-political, non-ideological examination of the professional qualifications of judicial nominees. There is no bright line litmus test as to whether a nominee is well qualified or qualified. The backgrounder carefully defines both

ratings, and each Committee member applies those definitions when they independently vote. It is, at its most basic, the difference between the highest standard and a very high standard.

Our rating is not the result of tallying the comments pro and con about a particular nominee, nor is it about politics or ideology or empirical data. Rather, in making our evaluation, we draw upon our previous experiences, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment.

From the outset in 2003; even with an earlier rating of well qualified for this nominee, there were considerations arising from confidential interviews and other background information that act to explain the thread of qualified running through the Standing Committee evaluations. The 2003 confidential record makes it clear that there were then present concerns regarding the nominee's breadth of professional experience. It was noted back then that he had never tried a case to verdict or judgment; that his litigation experience over the years was always in the company of senior counsel; and that he had very little experience in criminal cases.

Indeed, it is the circumstance of courtroom experience that builds the transcripts that make the record before the

court of appeals, and concerns were expressed about the nominee's insight into that very process. Nonetheless, a substantial majority saw other overriding factors that supported a rating of well qualified.

The additional interviews conducted in 2006 expanded upon those earlier concerns. One judge, who witnessed a nominee's oral presentation in court, commented that the nominee was, quote, less than adequate before the court and had been, quote, sanctimonious, and demonstrated, quote, experience on the level of an associate. The lawyer, who had observed him during a different court proceeding, stated, quote, Mr. Kavanaugh did not handle the case well as an advocate and dissembled. Other lawyers expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law.

Further, the 2006 interviews raised a new concern involving his potential for judicial temperament. Unlike the earlier 2003 final report and 2005 updated report, the recent supplemental evaluation contained comments from several interviewees with more recent experience with the nominee, which caused them to characterize the nominee as, quote, insulated. One interviewee suggested that much of his concern about the nominee being insulated was due, understandably, to the nominee's current position as staff secretary to the President. However, this interviewee

remained concerned about the nominee's ability to be balanced and fair should he assume a Federal judgeship. And another interviewee echoed essentially the same thoughts, quote, he is immovable and very stubborn and frustrating to deal with on some issues.

Both issues, his professional experience, and the question of his openmindedness, were brought up along with others with the nominee during his 2006 interview, and he was provided a full opportunity to address them in detail as part of our supplemental evaluation material.

This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. Taken in combination with the additional concern over whether this nominee is so insulated that he would be unable to judge fairly in the future and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context.

A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the Federal bench. Thank you for what is increasingly a rather unique opportunity to present these remarks.

Mr. Jensen. Thanks, Steve.

I will turn it over--is Senator Sessions still with us? Senator? Okay; well, this is Pete Jensen. I will go ahead. I have a few questions that I would like to ask you, Steve.

Mr. Tober. Sure, Pete.

Mr. Jensen. First, you mentioned that I think six votes had changed or six Committee members had changed their votes from well qualified to qualified. Did anyone on the Committee change their vote from qualified to well qualified?

Mr. Tober. Did anybody on the Committee from '05 to '06 change their vote from qualified to well qualified?

Mr. Jensen. Yes.

Mr. Tober. I am not sure of that answer, Pete, I would have to go back and look. I do not have that in front of me.

Mr. Jensen. You provided a few negative quotes about Mr. Kavanaugh in your written statement. Can you provide some positive quotes? We want to make sure that the Committee does not misunderstand that everybody whom you interviewed had derogatory things to say about Mr. Kavanaugh.

Mr. Tober. Let me underscore, Pete, that we didn't find him not qualified. There's not a breath of that in this report or any earlier report. We found him

qualified/minority well qualified. What I said at the end is what, in fact, many people said, that he has a solid reputation for integrity, intellectual capacity--a lot of people refer to him as brilliant--and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There is just no question about that.

Mr. Jensen. Okay; and also, there has been a lot of talk about how this is--it is highly unusual to conduct a hearing in this manner. Along the highly unusual strain, I have one question, and that is to your knowledge has the Committee ever been brought in to testify for a lower court nominee that did not receive a not qualified rating?

Mr. Tober. I believe we did once.

Mr. Jensen. For whom?

Mr. Tober. I believe it was on--lower court meaning anything below the Supreme Court?

Mr. Jensen. Yes.

Mr. Tober. I believe we came in on the nomination of Judge Wilkinson in about 1984 to explain a qualified rating.

Mr. Jensen. And was that before or after the nomination had been reported out of Committee?

Mr. Tober. I don't know the answer to that, Pete. You'd have to tell me, I guess, when it was reported out

and when we came in. I honestly don't know.

Mr. Jensen. Okay; I believe it was after the nomination had been reported. Yes, that is correct.

Mr. Tober. It may have been. All I know is that we were asked to attend and to testify, to answer some questions regarding process, and in fact, we did so.

Mr. Jensen. Okay.

Ms. Bresnahan. It was a prenomination process, too. This is Pam Bresnahan.

Mr. Jensen. Yes, hi, Pam.

Ms. Bresnahan. Different process.

Mr. Jensen. I am sorry. What was the different process?

Ms. Bresnahan. I said it was prenomination for Wilkinson. You know, the ABA had gone through and vetted Judge Wilkinson prenomination.

Mr. Jensen. Right.

Ms. Bresnahan. Before this process was in place.

Mr. Jensen. I believe, and if you would not mind, Steve, checking on that, whether it was before or after it was reported out of Committee but also letting the Committee know what the circumstances were for the ABA coming in to testify.

Mr. Tober. I will. I'll ask one of the staff folks to get on that and get you an answer, Pete.

Mr. Jensen. That would be great. Thanks, Steve.

Staff, any other staff that have questions?

Mr. Paris. Yes, this is Jeremy Paris, counsel to Senator Leahy.

Mr. Tober. Hi, Jeremy.

Mr. Paris. Hi; how are you doing?

Mr. Tober. Fine, thank you.

Mr. Paris. I just want to ask a few follow-up questions. Do you have any reason to doubt the sincerity, credibility, or judgment of the most recent interviewees?

Mr. Tober. The people we spoke with?

Mr. Paris. Yes.

Mr. Tober. None.

Mr. Paris. Okay; in evaluating Mr. Kavanaugh's qualification for this nomination, I assume the Standing Committee reviewed his work for the last six years in the White House. That's almost half his legal career as associate White House Counsel and assistant and staff secretary to the President. I want to know, how did you evaluate Mr. Kavanaugh's work for six years in the White House?

Mr. Tober. Well, I will let Marna Tucker address that, too, but let me preface it by saying that one of the things we recognize by the course of Mr. Kavanaugh's experience in practice is the years he has served in rather

rarified air, including what you have just asked me about. And that is one of the concerns embodied in the expressed statement about being insulated and the concern about that.

The reason that's important; let me put this in perspective: the reason it is important to know whether someone has been insulated in that sense of the word is that when you have--our backgrounder requires that a nominee to the court have a minimum of 12 years of practical experience in the practice of law. When they do not have that, or if they are on the cusp of it, we then look to see what life experience they are having, so that they can bring life experience to the bench, and they need to be of a quality of life experience that will serve the American people well.

That is one of the areas that we looked at. That was one of the concerns that was expressed by some of the interviewees, that this was an insulating place to be and may not truly reflect upon a more broadened sense of life experience that one is supposed to have of a person sitting on the Federal bench.

Having said that, let me ask Marna Tucker to add any additional comments she has in response to your question.

Ms. Tucker. I would like to describe the process I followed in dealing with Mr. Kavanaugh's time in his various positions in the White House. He was, as I recall,

first a deputy White House counsel; then a senior White House counsel; then, finally, staff secretary. I spoke to many people, several of his superiors, others of his colleagues who worked in the same offices, people in the Cabinet, and asked them the questions about his legal competence, his integrity, and his potential for judicial temperament.

And they gave their different views on all of these. I particularly focused on whether or not he was doing legal work at the time and if they were able to comment on his legal work or quasi-legal work. That is what I did.

Mr. Tober. Is that fully responsive?

Mr. Paris. Yes; thank you. The new interviews that were conducted, one of them was from a judge, another one was from a lawyer who had seen Mr. Kavanaugh in court. My question is, am I correct that the new concerns raised come from a number of different interviewees based on independent and separate observations? In other words, can you address one court appearance? Were there several court appearances? Can you provide a little bit more detail?

Mr. Tober. Well, I want to be sure that what you have in front of you is fully understood, and then, I will ask Marna to weigh in again. I believe what we said was that we had comments from one judge, and then, we had a comment from a lawyer who saw the nominee in a different context,

in a different case, and then, we said there were other comments from other lawyers that had expressed similar sentiment about his youth and relative inexperience. Having said that, that's what we tried to write in our written statement so that that's not taken out of context.

Marna, do you have more that you wish to add to that?

Ms. Tucker. Well, I will simply add that the people I contacted were people whose names I received from the PDQ that the Senate had, that it listed lawyers on both sides of all of his major cases, people that Mr. Kavanaugh himself sent me the names of, and additional judges who had sat on cases that Mr. Kavanaugh was counsel in. So it is important to note, I contacted people who had relatively hands-on experience with this.

And in terms of the criticism, my job was if there was a criticism, it was to follow it through and to find out whether the criticism was warranted and also to give Mr. Kavanaugh a chance to respond to that criticism, which I did.

Mr. Paris. Thank you. Walking back just for a moment to make sure I fully understood I think it was Ms. Tucker's answer to the previous question about evaluating the six years in the White House. I believe you testified that you evaluated his legal and quasi-legal work. Can you describe what kind of legal work he did in the White House?

Ms. Tucker. His legal work was done primarily when he was in the Office of White House Counsel, both as a deputy counsel and as the senior counsel. In terms of exactly the legal work that he did, much of it--I mean, I don't know what he did. Much of it is privileged; in fact, almost all of it is privileged.

But in terms of--I was interested in primarily asking people how well he did his job, how thoroughly he did his job, how fairly he did his job. And as to the specific issues, we did ask him about a few areas. We asked Mr. Kavanaugh about a few areas of concern we had of specifics. But on the legal work, I can't tell you exactly what legal issues he did when he was in White House Counsel's office.

Mr. Paris. Thank you. I have no further questions, but I believe some of my colleagues do.

Mr. Meyer. This is Jonathan Meyer for Senator Biden. I just have a couple of quick questions.

The first is, with regard to the issue of--you said that no less than six members who served on the Committee and continue to serve today changed their votes. How many membership slots have switched over on the Committee from the first review until now? In other words, how many have been departed and replaced by someone else?

Mr. Tober. In August of '05; we change our constituency, if you will, on this Committee at the end of

every annual meeting from the ABA, and it runs for three years for most folks; one year, essentially, for the chair. I believe that there were seven appointments made in August of '05, so there were eight folks who carried over from the 2005 Committee.

Mr. Meyer. Eight carried over, and six changed from--

Mr. Tober. Seven were added, and six changed from the carryover.

Mr. Meyer. Okay; so six of eight changed their votes is what the bottom line is on that; is that right?

Mr. Tober. That is correct.

Mr. Meyer. Thank you.

I also had a question about a different section of your statement. If people are looking at your written statement, it's on page 8. You had a quote from a lawyer who said, quote, Mr. Kavanaugh did not handle the case well as an advocate and dissembled. I would like to learn anything more I can about what that referred to. I realize you can only go so far, but what was meant by he dissembled?

Mr. Tober. Well, I will turn that over to Ms. Tucker in a minute, but as you know, Jon, we cannot give information out that would tend to attribute to anybody who the comments are coming from.

Mr. Meyer. No, I understand, and I am asking for any

identification. I'm just trying to get some clarification on what is meant by that statement.

Mr. Tober. Marna?

Ms. Tucker. I can only give you the quote of what that person said who was involved in that case, but I can't tell you any more about what the case was or who said it.

Mr. Meyer. No, but did you ask him what he meant by that?

Ms. Tucker. I understood what he meant by that.

What he meant by that was--let me see. The quote was he did not handle the case well as an advocate; he was not forceful, and when he dissembled, he did not argue his case clearly. When questioned, he did not respond appropriately. That is my interpretation.

Mr. Meyer. Okay; thank you. Okay; I think that was all I had. Thank you very much.

Mr. Flug. This is Jim Flug, Senator Kennedy's

Mr. Artim. And this is Bruce Artim from Senator Hatch. After you, can I get a crack at a question after you?

Mr. Flug. You can go first so that we have--

Mr. Jensen. Let's go to Bruce so that we're--

Mr. Flug. Yes, sure.

Mr. Jensen. --back and forth.

Bruce, if you want to--

Mr. Artim. Ms. Tucker, when you were describing the process with the names submitted, it sounded as though from the White House Staff Secretary that Mr. Kavanaugh, he submitted a list of names. Is that the only universe of people you called upon, or do you have your own independent source of soliciting opinion?

Ms. Tucker. Of people just in the White House, or do you mean my universe of contacts?

Mr. Artim. The way you described it was as if Mr. Kavanaugh submitted a list of names. And did you call only the people on that list?

Ms. Tucker. Oh, no. My process was, as I said before, I read the PDQ, which listed the names of counsel on cases and people who were involved with Mr. Kavanaugh in his various areas of employment. I contacted those people. I contacted an independent list, not all of the people but most of the people that Mr. Kavanaugh had given me as a separate list, plus I went through all of the cases and contacted judges who heard his arguments.

Mr. Artim. But on the White House and the--particularly in this last role as staff secretary, can you give us--I know you can't identify names, but can you give us sort of a flavor and perhaps quantify, you said, you mentioned Cabinet secretaries? I mean, are we also talking sub-Cabinet officials? Can you give me--was it a

smattering of people? How many people are we talking about from the staff secretary roles? I also presume you might have extensive contacts with other White House components and OMB and other entities. How did you relate to those other White House offices?

Ms. Tucker. I contacted everyone whom I could contact who had a connection with Mr. Kavanaugh in his role as staff secretary. Now, of course, as staff secretary, although that role deals with reviewing the paper that goes to the President directly, what the role also involves is he has to contact various people in the Cabinet or sub-Cabinet positions in order to make sure that he presents the issues properly to the President. So I would talk to people he would have to deal with in his role as staff secretary.

Mr. Artim. I'm just trying to get a feel. There's a lot of Cabinet Departments the White House could--I mean, was it 10 people? Twenty? About how many people are we talking about?

Ms. Tucker. I contacted several people. I don't know the exact number.

Mr. Artim. And were there people on the list of names that he submitted that you didn't contact?

Ms. Tucker. Yes.

Mr. Artim. And, I mean, you may not be able to answer

this, and if you can't, don't, but is there a way that you--could you roughly say, of the people's names he submitted, did you contact half of them? Not all of them, but a quarter, roughly how many people did you contact?

Ms. Tucker. Well, the people that I didn't contact, most of them had been contacted by my predecessor, Pamela Bresnahan, and I didn't see any necessity to repeat that at the time. But there were people that I not seen who--that she had not contacted that I tried to contact. It was the vast majority of people on his list.

Mr. Artim. So it was on his list. Between the two of you, you say the vast majority were contacted?

Ms. Tucker. Yes.

Mr. Artim. And the list also dealt with also other White House components?

Ms. Tucker. I don't know what you mean by that.

Mr. Artim. OMB, USTR, Council of Economic Advisors, all the various entities that make up the White House, which I presume in that role, he's also refereeing not just among the Departments and agencies; he's also probably refereeing among White House components.

Ms. Tucker. Well, all I know is who I spoke to, and these were people who had had contacts with him in his job as staff secretary. I don't want to violate the confidence of people that I spoke to.

Mr. Artim. But can you at least tell us, were there people from other White House components? Are you saying, are they just Cabinet officials or sub-Cabinet officials?

Ms. Tucker. They're from all different branches. They're from different branches. Some are Cabinet, sub-Cabinet, White House Office, superiors to him, people who were colleagues of his.

Senator Sessions. This is Senator Jeff Sessions. I had to slip out for a moment to preside in the Senate, and I have been relieved. Could I ask a few quick questions?

Mr. Jensen. Yes, please, Senator.

Senator Sessions. Stephen Tober, are you there still?

Mr. Tober. I'm here, Senator.

Senator Sessions. Yes; well qualified; what percentage of the people that are nominated get well qualified?

Mr. Tober. Senator, I don't know what percentage that would be, and I don't know how far back we would look to give you an answer. I do know a significant number of people receive well qualified. We have a significant number of people who get qualified, and of course, we have the mix. We have people who receive a split vote, even though the majority rating is the official rating.

Senator Sessions. When Kavanaugh was first given a well qualified rating, and a number of voters gave him

qualified, he was relatively young. Were there other factors in his background? What other factors in his background played positively and negatively in that evaluation.

Mr. Tober. In the '03 and '05 evaluations?

Senator Sessions. Yes, in the original.

Mr. Tober. The positive factors haven't changed a whole lot. He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components, and I have said this before, but I think you were probably doing better things: he has those skills that will serve him well, certainly, on a Federal court.

What was of concern back in '03 and '05 and became, if you will, a more enhanced concern in '06 was the fact that his experience in the traditional notions of practice have been very thin; in fact, in some areas, extremely thin.

He has never tried a case to verdict or judgment. Every experience he had in the traditional setting of a courtroom in the traditional sense of the word was with senior counsel present. He has minimal or at least nominal criminal experience. And the concern was that to put him on summarily to a Federal bench where at that level of appellate review, he is going to be reading transcripts of records from a trial setting that he is not completely

familiar with is of some concern.

Senator Sessions. I guess what I would like to pursue there is the American Bar Association likes that kind of experience. You don't always get the complete package, but you like the kind of experience that shows corporate practice or at least law firm practice, government service, criminal as well as civil, and trial practice. Those are the things you like to see in a perfect nominee, right?

Mr. Tober. Well, we write about it in our backgrounder. We talk about the fact, Senator, that we like to see someone having at least 12 years of traditional experience, and this nominee back then, and even today to a degree, was just about bare on the cusp.

We don't stop there. We go on and say--but to answer your question, you know, we are not so bound by simple traditional notions that we are not willing to look at other experience.

Senator Sessions. I would note that despite some of those lacks, the Committee gave him a well qualified rating, because apparently, they found his writing skills, his brilliant background, the fact that he had clerked for two circuit judges and I guess a Supreme Court Judge, all of those were factors that moved him in some way higher than you would normally expect a person to be.

Mr. Tober. He did indeed receive a substantial

majority vote of well qualified. Yes, he did.

Senator Sessions. Well, now, it sort of seems like what's changed is that he is serving at the call of the President in a position that the President needs him in, in a critical personal position to the President, and having served in that position now for how long has it been in the White House there, it has further removed him from the things you normally look for, which is courtroom and law firm and litigation experience.

Mr. Tober. Well--

Senator Sessions. Is that what's happening here basically?

Mr. Tober. No, sir, that's not a fair statement.

Senator Sessions. I don't mean to be arguing in the sense of being that that's negative, but it seems to me that's kind of what happened, that he's been away from the practice, and you said in your statement that he was insulated, so he's been away and away from the aggressive full-time practice of law. That is undeniable.

Mr. Tober. Well, I agree with all of that. I guess that what I'm trying to say is that running throughout his rating, even when it was well qualified, there has always been a constancy of concern about his lack of experience, which resulted in a minority of qualified. What's happened, in my opinion, having read all this and

synthesized it into the report you're referring to, is that by expanding the universe of contact, including judges, for example, whom we had not previously talked to about the nominee and any other lawyers as well that the professional experience concern was heightened a bit, and the additional concern about get insulation, the question of openmindedness and judicial temperament in our standards was raised essentially for the first time.

And the combination of those two, Senator, in my opinion, is what brought about the substantial majority qualified/minority well qualified vote. He is qualified to serve on the Federal bench.

Senator Sessions. Yes, well, I appreciate that, and I would share that. I am not sure--one thing I would say in defense of your rating as a relatively young lawyer, he was fortunate to get a well qualified to begin with. I mean, you know you have to be pretty good to get that level, and I think the fact that it has edged away is of concern to me in the sense that I am not sure what exactly would have occurred to justify that. But I know that you indicate a couple of things there that--anyway, I don't have that before me; I was going to read something in the report.

So he is at the point where he remains rated qualified. He is qualified. Some still rate him well qualified, and you attribute the change to his--talking to

different people more than the fact of a change in his duties or both?

Mr. Tober. I take it as attributed to the expanded universe of people with whom we spoke who have had contact with the nominee, updating that contact to the present; that is correct.

Senator Sessions. And could they have factored in his away from active practice in their evaluation of his qualifications.

Mr. Tober. I certainly think that's fair, but I don't want to characterize it as an overriding concern. It's been there.

Senator Sessions. Right.

Mr. Tober. It's been there all along. It seemed to get some additional, if you will, traction when we did this review, the supplemental evaluation, and then, got it combined with a new issue that hadn't previously been in the earlier report about his insular position.

Senator Sessions. Okay; I've got to run back. Thank you so much. We appreciate the work that you do, and I believe the nominee is a superb person who has a remarkable record of achievement, and we thank you for continuing to provide your information to us.

Mr. Tober. Thank you, Senator.

Senator Sessions. Thank you.

Mr. Flug. Mr. Tober, I'll continue where I left off.

Senator Hatch. Jim, let me step in. This is Senator Hatch; just for a second.

Mr. Flug. Oh, hi, Senator.

Senator Hatch. So I just wanted to mention that am I correct in looking at the record that he's had some 24 people evaluate him, and not one has found him not qualified?

Mr. Tober. I don't know the number to be 24. I take your word on that. But it is true: there is not a single not qualified vote in the picture.

Senator Hatch. Out of all of those who have looked at his record.

Mr. Tober. That is correct, Senator.

Senator Hatch. Well, we appreciate all you do, and I just wanted to mention that to you. But thanks for all you do.

Mr. Tober. Thank you, sir.

Mr. Flug. Are you through, Senator?

Senator Hatch. Yes, I'm through.

Mr. Flug. Okay; Mr. Tober, both you and Ms. Tucker used the word in your oral and written statements concerns of the Committee. You, on page 7 onto 8, talk about then present concerns regarding this nominee's breadth of professional experience. And then, Ms. Tucker talked in

the context of his White House service about asking him about specific areas of concern. Are those two congruent with one another? Are you two talking about the same thing, or is Ms. Tucker, in her White House inquiries, talking about other areas of concern than the areas of concerned mentioned in your presentation?

Mr. Tober. Is this Mr. Flug? Is that who's asking me the question?

Mr. Flug. Oh, okay; thank you, sir.

Mr. Tober. I hope we're congruent, because what I tried to do was read everything that I have in these confidential reports and create a synthesis of that information. But I'll certainly let Ms. Tucker speak to that.

Ms. Tucker. Well, I think we certainly are congruent, but there are two different areas that I addressed my comments to. One is his legal work prior to being in the White House as well as his work in the White House. So--and Mr. Tober shared that information with me as well.

Mr. Flug. And when you say you asked him about specific areas of concern, did you have specific areas of concern with his work at the White House as well as with his work prior to the White House?

Ms. Tucker. Yes.

Mr. Flug. I'm sorry?

Ms. Tucker. Yes.

Mr. Flug. And what were the areas of concern that you had with his work at the White House?

Ms. Tucker. One of the areas of concern that we had with his work at the White House is first of all, I ought to say we asked him about several areas of concern that we had, and on the whole, he had very little information and was not involved in things like torture memos and issues like that. We asked him about a panoply of questions like that.

We also asked him, and the main area of concern we had was the issue of since he had been in charge of judicial nominations while he was in the White House Counsel's office, during that time, although he did not know about it until much, much later, during that time, there were documents taken from Senate computers by one Manuel Miranda, and we questioned him whether he had information from Mr. Miranda, since the Senate investigation only dealt with the matters that had occurred in the Senate. It did not go to any people in the White House.

We asked him whether the White House had an investigation, and we asked him whether--his views on this and whether he had been involved in any way with what I will call the purloined document. He was not--he had no knowledge of the fact that documents or information he was

getting from Mr. Miranda was taken improperly. He did not know about that until way after the fact.

And our concern was that we asked him whether he felt, has he checked into whether or not the process for which he was responsible, namely, presenting to the President issues concerning judges, whether that process had been compromised. And he did not express any concern that the process had been compromised or that there was the need for a White House investigation. He said he was already finished with that job. The appointees had already been confirmed, and there was no need for an investigation from his point of view.

We were concerned about his lack of interest in that particular matter, considering we felt that the process for which he was responsible had been tainted and needed some further examination.

Mr. Jensen. Could I ask a follow-up question? When you say we--

Mr. Flug. Can I finish my questions?

Mr. Jensen. This is just a clarification. When you say we, who are you referring to, Ms. Tucker? You said that we were concerned that he did not express enough concern over the investigation.

Ms. Tucker. This occurred at our interview with Mr. Kavanaugh and John Payton, who is here with me today and

can answer this as well, we conducted the interview. And Mr. Payton and I were both concerned about that.

Mr. Flug. And did you express those concerns to him?

Ms. Tucker. Yes.

Mr. Flug. And how did he respond?

Ms. Tucker. I'll let Mr. Payton respond to that.

Mr. Payton. Hi, this is John Payton. Just as Ms. Tucker just described, he was surprised to even reflect back on the issues, since he thought that he had left that behind, and he really did not appreciate any need to worry about what had happened in the office that he had left behind.

Mr. Flug. So he had no inclination to answer the question of whether, after the fact, he realized that materials which may have been disseminated to him or information which may have been disseminated to him were, to use Ms. Tucker's word, tainted.

Mr. Payton. Well, he didn't deny that. He didn't deny that something that shouldn't have happened had happened.

Mr. Flug. I'm sorry, but he was not concerned that the process that he was in charge of may have been tainted by that information, and he showed no inclination to inquire further into that?

Mr. Payton. He thought he had no continuing

responsibility to look into that or to see what had happened or didn't happen.

Mr. Flug. And were you aware that Members of the Committee had asked him similar questions two years closer to the fact and that he had not replied at that time, too?

Ms. Tucker. We had read the Senate hearings and those questions, the written questions as well as the hearing.

Mr. Flug. Thank you.

Mr. Jensen. Any Republicans that have any questions?

Mr. Pai. This is Ajit Pai with Senator Brownback. I just had one question.

How many nominees have received three evaluations before? Do you know?

Mr. Tober. How many nominees have received three evaluations before? You know, I don't know the answer to that. I'd be happy to ask staff to take a look at it. Please keep in mind that prior to 2001, it was a prenomination screening process, so that the likelihood of that probably was dampened by the fact that things would not have gone up three times, and it all depends on the factor of how many times people have been renominated. But I will certainly find out and try to let you know.

Mr. Flug. I do need to ask one other follow up. Ms. Tucker mentioned that one of the areas concerned was torture. At the time that you last interviewed him, had

the issue of NSA wiretapping become public, and did you cover that as well?

Ms. Tucker. Yes, we did ask him about that, and he said that he had no involvement with that issue in the White House.

Mr. Flug. And do you keep a transcript of your interviews?

Ms. Tucker. No.

Mr. Tober. Wait, wait. Mr. Flug?

Mr. Flug. Yes.

Mr. Tober. The answer is we don't keep transcripts, and we don't produce them anyway, but we don't have them.

Mr. Flug. Okay.

Mr. Tober. Pete, Mr. Flug, are you done, I don't mean to--

Mr. Flug. No; I mean, I assume that it is appropriate, if you do appear tomorrow, and Senators have additional questions along these lines, these issues, obviously from the previous questions and from the follow-up questions that were propounded more recently are very important to the Members of the Committee, and the prior answers I think were generally thought to be not fully responsive. So if there is a desire to go more deeply into this, his answers to you, and you may have asked better questions than the Committee did will be relevant to the

Committee.

Mr. Tober. No, I understand that, sir.

Pete, can I go back and just add one thing to--

Mr. Jensen. Sure.

Mr. Tober. --I believe the gentleman from Senator Brownback's office asked me about the three reviews?

Just so it's clear here, and I think it is, Mr. Kavanaugh was nominated for the first time in 2003. He was renominated in 2005, and he was renominated in 2006. Am I correct on that, Pete?

Mr. Jensen. Yes.

Mr. Tober. And our practice, which started actually just a little while ago during Tom Hayward's term was that when there is a renomination, we are going to bring forward from the last date of the original final report a supplemental evaluation of what that nomination is all about. So we've done that here, and I will find out if that's happened before and, if so, how many times.

Mr. Jensen. All right; Ajit, do you have anything further?

Mr. Pai. No, I guess would that inquiry include, before you adopted that practice, more than one prenomination evaluation? Were there any cases in which a nominee was evaluated more than once prenomination?

Mr. Tober. The good news is I don't know the answer

to that. We can go and try to find out, but I suspect, given the very different coloration of the way things worked prenomination, I don't think you're going to find much information from that. So it's going to be a question of going forward from that date, I think, from 2001, with maybe a couple of rare exceptions. There may have been some Supreme Court things that we can take a look at for you, but we'll get whatever data there is.

Mr. Pai. Okay; thanks.

Mr. Jensen. Any other questions?

Okay; Steve, just before we conclude, just a couple of last follow ups. Would you restate the total number of people that were interviewed over the course of the three evaluations?

Mr. Tober. Yes; it's in my statement, Pete. Let me turn to it. What I said was--I think it should be on page 6, I believe, of what I've submitted to you, where I indicate that generally, we require a minimum 40 to 60 contacts, and in 2003, there were 55 such contacts, and in 2006, there were 91 such contacts.

Mr. Jensen. Okay; and of those--does that include 2005?

Mr. Tober. 2005, there were no third party interviews. The 2005 update, and Ms. Bresnahan is on the line; she can clarify it, if you wish, did not include any

additional interviews other than a follow-up interview with the nominee himself.

Mr. Jensen. Why were none done in 2005 and an additional--what is it--36 done in 2006?

Mr. Tober. I'll turn it over to Ms. Bresnahan to answer that.

Ms. Bresnahan. My memory is, Pete, that what happened was in 2003, we did 55, I did 55 some-odd interviews, and then, within the year, he was renominated, and then, the Committee or Tom Hayward, and I believe we had a Committee meeting, and the decision was made for those people renominated within the year, we were not going to do additional interviews.

Then, as time passed, and it went to the new Committee, it's my understanding that then, since more time had passed, they had decided to contact additional people. All I did for my renomination was we didn't have an updated personal data questionnaire, so I called the nominee, spoke to him, asked what had changed, what was going to be changed on the new Senate questionnaire, and we did an additional Lexis search and asked if there had been any additional writing samples, which we knew, since he had been a staff secretary, there really wouldn't have been.

Mr. Jensen. And of those 91, can you tell us how many recommended him for the D.C. Circuit?

Mr. Tober. I can't, Pete. We don't count numbers. We don't do empirical data. I mean, there were a significant number of folks who thought and do think that Mr. Kavanaugh is an extremely competent and able individual to go on the bench. There are some people, again, not an insignificant number, who had some concerns about his lack of experience, and there were a number of people who felt that he was insulated and were concerned about what the picture of his life's experience would be that he might bring as an alternative to public service.

And that is the blend of what the report is, and as I'm sure you know, Pete, what happens is the underlying '03 report, as it is, and the '06 report, as it is, are presented to 14 people on this Committee, who independently, in their own offices, without connecting with each other, read everything and reach a conclusion of their own, independently, applying either well qualified, qualified, or not qualified standards that are clearly defined in our backgrounder. And you have, in this case, from having read all of that material, a substantial majority qualified and a minority well qualified.

Ms. Bresnahan. Also, just to be clear--this is Pam Bresnahan speaking--some of the people Ms. Tucker talked to, I also talked to. So it isn't 91 plus 55.

Mr. Jensen. Okay; those are--

Mr. Bresnahan. I think that's what you were asking, Pete.

Mr. Jensen. So there's a total of 91 interviews; we don't know how many interviewees; is that--

Ms. Bresnahan. Oh, no, there's at least 91 plus some number, because the 55 has some overlap, because Ms. Tucker talked to some of the same people, it's my understanding. I mean, she can speak for herself. She's on the phone, but it wasn't 100 percent different each time.

Mr. Payton. But it is 91 contacts, 91 people.

Ms. Bresnahan. Plus some number of the 55 I talked to that she did not talk to.

Mr. Payton. There was some overlap, Pete.

Mr. Tober. There was some overlap.

Mr. Payton. I misunderstood your question. There clearly was some overlap.

Ms. Bresnahan. That's what he asked.

Mr. Payton. I'm sorry; I misunderstood. But there were judges who had not been talked to before who were talked to this time, and the universe was expanded, for the reasons that we already explained.

Mr. Jensen. And I don't know if this is a question for Mr. Payton or for you, Steve, but for the first two evaluations, it was just Ms. Bresnahan that was assigned to conduct the investigation. Why was Mr. Payton brought in

for the third evaluation?

Mr. Tober. Well, our backgrounder addresses that too, Pete. There are times when in the discretion of the chair, if it is appropriate to have a second interviewer brought in, you'll do so, and frankly, it was because of the fact that this was a nominee that Ms. Tucker was spending a considerable amount of time on.

This is a volunteer organization. These people, you may recall, were just coming off of having done a significant amount of work on Justice Roberts, Harriet Miers, Justice Alito. I tried to make sure that nobody was overloaded or felt pressured, and we do all of that, Pete, as you also know, within 30 days and then try to get to a vote in five.

So we were moving along as smartly as we could given the caseload we had. That was my suggestion, and I was happy with it.

Mr. Jensen. So Mr. Payton was brought in to assist Ms. Tucker.

Mr. Payton. That is correct, that is right.

Mr. Jensen. In the evaluation.

Mr. Payton. That is right.

Ms. Tucker. At the White House interview, at that level.

Mr. Jensen. So Mr. Tucker was not involved with all

of the interviews, just--

Mr. Payton. Mr. Payton.

Mr. Jensen. Mr. Payton; excuse me.

Mr. Tober. Mr. Payton was not involved, except at the interview.

Mr. Jensen. Except at the--

Mr. Payton. Interview.

Mr. Jensen. The interview with Mr. Kavanaugh.

Mr. Payton. That is correct.

Mr. Jensen. Okay.

Mr. Tober. And some of the process that occurs thereafter.

Mr. Payton. Yes, right.

Mr. Jensen. And I know ahead of time you're not going to answer this question, Steve, but I'm going to ask it anyway.

Mr. Tober. Go right ahead, Pete.

[Laughter.]

Mr. Jensen. I understand that the investigators issue a recommended rating to the Committee. Will you tell us the recommended ratings for any of the three evaluations that were conducted?

Mr. Tober. You read it right to begin with, Pete. I cannot answer that question. And since this is a public transcript, I hate to leave it just at that. Let me point

out that the reason that this process works for the American people, for the Senate, for the American Bar Association, is that we maintain confidences, not just for the people that we talk to but for the individuals who are asked to carry this heavy load of putting this work together.

If we began to peel that back, this process, which has been taking place since 1948, would not be working as well as it is, and it probably wouldn't be very useful to anybody. And so, I hope and trust that you understand that. It is with reluctance that I don't answer your question, but there is a great sense of history weighing down on me for that very reason.

Mr. Jensen. Okay; sure. And then, the last question, and then, we'll let you go with appreciation for being on this call, and that is would you just go over one last time, I know it's in your statement, but I'd like to get it back on the record, exactly how you define both well qualified and qualified.

Mr. Tober. I'd be happy to. It is in the statement. Let me turn, if I can, to the backgrounder that, as you know, is a public document we put out to everybody involved in this process, and let me just read it. And it says, quote, to merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her

legal community, of outstanding legal ability, breadth of experience and the highest reputation for integrity, and either demonstrate or exhibit the capacity for judicial temperament.

The rating of qualified means that the nominee meets the Committees' very high standards with respect to integrity, professional competence, and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a Federal judge.

In anticipation of your next question, yes, Mr. Kavanaugh is qualified with a minority well qualified.

Mr. Paris. Pete, Steve, can I just jump in for a second? This is Jeremy Paris.

Mr. Tober. Sure, Jeremy.

Mr. Paris. I hate to maybe beat a dead horse, but according to the written testimony, in 2003, there were 55 contacts. And then, there were 19 more judges and 17 more lawyers, which is 36 added to the original 55 makes 91. So am I correct that it is actually 91 contacts with judges, lawyers, and others, with information?

Mr. Tober. Yes, and if you go on from there, just to make sure I'm clear about this, Jeremy, in the next sentence in that paragraph--

Mr. Paris. Yes.

Mr. Tober. --I indicated that not all the original 55 contacts were summarily repeated.

Mr. Paris. Right, right.

Mr. Tober. Thus, there was a larger group given an opportunity in 2006 to pass comment.

Mr. Paris. Thank you. I just wanted to clarify.

Mr. Tober. Yes.

Mr. Jensen. So is it correct to say that of the 42 votes that have been cast by this Committee on Mr. Kavanaugh's nomination, every one of those votes agreed that he met the very high standards of either well qualified or qualified to be a circuit judge on the D.C. Circuit, and not one of those 42 votes believed that he was not qualified?

Mr. Tober. Well, I don't know about the math, but I do know about the categories, and I can tell you that I have not seen a vote of not qualified in this matter.

Mr. Jensen. Okay; Steve, thank you very much to all of the ABA representatives on the phone. On behalf of the Chairman, we appreciate all of the many hours that you spend doing this, and it is a tremendous service to the Committee, and thank you very much for being on today.

Mr. Tober. Thank you, Pete, and thank you, everybody else.

[Whereupon, at 3:14 p.m., the hearing was concluded.]

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002	Report	Kavanaugh Op-Ed [with attachments]	4	N.D.	PRM;
003	Letter	[Letter] - To: Arlen Specter - From: Brian Benczkowski	1	N.D.	P6/b6;

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Client No.

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

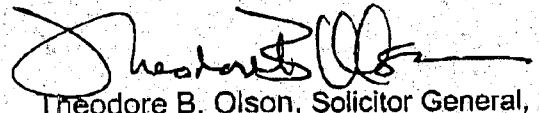
As former Solicitors General of the United States, we write to urge this Committee and the Senate to vote to confirm Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. Mr. Kavanaugh embodies all of the characteristics that make an outstanding federal court of appeals judge: exceptional appellate experience, stellar academic credentials, and unquestioned integrity.

Each of us has practiced extensively in the federal courts of appeals and the Supreme Court of the United States. Our experience has given us invaluable insight into the essential qualities of a good federal appellate judge. A federal judge must be completely impartial and dedicated to the rule of law, intelligent, reflective, and even tempered.

Mr. Kavanaugh thoroughly embodies these qualities, and we would welcome the opportunity to practice before him. His academic credentials are impeccable, and his professional accomplishments great and varied. Mr. Kavanaugh has extensive appellate experience, including both civil and criminal matters, in the courts of appeals and the Supreme Court of the United States. Perhaps most importantly of all, he is rightly known for his absolute integrity and sustained dedication to public service.

We have absolutely no hesitation endorsing Mr. Kavanaugh. He is exceptionally well qualified to serve on the Court of Appeals for the District of Columbia and would be a great credit to the judiciary. We therefore urge this Committee, and the Senate as a whole, to act promptly to confirm him.

Very truly yours,



Theodore B. Olson, Solicitor General, 2001-2004

On behalf of:

Kenneth W. Starr, Solicitor General, 1989-1993
Charles Fried, Solicitor General, 1985-1989

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, U. S. Department of Justice

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Rao, Neomi J.

From: White House Communications [WhiteHouseCommunications@whitehouse.gov]
Sent: Wednesday, May 10, 2006 5:39 PM
To: Rao, Neomi J.
Subject: WHAT THEY'RE SAYING: Brett Kavanaugh's Nomination To The U.S. Court Of Appeals For The D.C. Circuit

What They're Saying ...

Brett Kavanaugh's Nomination To The U.S. Court Of Appeals For The D.C. Circuit

"It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. ...I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit."
–Neal Katyal, Georgetown University Law Center Professor, Former Attorney To Vice President Gore, And Former Clinton Administration Official, Letter To Sen. Arlen Specter (R-PA), 5/9/06

Professor Neal Katyal On Brett Kavanaugh's Nomination

Katyal: Kavanaugh "Would Be A Welcome, Terrific Addition To The United States Court Of Appeals." "I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a pro bono case in which I am lead counsel, Hamdan v. Rumsfeld (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you. Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals." (Neal Katyal, Letter To Sen. Arlen Specter (R-PA), 5/9/06)

- **Katyal: "This Is An Entirely Unsolicited Letter."** "This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination." (Neal Katyal, Letter To Sen. Arlen Specter (R-PA), 5/9/06)

Media Reports And Editorials On Brett Kavanaugh's Nomination

***Congress Daily*: "Kavanaugh Breezes Through 2nd Judicial Nomination Hearing."** "An unruffled Brett Kavanaugh weathered a barrage of critical Democratic questions Tuesday and pledged to be nonpartisan if confirmed as a judge on U.S. Circuit Court of Appeals for the District of Columbia." (Michael Posner, "Kavanaugh Breezes Through 2nd Judicial Nomination Hearing," *Congress Daily*, 5/10/06)

***The Washington Post*: Kavanaugh "Does Not Appear To Be An Ideologue."** "Yet Mr. Kavanaugh is a talented attorney. He has been involved in controversies, but he does not appear to be an ideologue. While Democrats complain that his experience is thin, it is no more so than others who have won confirmation and served on that

court. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) is holding a second hearing on Mr. Kavanaugh's nomination today. If it produces nothing new, he should be confirmed." (Editorial, "A Tale Of Two Judges," *The Washington Post*, 5/9/06)

***National Review's* Edward Whelan: Kavanaugh "Has A Remarkable Breadth Of Experience That Few Judicial Nominees Could Match."** (Edward Whelan, Op-Ed, "A Public Disservice," *National Review*, 5/3/06)

***The Wall Street Journal*: In A "Rational World," Kavanaugh "Wouldn't Be Considered Anything Close To Controversial Enough" To Merit A Filibuster.** "In a rational world, he wouldn't be considered anything close to controversial enough to trigger that accord's 'extraordinary circumstances' exception." (Editorial, "The Next Filibuster?" *The Wall Street Journal*, 5/4/06)

***The Washington Times*: "After Nearly Three Long Years Since He Was First Nominated, Mr. Kavanaugh Should Finally Get His Long-Deserved Vote On The Senate Floor."** "After Senate Judiciary Committee Chairman Arlen Specter received a letter from the seven Democratic members of the 'Gang of 14' promising not to support a filibuster against Mr. Kavanaugh's nomination if he appeared before the committee a second time, the chairman scheduled today's hearing. A committee vote could come Thursday. Before the Memorial Day recess, after nearly three long years since he was first nominated, Mr. Kavanaugh should finally get his long-deserved vote on the Senate floor." (Editorial, "The Kavanaugh Hearing," *The Washington Times*, 5/9/06)

Senators On Brett Kavanaugh's Nomination

Sen. Majority Leader Bill Frist (R-TN): Kavanaugh's "Forthcoming And Candid Responses Before The Senate Judiciary Committee [On Tuesday] Further Confirm That He Will Be The Kind Of Fair And Independent Judge America Expects In Its Courtrooms." (David G. Savage, "Bench Nominee Denies Role In Controversies," *Los Angeles Times*, 5/10/06)

Sen. Orrin Hatch (R-UT): Kavanaugh "Merits Our Support And When Confirmed Will Serve The Public Well As A Fair And Impartial Jurist." "I have confidence that Mr. Kavanaugh will again today demonstrate his deep understanding and knowledge of the law. I expect that he will once again display his intellect, sound judgment and judicial temperament. I have no doubt that [he] fully appreciates the proper role and limitations placed on federal appellate judges in our constitutional system. ... I only hope that we focus on the qualifications and character of the nominee we have before us today. If we do that, I have no doubt that Brett Kavanaugh merits our support and when confirmed will serve the public well as a fair and impartial jurist." (Sen. Orrin Hatch (R-UT), "Sen. Hatch Comments On Kavanaugh's Nomination," Press Release, 5/9/06)

Sen. John Cornyn (R-TX): Kavanaugh "Is An Outstanding Nominee And Someone Who I Think Should Be Confirmed To The District Of Columbia Circuit Court Of Appeals." (Sen. John Cornyn (R-TX), Media Availability, 5/9/06)

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Rao, Neomi J.

From: White House News Update [News.Update@WhiteHouse.Gov]
Sent: Thursday, May 04, 2006 6:51 AM
To: Rao, Neomi J.
Subject: WSJ - (Editorial) The Next Filibuster?

The Next Filibuster?

Republicans should welcome a judicial brawl.

It's merely taken three years, but Brett Kavanaugh's nomination to the D.C. Circuit Court of Appeals is scheduled to come for a vote before the Senate Judiciary Committee today. Democrats are likely to oppose him in lock-step, and some on the left are urging them to use the F-word.

Anything is possible, but it's hard to believe Democrats are nuts enough to launch a judicial filibuster in the middle of an election year with a GOP President so low in the polls. Talk about a get-out-the-vote gift for Republicans. Then again, no one ever got rich overestimating the intelligence of the political class.

Mr. Kavanaugh is one of the "left-behind" nominees, who weren't covered one way or another by the bipartisan Gang of 14's no-filibuster deal last year. In a rational world, he wouldn't be considered anything close to controversial enough to trigger that accord's "extraordinary circumstances" exception. But the anti-Bush, anti-conservative animus isn't rational, and the main (only) charge against Mr. Kavanaugh is that he's allegedly too "partisan" to sit on the bench.

In the charming and revealing phrase of New York Democrat Chuck Schumer, Mr. Kavanaugh's nomination is "payment for political services rendered." Translation: Mr. Kavanaugh's career has been closely associated with some prominent conservatives. By this standard, Supreme Court Justices Stephen Breyer, who once worked for Senator Ted Kennedy, or Ruth Bader Ginsburg, who was general counsel of the American Civil Liberties Union, also don't deserve to sit on the bench because they were liberal partisans. Not to mention Brandeis, Douglas, Fortas, Goldberg, Mikva and other prominent liberal jurists.

Mr. Kavanaugh's first sin is to work for President Bush as White House staff secretary, a little known but powerful position. Withdrawn Supreme Court nominee Harriet Miers once held this job, whose duties include deciding which pieces of paper get sent into the Oval Office. Defeating Mr. Kavanaugh would be a personal slap in the face to the President.

His past transgressions include working for Alberto Gonzales, when he was White House Counsel. This has given an opening to Senator Patrick Leahy, the ranking Democrat on Judiciary, to demand a second hearing for Mr. Kavanaugh on grounds that he wants to explore the nominee's possible role in the Administration's secret wiretapping program. The White House says that he did not play an active role in those deliberations, but even if he did, so what? The President approved these wiretaps and key Members of Congress were well aware of them.

We suspect that what really makes Mr. Kavanaugh radioactive to Democrats is his work on the staff of Whitewater Independent Counsel Kenneth Starr. Never mind that Mr. Starr's mandate to cover the Paula Jones episode was issued by President Clinton's own Attorney General, Janet Reno. And never mind that the special counsel probe was originally requested by Mr. Clinton himself and urged on by liberals in

Congress and the media. Now they apparently want to disqualify Mr. Kavanaugh for executing an assignment they demanded be done.

Mr. Kavanaugh also participated in the Florida recount in 2000 -- which prominent lawyer didn't, on either side? -- and he represented Elian Gonzalez pro bono (at the behest of the Democratic mayor of Miami) in the Cuban boy's appeal to the Supreme Court after an appeals court upheld his deportation order.

As for a filibuster, it's possible Democrats will hold fire on Mr. Kavanaugh in favor of filibustering Fourth Circuit nominee Terrence Boyle, whom Senate Majority Leader Bill Frist also wants to vote on by Memorial Day. Mr. Boyle, a federal judge in North Carolina, has been waiting even longer than Mr. Kavanaugh. He was in Mr. Bush's first group of nominees announced on May 9, 2001.

In either case, Republicans would then have the chance to resort to the "nuclear option" of changing Senate rules to do away with the filibuster against judicial nominees. A majority of 51 votes would be enough to confirm, which is what the Constitution's advice and consent power anticipates. A filibuster fight would be exactly the sort of political battle Republicans need to energize conservative voters after their recent months of despond. Senator Schumer, make Bill Frist's day.

More likely is the Samuel Alito scenario. Senators John Kerry and Ted Kennedy tried to rally (or faked) a Democratic filibuster against Mr. Alito's Supreme Court nomination, but the full Senate confirmed him by 58-42. Though the ultimate 42 "no" votes would have been enough to sustain a filibuster (only 41 votes are needed to prevent cloture), enough Democrats decided to "split" their votes by opposing the filibuster and then opposing the nominee. As long as Republicans hold together, Mr. Kavanaugh should be sworn in and sitting on the bench by summer.

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Fred F. Fielding
202.719.7320
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May 5, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

We are writing to offer our strong support for the confirmation of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. We have each served as Counsel or Deputy Counsel to the President, and believe that Mr. Kavanaugh has the qualifications and experience necessary for the D.C. Circuit.

As former Counsel and Deputy Counsel to the President, we understand the importance of judicial appointments, particularly those to the federal courts of appeals. In our view, Mr. Kavanaugh possesses all of the requisite qualifications for such an appointment, including outstanding academic credentials, keen intellect, a calm and thoughtful demeanor, and exceptional analytical skills. He has extensive relevant professional experience, including arguments before the Supreme Court of the United States and the federal courts of appeals.

We would also like to emphasize the critical nature of the position that Mr. Kavanaugh currently holds as Staff Secretary. The importance of this position, as well as its substantive nature, is not always well known or understood outside the White House. As Staff Secretary, Mr. Kavanaugh is responsible for ensuring that all relevant views are concisely and accurately presented to the President. The ability to assess presentations of differing arguments on a wide range of topic areas is a skill that would serve him well on the D.C. Circuit.

Mr. Kavanaugh would be a fair and impartial judge, dedicated to the rule of law. He possesses the highest personal integrity and is exactly the type of individual this country needs on the federal appellate bench. We urge the Senate to act promptly to confirm him to the U.S. Court of Appeals for the D.C. Circuit.

Sincerely,

Fred F. Fielding

On behalf of:

Arthur B. Culvahouse, Jr.
Peter J. Wallison
Phillip D. Brady
Richard A. Hauser
Timothy E. Flanigan
David G. Leitch
John P. Schmitz
Jay B. Stephens

cc: The Honorable Patrick J. Leahy

5/9/2006

Senator Arlen Specter
Chairman, United States Senate Judiciary Committee
Washington, DC

Dear Senator Specter:

I write in support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. This is an entirely unsolicited letter, I have not spoken with Mr. Kavanaugh for approximately four years, nor have I spoken with anyone else at the White House, U.S. Department of Justice, or U.S. Senate, in conjunction with this nomination.

I have watched this nomination with strong interest for the past two years, but have stayed silent because I was not sure whether Mr. Kavanaugh had any role in a *pro bono* case in which I am lead counsel, *Hamdan v. Rumsfeld* (currently pending at the United States Supreme Court). Because of my uncertainty as to his involvement, I felt it improper to comment on the nomination given my status as counsel for a party. In the hearing before your committee today, however, Mr. Kavanaugh stated that he had no role with respect to Guantanamo Bay policy. I am very grateful for the hearing today, for it has allowed me to write to you.

Accordingly, I feel free to say that Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.

I think the *Washington Post* today, in its editorial urging Mr. Kavanaugh's confirmation, hit the nail on the head when it said that the Democrats have understandable concerns with Mr. Kavanaugh that necessitated this second hearing given his position in the Administration. But now that the hearing has taken place, it is high time to confirm him.

It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good – he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction. I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh, and not what one should

expect. As you reminded people in today's hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.

I have only written one letter in support of a judicial confirmation before, for a nominee of either political party, and that was for then-John Roberts to serve on the D.C. Circuit. (As *Hamdan* was pending at the Supreme Court, I stayed silent with respect to the high-court nominations.) I do not believe it appropriate to write to you unless I feel strongly about a particular nominee. I feel strongly now: Brett Kavanaugh should be confirmed to the United States Court of Appeals for the D.C. Circuit.

At the same time, I also have strong concerns about the need for balance on this Court. At present, six of the nine sitting Judges on the D.C. Circuit were nominated by Republican Presidents, and only three by Democrats. Some of that imbalance is the unfortunate result of not providing up-or-down confirmation votes on President Clinton's nominees in the 1990s. I note that the Senate has done a much better job of confirming judges in recent years (including two Judges recently to the D.C. Circuit). Senators from both parties, and your stewardship of the Committee in conjunction with Senator Leahy, have done so much to move past the acrimonious 1990s. In the future, it is my fervent hope that the Administration, and the Senate, strive toward a bench in D.C. that mirrors the heartland of the American people.

I hope this helps as your committee evaluates Mr. Kavanaugh's nomination.

Sincerely,

Neal Katyal
Professor of Law
Georgetown University

May 5, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. Our past experiences as Attorneys General include extensive involvement in the selection of judges combined with a comprehensive knowledge of and familiarity with our federal court system. From that vantage point, we can each state with certainty that Mr. Kavanaugh is an outstanding nominee to the federal bench.

Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. His academic credentials are superlative, having graduated from Yale University and from Yale Law School. He followed these achievements by clerking for Supreme Court Justice Anthony Kennedy. Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table—namely a warm personality, a strong work ethic, and a good character.

We believe that Mr. Kavanaugh possesses each characteristic of an outstanding nominee to the U.S. Court of Appeals for the D.C. Circuit, including academic and professional credentials and integrity. We therefore urge this Committee and the Senate to move quickly to confirm Mr. Kavanaugh to the federal bench. America would be well served by Mr. Kavanaugh's prompt confirmation.

Sincerely,

William P. Barr, Attorney General under
President George H.W. Bush, 1991-1993

On behalf of:

Griffin B. Bell, Attorney General under
President Carter, 1977-1979

Edwin Meese, III, Attorney General under
President Reagan, 1985-1988

Dick Thornburgh, Attorney General under
Presidents Ronald Reagan and George H. W. Bush,
1988-1991

John Ashcroft, Attorney General under
President George W. Bush, 2001-2005

cc: The Honorable Patrick J. Leahy

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Report	Kavanaugh Op-Ed [with attachments]	4	N.D.	PRM;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - Letters & OpEds

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- 1 woman?
+ Pam Harris sep lett
- more signatures expected.

May 3, 2006

By Facsimile and U.S. Mail

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re Nomination of Brett M. Kavanaugh for United States Circuit Judge

Dear Chairman Specter and Senator Leahy:

We are a bipartisan group who were classmates with Brett Kavanaugh at Yale Law School in the Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly. We write in support of his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

We understand that some have questioned whether Mr. Kavanaugh would make a fair and impartial judge, given his political experience in the executive branch. We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, intelligence, honesty, good sense and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals.

From the time we first met him as a classmate, Mr. Kavanaugh has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Mr. Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Mr. Kavanaugh stood out as ideological at all. He was not a young man with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Mr. Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his enthusiasm in organizing pre-graduation activities, such as a bus trip to Fenway Park. Brett Kavanaugh is a man anyone would be proud to have as a friend. He is extraordinarily

bright, yet modest and humble about his intellect. His temperament is extremely well-suited to the federal bench.

Many of us disagree—occasionally strongly—with policy views Mr. Kavanaugh holds. But those disagreements do not diminish our conviction that Mr. Kavanaugh is a fair-minded and reasonable man who would, as a judge, interpret and apply the law fairly. Based on our years of knowing Mr. Kavanaugh, we are firmly convinced that his allegiance as a federal judge would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to federal judges across America, in chambers for United States District Court and Court of Appeals judges and United States Supreme Court justices. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach the correct and just result in every case before them. We believe Mr. Kavanaugh would become such a judge. We doubt that we will agree with every decision Mr. Kavanaugh may make as a judge (and we doubt that the 100 Senators of the United States will, either), but we firmly believe that Mr. Kavanaugh would, through hard work, diligence and thoughtfulness, reach those decisions in a well-reasoned, honest and impartial manner that would bring credit to the distinguished court to which he has been nominated.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh's nomination and we urge the Senate to confirm him to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

Respectfully,

James L. Brochin
Trevor A. Brown
Edmund C. Burns
Whit Cobb
Robert E. Easton
Jonathan S. Franklin
Robert H. Griffen
Vernon C. Grigg III
Steven H. Hartmann
C. Corley Holt
John P. Irwin
Paul E. Kalb
Zeb Landsman
Barr Linton
Kyle D. Logue
Mark W. Osler
Michael J. Proctor
Robert Rivera, Jr.
Douglas Rutzen
Austin C. Schlick
Michael A. Schwartz
Floyd G. Short
Jeff Shumway
Kent Sinclair
Richard J. Sullivan

Brian A. Benczkowski

(b)(6)

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

I am an attorney in private practice, and a former staffer in the United States Senate and at the United States Department of Justice. I write in support of the nomination of Brett Kavanaugh to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit.

I have known Mr. Kavanaugh for several years, and believe he possesses the appropriate qualifications and temperament to serve in this important position. I am certain that the Committee is well aware of Mr. Kavanaugh's impressive career in public service, and the fact that the American Bar Association has given him their highest "Well Qualified" rating. Those of us who have worked with him and have been impressed by his legal skills understand that this rating is entirely well deserved.

What many may not appreciate is that in his personal and professional life, Mr. Kavanugh also consistently displays the temperament appropriate for a member of the federal bench. While serving at the Department of Justice, I had occasion to work with him on a variety of projects. Although we may not always have agreed on how to resolve a particular issue, Brett was never argumentative, never arrogant, and always humble—even when, as often was the case, he was right. I have never seen him deviate from this approach to solving problems, which will serve him and the court well if he is confirmed to the D.C. Circuit.

I hope the Committee and the Senate will give Mr. Kavanaugh's nomination full and fair consideration in the coming months. Any objective review of his qualifications should lead to the conclusion that he deserves confirmation to the D.C. Circuit.

Sincerely,

Brian A. Benczkowski

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Wendy J. Keefer
Todd M. Musheff
P. Gunnar Nistad

Lucinda Gardner Wichmann
Phillip S. Ferderigos
Andrea H. Brisbin
K. Michael Barfield
Arthur C. Pelzer
John W. Fletcher
John A. Jones

† Registered Patent Attorney

Robert A. Patterson (1921-2004)
Nathaniel B. Barnwell (1877-1950)
Ben Scott Whaley (1909-1987)
Samuel J. Corbin (1907-1975)

May 24, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Support of Nomination of Brett M. Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

I am writing this letter to express my strong support for the nomination of Brett Kavanaugh to be a judge on the D.C. Circuit Court of Appeals. I have had the pleasure of getting to know Brett over the past several years and could not think of a finer choice to sit on our appellate courts.

Brett's legal career, and the positive reputation it has earned him, speaks for itself. He has been and remains a shining star in terms of intelligence, temperament, work ethic, honesty and integrity. As I am sure you will agree upon reviewing his resume, his experience makes him well suited to the appellate bench. It is no surprise the ABA gave Brett a well qualified rating for this position. He would be a positive addition to the D.C. Circuit and would undoubtedly apply the law fairly and consistently.

I urge the Judiciary Committee to send this nomination to the floor of the Senate with a positive recommendation so that the full Senate may vote on the nomination of Brett Kavanaugh. Not only does Brett deserve the opportunity to have his nomination considered by the full Senate, he is most deserving of confirmation to the position to which he has been nominated.

Respectfully,

Wendy J. Keefer

cc: The Honorable Patrick J. Leahy

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Counsel's Office, White House

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[Brett Kavanaugh]: TPs (Talking Points)

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001	Handwritten Note	[Notes]	1	N.D.	P5;
002	Draft	Brett M. Kavanaugh	17	N.D.	P5;
003	Letter	Nomination of Brett M. Kavanaugh to D.C. Circuit - To: Orrin Hatch - From: Pamela Harris	1	04/27/2004	P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
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[Brett Kavanaugh]: TPs (Talking Points)

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Washington, DC 20037-1435

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STAFF LIAISON
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cardmand@staff.abanet.org

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E-mail: stober@toberlaw.com

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
740 Fifteenth Street, NW
Washington, DC 20005-1022
Facsimile: (202) 662-1762

BY FACSIMILE AND MAIL

Naomi
- no cover needed

April 3, 2006

Ms. Harriet Miers
Counsel to the President
The White House
Washington, D.C. 20502

Re: **Brett M. Kavanaugh, Esq.**
United States Court of Appeals for the District of Columbia

Dear Ms. Miers:

The purpose of this letter is to confirm that this Committee has completed a supplemental investigation regarding the renomination of Brett M. Kavanaugh for appointment as Appellate Judge of the United States Court of Appeals for the District of Columbia.

As a result of our investigation, a substantial majority of the Committee is of the opinion that Brett M. Kavanaugh is Qualified for appointment as Appellate Judge of the United States Court of Appeals for the District of Columbia. A minority of the Committee is of the opinion that Brett M. Kavanaugh is Well Qualified for appointment as Appellate Judge of the United States Court of Appeals for the District of Columbia.

Yours very truly,

Stephen L. Tober

Stephen L. Tober
Chair

SLT/sst

cc: Rachel Brand, Esq.
ABA Standing Committee on Federal Judiciary

436900/C/1

CHAIR
Stephen L. Tober
P.O. Box 1377
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Portsmouth, NH 03802-1377

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FOURTH CIRCUIT
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SIXTH CIRCUIT
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Chicago, IL 60611

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Pierre, SD 57501-0160

NINTH CIRCUIT
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Salt Lake City, UT 84111-2216

ELEVENTH CIRCUIT
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Atlanta, GA 30309-3996

D.C. CIRCUIT
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Suite 200
2001 L Street, NW
Washington, DC 20036-8103

FEDERAL CIRCUIT
John Fayton
2445 M Street, NW
Washington, DC 20037-1435

BOARD OF GOVERNORS LIAISON
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STAFF LIAISON
Denise A. Cardman
202-662-1761
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Please respond to:
Stephen L. Tober
Tober Law Offices, PA
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Portsmouth, NH 03801
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Fax: 603.431.9426
E-mail: stober@toberlaw.com

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
740 Fifteenth Street, NW
Washington, DC 20005-1022
Facsimile: (202) 662-1762

April 3, 2006

BY FACSIMILE AND MAIL

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Brett M. Kavanaugh, Esq.
United States Court of Appeals for the District of Columbia

Dear Senator Specter:

The purpose of this letter is to confirm that this Committee has completed a supplemental investigation regarding the renomination of Brett M. Kavanaugh for appointment as Appellate Judge of the United States Court of Appeals for the District of Columbia.

As a result of our investigation, a substantial majority of the Committee is of the opinion that Brett M. Kavanaugh is Qualified for appointment as Appellate Judge of the United States Court of Appeals for the District of Columbia. A minority of the Committee is of the opinion that Brett M. Kavanaugh is Well Qualified for appointment as Appellate Judge of the United States Court of Appeals for the District of Columbia.

A copy of this letter has been sent to Brett M. Kavanaugh for his information.

Yours very truly,

Stephen L. Tober
Chair

SLT/sst

cc: Brett M. Kavanaugh, Esq.
Ms. Harriet Miers
Rachel Brand, Esq.
ABA Standing Committee on Federal Judiciary
Denise A. Cardman, Esq.

This letter was sent to the following members of the Committee on the Judiciary, United States Senate, 224 Dirksen Senate Office Building, Washington, D.C. 20510-6275

Majority:	Hon. Arlen Specter, Chairman
	Hon. Orrin G. Hatch
	Hon. Charles E. Grassley
	Hon. Jon Kyl
	Hon. Mike DeWine
	Hon. Jeff Sessions
	Hon. Lindsey Graham
	Hon. John Cornyn
	Hon. Sam Brownback
	Hon. Tom Coburn
Minority:	Hon. Patrick J. Leahy
	Hon. Edward M. Kennedy
	Hon. Joseph R. Biden, Jr.
	Hon. Herbert H. Kohl
	Hon. Dianne Feinstein
	Hon. Russell D. Feingold
	Hon. Charles E. Schumer
	Hon. Richard Durbin

Douglas H. Ginsburg

D.C. CIRCUIT
Chief Judge, D.C. Circuit
5128 United States Courthouse
333 Constitution Avenue, N.W.
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(202) 216-7190
Fax: (202) 273-0678
Appointed in 1986 by President Reagan
Born: 1946

Education Cornell Univ., B.S., 1970; Univ. of Chi., J.D., 1973

Clerkships Law Clerk, Hon. Carl McGowan, United States Court of Appeals, District of Columbia, 1973-74; Law Clerk, Justice Thurgood Marshall, United States Supreme Court, 1974-75

Government Positions Deputy Assistant Attorney General for Regulatory Affairs, Antitrust Division, United States Department of Justice, 1983-84; Administrator for Information and Regulatory Affairs, Office of Management and Budget, 1984-85; Assistant Attorney General, Antitrust Division, United States Department of Justice, 1985-86

42
30/41?
31

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Harry T. Edwards

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
5400 United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7380
Fax: (202) 273-0119
Appointed in 1980 by President Carter
Born: 1940
Children: Brent, Michelle

Education Cornell Univ., B.S., 1962; Univ. of Michigan, J.D., 1965; Assistant Editor, Michigan L. Rev, 1963-65

none

Private Practice Associate, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, 1965-70

Academic Positions Professor, Univ. of Michigan, 1970-75, 1977-80; Visiting Professor of Law, Program for International Legal Cooperation, Free Univ. of Brussels, 1974; Harvard Law School: Visiting Professor, 1975-76; Professor, 1976-77; Faculty (law and higher education), Lecturer, Pa. Law School, 1981-82; Distinguished Lecturer, Duke Law School, 1983-89; Lecturer, Georgetown Law School, 1985-86; Lecturer, Harvard Law School, 1982-88; Lecturer, Univ. of Michigan Law School, 1988-89; Lecturer, New York Univ. Law School

Other Employment Labor Arbitrator (part time), 1970-80

Judicial Committees & Activities Member, Supreme Court Historical Society, 1997-present; Federal Judges Assn.

Professional Associations A.B.A.: Assn. of American Law Schools; American Judicature Society; American Law Institute; American Academy of Arts and Science; Order of the Coif; American Society of International Law; Fellows of the American Bar Foundation

Almanac of the Federal Judiciary

Merrick B. Garland

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
5409 United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001
(202) 216-7460
Fax: (202) 208-2449
Appointed 1997 by President Clinton
Born: 1952

Education Harvard, A.B., summa cum laude, 1974, J.D., magna summa laude, 1977

Government Positions Special Assistant to the Attorney General, United States Department of Justice, 1979-81; Associate Independent Counsel, 1987-88; Assistant United States Attorney, D. D.C., 1989-92; Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, 1993-94; Principal Associate Deputy Attorney General, United States Department of Justice, 1994-97

Clerkships Law Clerk, Hon. Henry J. Friendly, United States Court of Appeals, Second Circuit, 1977-78; Law Clerk, Justice William J. Brennan, Jr., United States Supreme Court, 1978-79

Private Practice Partner and Associate, Arnold & Porter, 1981-89, 1992-93

Academic Positions Lecturer, Harvard Law School (Advanced Antitrust), 1985-86

Professional Associations American Law Institute; Section of Administrative Law & Regulatory Practice, A.B.A.; Co-chair, Administrative Law Section, District of Columbia Bar

Judicial Committee & Activities United States Judicial

Almanac of the Federal Judiciary

Karen LeCraft Henderson

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
3118 United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001
(202) 216-7370
Fax: (202) 273-0983
Appointed in 1990 by President Bush
Born: 1944

Education Duke Univ., B.A., 1966; Univ. of North Carolina, J.D., 1969

Private Practice Partner, Wright & Henderson, Chapel Hill, N.C., 1969-70; Sinkler, Gibbs & Simons, P.A., Columbia, S.C., 1983-86

Government Positions Assistant Attorney General, Columbia, S.C., 1973-78; Senior Assistant Attorney General and Director of Special Litigation Section, Columbia, S.C., 1978-82; Deputy Attorney General and Director of Criminal Division, 1982, Columbia, S.C.

Previous Judicial Positions United States District Judge, District of South Carolina, 1986-90

Professional Associations A.B.A.; South Carolina Bar; American Law Institute; Supreme Court Historical Society

Honors and Awards Univ. of South Carolina, LL.D., 1990

Noteworthy Rulings *Willner v. Thornburgh,* 928 F.2d 1185 (D.C. Cir. 1991), *cert. denied,* 502 U.S. 1020 (1991): Henderson dissented from a court opinion holding that Justice Department requirement that government employment applicant's submit to urine tests did not violate the Fourth Amendment's protections against unreasonable searches. She

Almanac of the Federal Judiciary

A. Raymond Randolph

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
3108 E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7425
Fax: (202) 273-0004
Appointed in 1990 by President Bush
Born: 1943

Education Drexel Univ., B.S., 1966; Univ. of Pennsylvania Law School, J.D., summa cum laude, 1969

Clerkships Law Clerk, Hon. Henry J. Friendly, United States Court of Appeals, Second Circuit, 1969-70

Government Positions Assistant to the Solicitor General, Washington, D.C., 1970-73; Deputy Solicitor General, Washington, D.C., 1975-77; Special Counsel, Committee on Standards of Official Conduct, United States House of Representatives, 1979-80

Judicial Positions Member, United States Judicial Conference Committee on Codes of Conduct, 1992-98; Chairman, 1995-98

Private Practice Miller, Cassidy, Larroca & Lewin, Washington, D.C., 1973-75; Sharp, Randolph & Janis, Washington, D.C., 1977-79; Sharp, Randolph & Green, Washington, D.C., 1979-83; Randolph & Fox, Washington, D.C., 1983-84; Randolph & Truitt, Washington, D.C., 1984-87, Pepper, Hamilton & Scheetz, 1987-90

Academic Positions Adjunct Professor of Law, Georgetown Law Center, 1974-78; Adjunct Professor of Law, George Mason Law School, 1992; Distinguished Adjunct Professor of Law, George Mason Law School, 1998-present

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Almanac of the Federal Judiciary

John G. Roberts, Jr.

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
3832 E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7321
Appointed in 2003 by President G.W. Bush
Born: 1955

Education Harvard College, A.B., summa cum laude, 1976, Harvard Law School, J.D., magna cum laude, 1979

Clerkships Law Clerk, Hon. Henry Friendly, United States Court of Appeals for the Second Circuit, 1979-1980; Law Clerk, Associate Justice William Rehnquist, Supreme Court of the United States, 1980-1981

Private Practice Associate then Partner (1987), Hogan & Hartson, Washington, D.C., 1986-89, 1993-03

Government Positions Special Assistant to the Attorney General William French Smith, United States Department of Justice, 1981-1982; Associate Counsel to the President, White House Counsel's Office, 1982-1986; Principal Deputy Solicitor General, United States Department of Justice, 1989-1993

41

Professional Associations District of Columbia Bar; American Law Institute; American Academy of Appellate Lawyers; Edward Coke Appellate Inn of Court; Supreme Court Historical Society

Other Activities Phi Beta Kappa; Lawyers Club; Metropolitan Club; Robert Trent Jones Golf Club

Publications *New Rules and Old Pose Stumbling Blocks in High Court Cases,* The Legal Times, Februrary 26, 1990, co-

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Almanac of the Federal Judiciary

Judith W. Rogers

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
United States Courthouse
333 Constitution Avenue N.W.
Washington, D.C. 20001
(202) 216-7260
Fax: (202) 482-2546
Appointed in 1994 by President Clinton
Born 1939

Education Radcliffe College, A.B., cum laude, 1961; Harvard Law School, LL.B., 1964; University of Virginia Law School, LL.M., 1988

Clerkships Law Clerk, Juvenile Court of the District of Columbia, 1964-65

Government Positions Assistant United States Attorney, District of Columbia, 1965-68; Trial attorney, Criminal Division, United States Department of Justice, Washington, D.C., 1969-71; General Counsel, Congressional Commission on the Organization of the District Government, 1971-72; Legislative Program Coordinator, Office of the Assistant to the Mayor-Commissioner, and subsequently in the Office of the Mayor, D.C. government, 1972-74; Special Assistant for Legislation to the Mayor, D.C. Government, 1974-79; Assistant City Administrator for Intergovernmental Relations, D.C. Government, 1979; Corporation Counsel for the District of Columbia, 1979-83

Previous Judicial Positions Associate Judge, District of Columbia Court of Appeals, 1983-88; Chief Judge, District of Columbia Court of Appeals, 1988-93

Other Employment Staff attorney, San Francisco Neighborhood Legal Assistance Foundation, 1968-69

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Almanac of the Federal Judiciary

David B. Sentelle

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
5818 United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7330
Fax: (202) 273-0174
Appointed in 1987 by President Reagan
Born: 1943
Spouse: Jane Oldham
Children: Sharon Rene, Reagan Elaine, Rebecca Grace

Education Univ. of North Carolina, B.A., 1965, J.D., with honors, 1968

Private Practice Uzzell & DuMont, Asheville, N.C., 1968-70 (Specialty: insurance defense); Bryant, Hicks & Sentelle, Charlotte, N.C., 1977-80; Tucker, Hicks, Sentelle, Moon & Hodge, P.A., Charlotte, 1980-85 (Specialty: litigation)

Government Positions Assistant United States Attorney, Charlotte, 1970-74

Academic Positions Visiting Professor, Univ. of North Carolina, Charlotte, 1977, U.N.C. Chapel Hill, 1991-92

Previous Judicial Positions District Judge, North Carolina General Courts of Justice, Charlotte, 1974-77; U.S.D.C., W.D.N.C., 1985-87

Professional Associations A.B.A.; Federal Bar Assn. (Chapter President, 1975); North Carolina Bar Assn.; Edward Bennett Williams American Inn of Court (president)

Political Activities Mecklenburg County Republican Party (Chairman, 1979-80); North Carolina Republican Party (Convention Chairman, 1980-81); National Republican

Almanac of the Federal Judiciary

David Stephen Tatel

D.C. CIRCUIT
Circuit Judge, D.C. Circuit
3818 United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7160
Fax: (202) 208-1922
Appointed in 1994 by President Clinton
Born 1942

Education Univ. of Michigan, B.A., 1963; Univ. of Chicago Law School, J.D., 1966

Private Practice Sidley & Austin, Summer 1966, 1967-69, 1970-72; Hogan & Hartson, 1974-77, 1979-94

Government Positions Director Office for Civil Rights, United States Department of Health, Education & Welfare, Washington, D.C., 1977-79

Other Employment Executive Director, Chicago Lawyers' Committee for Civil Rights Under Law, Chicago, Ill., 1969-70; Director, National Lawyers' Committee for Civil Rights Under Law, Washington, D.C., 1972-74

Academic Positions Instructor, Univ. of Michigan Law School, 1966-67; Lecturer, Stanford Law School, 1991-92; Director, Carnegie Foundation for the Advancement of Teaching, 1997-present; Director, National Board for Professional Teaching Standards

Professional Associations A.B.A.; District of Columbia Bar Assn.; Chair, Board of Directors, The Spencer Foundation, 1990-97; Director, Carnegie Foundation for the Advancement of Teaching, 1997-present

Honors & Awards National Legal Aid Defenders Assn.

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Almanac of the Federal Judiciary

Laurence Hirsch Silberman

D.C. CIRCUIT
Senior Judge, D.C. Circuit
3400 United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7353
Fax: (202) 273-0831
Appointed in 1985 by President Reagan
Born: 1935
Spouse: Rosalie Gaull
Children: Robert, Katherine, Anne

Education Dartmouth College, A.B., 1957; Harvard Univ., LL.B., 1961

Military Service Army Reserve, 1957-58, Pvt.

Private Practice Moore Silberman & Schulze (and predecessor firms), Honolulu, 1961-67 (Specialty: labor law); Steptoe & Johnson, Washington, D.C., 1973-74 (Specialty: administrative law); Morrison & Foerster, Washington, D.C., 1978-79, 1983-85 (Specialties: banking, telecommunications, and administrative law)

Government Positions Attorney, Appellate Division, General Counsel's Office, National Labor Relations Board, 1967-69; Solicitor, United States Department of Labor, Washington, D.C., 1969-70; Under Secretary of Labor, Washington, D.C., 1970-73; Deputy Attorney General of the United States, Washington, D.C., 1974-75; Ambassador to Yugoslavia, 1975-77; President's Special Envoy on ILO Affairs, 1976; Co-chairman, Commission of the Intelligence Capabilities of the United States, 2004-05

21
20
39

Academic Positions Georgetown Univ. (Adjunct Professor of Administration Law, 1987-94, 1997, 1999-01; Adjunct Professor of Labor Law, 2001; Distinguished Visitor from the

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Almanac of the Federal Judiciary

Stephen F. Williams

D.C. CIRCUIT
Senior Judge, D.C. Circuit
3800 United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866
(202) 216-7210
Fax: (202) 273-0976
Appointed in 1986 by President Reagan
Born: 1936

Education Yale Univ., B.A., 1958; Harv. Univ., J.D., 1961

Military Service Army, 1961-62

Private Practice Debevoise, Plimption, Lyons & Gates, 1962-66

Government Positions Assistant United States Attorney, S.D.N.Y., 1966-69

Academic Positions Professor, Univ. of Colo. School of Law, 1969-86; Visiting Professor : UCLA School of Law, 1975-76; Univ. of Chicago. Law School (fellow), 1979-80; SMU School of Law, 1983-84

Professional Associations American Law Institute; Colorado Bar Assn.

Other Activities International Assn. of Energy Economists

Publications Books: Cases and Materials on the Law of Oil & Gas (with Richard C. Maxwell, Patrick H. Martin & Bruce M. Kramer) (6th ed. 1992); *The Legal Integration of Energy Markets* (with Terence Daintith) (Vol. 5 of *Integration Through Law: Europe and the American Federal Experience*) (1987)

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the DC Circuit

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

- ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

- ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

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Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: TPs (Talking Points)

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: TPs (Talking Points)

FRC ID:
10166

OA Num.:
6323

NARA Num.:
6124

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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UNITED STATES ORDER OF PRECEDENCE
PRESIDENT GEORGE W. BUSH ADMINISTRATION

April 2005

1	President of the United States
2	Vice President of the United States
3	Governor of a State (when in own state)
4	Speaker of the House of Representatives
	Chief Justice of the United States
5	Former Presidents of the United States (by seniority of assuming office)
	American Ambassadors (at post)
6	Secretary of State
7	President, United Nations General Assembly (when in session)
	Secretary General of the United Nations
	President, United Nations General Assembly (when not in session)
	President, International Court of Justice
8	Ambassadors, E. and P. of foreign governments accredited to the United States (in order of presentation of credentials)
9	Widows of Former Presidents of the United States
10	Associate Justices of the Supreme Court
	Retired Chief Justices of the United States
	Retired Associate Justices of the Supreme Court ~~(Note: Associate Justices who resign lose their rank.)~~
11	Members of the Cabinet (other than the Secretary of State) according to date of establishment of the department, and as added by The President, as follows:
	Secretary of the Treasury
	Secretary of Defense
	Attorney General
	Secretary of the Interior
	Secretary of Agriculture
	Secretary of Commerce
	Secretary of Labor
	Secretary of Health and Human Services
	Secretary of Housing and Urban Development
	Secretary of Transportation
	Secretary of Energy
	Secretary of Education
	Secretary of Veterans Affairs
	Secretary of Homeland Security
	Chief of Staff to the President

	Director, Office of Management and Budget
	United States Trade Representative
	Administrator, Environmental Protection Agency
	Director, National Drug Control Policy
12	President Pro Tempore of the Senate
	Senators (by length of service; when the same, by State's date of admission in the Union, or alphabetically by State)
13	Governors of States - when outside own state (Relative precedence among Governors, all of whom are outside their own state, is determined by their State's date of admission in the Union or alphabetically by State).
14	Acting Heads of Executive Departments
	Former Vice Presidents of the United States or their widows
15	Members of the House of Representatives (by length of service; when the same, by State's date of admission in the Union, or alphabetically by State)
16	Delegates to the House of Representatives (nonvoting members) from Territory of American Samoa, District of Columbia, Territory of Guam, Commonwealth of Puerto Rico, and United States Virgin Islands (by date of election of delegate)
	Governors of Commonwealth of Puerto Rico, Territory of Guam, Territory of American Samoa, United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands (determined by territory's date of entering U.S. jurisdiction, or alphabetically by territory)
17	Assistant to the President for National Security Affairs
	Counselor to the President
	Senior Advisor to the President
	Assistant to the President and Deputy Chief of Staff
	~~Assistant to the President and Deputy Chief of Staff for Policy~~
	~~Assistant to the President and Deputy Chief of Staff for Operations~~
	Assistants to the President (ranked by seniority)
	Chief of Staff to the Vice President
	Chairman, Council of Economic Advisors
	Chairman, Council on Environmental Quality
	Director, Office of Science and Technology Policy
	Chief of Protocol (when at the White House or accompanying The President)
18	Charge d'Affaires assigned to diplomatic missions in Washington, D.C.
	Charge d'Affaires ad interim assigned to diplomatic missions in Washington, D.C.
19	Former Secretaries of State (by seniority of assuming office)
	Former Cabinet Members (by seniority of assuming office)
20	Deputy to Members of the Cabinet, according to date of establishment of the department, and as added by The President, as follows:
	Deputy Secretary of State
	Deputy Secretary of the Treasury
	Deputy Secretary of Defense

	Deputy Attorney General
	Deputy Secretary of the Interior
	Deputy Secretary of Agriculture
	Deputy Secretary of Commerce
	Deputy Secretary of Labor
	Deputy Secretary of Health and Human Services
	Deputy Secretary of Housing and Urban Development
	Deputy Secretary of Transportation
	Deputy Secretary of Energy
	Deputy Secretary of Education
	Deputy Secretary of Veterans Affairs
	Deputy Secretary of Homeland Security
	Deputy Director, Office of Management and Budget (OMB)
	Deputy United States Trade Representative (USTR)
	Deputy Administrator, Environmental Protection Agency (EPA)
	Deputy Director, National Drug Control Policy
21	Permanent Representative of the United States to the United Nations
	Administrator, Small Business Administration (SBA)
	Director, Central Intelligence Agency (CIA)
	~~Director, Federal Emergency Management Agency (FEMA)~~
	Associate Attorney General
	Solicitor General
	Director, Federal Bureau of Investigation (FBI)
	Administrator, Agency for International Development (AID)
	Under Secretaries of State and the Counselor of the Department of State
	Under Secretaries of Executive Departments ~~when third in rank~~ (according to date of establishment of the Department)
	United States Permanent Representative on the Council of the North Atlantic Treaty Organization (USNATO)
	Representative of the United States to the European Union (USEU)
	Ambassadors at Large
	Secretary of the Army
	Secretary of the Navy
	Secretary of the Air Force
	Postmaster General
	Chairman, Board of Governors of the Federal Reserve
	Chairman, Export-Import Bank
22	Chairman, Joint Chiefs of Staff
	Vice Chairman, Joint Chiefs of Staff
	Retired Chairman, Joint Chiefs of Staff
	Chief of Staff of the Air Force, Chief of Staff of the Army, Commandant of the Marine Corps, and Chief of Naval Operations (order based on Chief's date of appointment)
	Commandant of the Coast Guard
23	Lieutenant Governors (when in own State)
24	Permanent Representatives of foreign governments to the United Nations
	Secretary General of the Organization of American States (OAS)
	Chairman, Permanent Council of the Organization of American States (OAS) (new Chairman appointed every three months)

	Permanent Representatives to the Organization of American States (OAS)
	Representative of the United States to the European Office of the United Nations, Geneva
	Representative of the United States to the Vienna Office of the United Nations (UNVIE)
	Permanent Representative of the United States to the Organization of American States (OAS)
	Representative of the United States to the Organization for Economic Cooperation and Development (USOECD)
	Heads of International Organizations, including International Monetary Fund, World Bank (International Bank for Reconstruction and Development), North Atlantic Treaty Organization (NATO)
25	Administrator, General Services Administration (GSA)
	Administrator, National Aeronautics and Space Administration (NASA)
	Chairman, Merit Systems Protection Board
	Director, Office of Personnel Management (OPM)
	Administrator, Federal Aviation Administration (FAA)
	Chairman, Nuclear Regulatory Commission
	Director, Peace Corps
26	Deputy Permanent Representative of the United States to the United Nations
	Deputy Administrator, Small Business Administration (SBA)
	Deputy Director, Central Intelligence Agency (CIA)
	~~Deputy Director, Federal Emergency Management Agency (FEMA)~~
27	American Ambassadors (on State and Official Visits to the United States)
	Chief of Protocol (at the Department of State or at events outside the White House)
	American Ambassadors (on State and Official Visits to the United States outside Washington, D.C.)
	Career Ambassadors
28	Chief Judges and Circuit Judges of the United States Courts of Appeals (by length of service)
	Chief Judges and District Judges, United States District Courts (by length of service)
	Chief Judges and Judges of the United States Court of Military Appeals for the Armed Forces
	Chief Judges and Judges of the United States Court of Appeals for Veterans Claims
29	Mayors of U.S. cities and the District of Columbia when in own city
	~~Acting Chief of Protocol (when at The White House or accompanying The President)~~
30	Deputy Assistants to the President (ranked alphabetically)
	Deputy Administrator, Agency for International Development (AID)
	American Charge d'Affaires (at post)
31	Assistant Secretaries, Counselors, and Legal Advisers of Executive Departments (by date of appointment)

32	Under Secretaries General of the United Nations
	Administrator, National Oceanographic and Atmospheric Administration (NOAA)
	Deputy Director, General Services Administration (GSA)
	Deputy Director, National Aeronautics and Space Administration (NASA)
	Deputy Director, Office of Personnel Management (OPM)
33	Assistant Administrators, Agency for International Development (AID)
	Assistant United States Trade Representatives
34	United States Comptroller General
	Members of the Council of Environmental Quality
	Members of the Council of Economic Advisers (ranked alphabetically)
35	American Ambassadors-designate (in the United States under normal orders, or on leave)
	Representatives of United States Missions to the European Union (USEU) and the Organization for Economic Cooperation and Development (USOECD)
36	Mayors of U.S. cities and the District of Columbia (when not in own city)
37	Under Secretary of the Army
	Under Secretary of the Navy
	Under Secretary of the Air Force
	Acting Deputy Secretaries of Executive Departments
	Acting Under Secretaries of Executive Departments
38	Four Star Military Officers - General or Admiral (in order of seniority; retired officers rank with but after active officers)
	Officers of the U.S. Senate and U.S. House of Representatives
	Assistant Secretary of the Army (by date of appointment)
	Assistant Secretary of the Navy (by date of appointment)
	Assistant Secretary of the Air Force (by date of appointment)
	Executive Secretary, National Security Council (NSC)
39	General Counsels of Military Departments
	Directors of Defense Agencies (by establishment date of the agency)
	Three Star Military Officers - Lieutenant General, Vice Admiral (in order of seniority; retired officers rank after active members)
	State Senators and Representatives (when in own state)
	Former American Ambassadors/Chiefs of Diplomatic Missions (in order of presentation of credentials at first post)
40	Acting Assistant Secretaries of Executive Departments
	President, Overseas Private Investment Corporation (OPIC)
	Treasurer of the United States
	Director of the Mint
	Chairman, Federal Communications Commission (FCC)
	Director, National Bureau of Standards
	Other Chairman of Bureaus, Boards and Commissions not previously listed
	Librarian of Congress
	Vice Chairmen and Members of the Board of Governors of the Federal

	Reserve System
	Secretary of the Smithsonian Institution
	Chairman, National Endowment for the Humanities
	Chairman, National Endowment for the Arts
	Director, National Science Foundation
	Surgeon General, United States Public Health Service
	Heads of independent agencies not mentioned previously (by date of establishment of the agency)
41	Special Assistants to the President
	Chairman of the American Red Cross
	Ministers of foreign governments assigned to diplomatic missions in Washington, D.C.
	Deputy Chief of Protocol
	Commissioner of the United States Customs Service
	Commissioners (Level IV Executives)
42	Deputy Under Secretaries of Executive Departments
	Deputy Assistant Secretaries of Executive Departments (by date of appointment)
	Deputy Counsels of Executive Departments (by date of appointment)
43	Assistant Chiefs of Protocol
	Directors of Offices of Executive Departments
	Counselors of foreign governments assigned to diplomatic missions in Washington, D.C.
	Consuls General of foreign governments
	Two Star Military - Major General, Rear Admiral (in order of seniority; retired officers rank with but after active officers)
	Deputy Assistant Secretaries of Military Departments (by date of appointment)
44	Chief Judge and Judges, United States (formerly Customs) Court of International Trade
	Chief Judge and Associate Judges, United States Court of Claims
	Chief Judge and Associate Judges, United States Tax Court
45	One Star Military - Brigadier Generals, Rear Admirals (in order of seniority; retired officers rank with but after active officers)
	Desk Officers of executive departments
	First Secretaries of foreign governments assigned to diplomatic missions in Washington, D.C. when there is no Counselor
	Members of Bureaus, Board and Commissions

Setting the Facts Straight on Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

Brett Kavanaugh is a highly respected attorney with a broad background in both government service and private practice. His legal experience makes him uniquely suited to serve on the D.C. Circuit. Over the course of his career, Mr. Kavanaugh has served as a federal appellate law clerk, a federal prosecutor, an appellate lawyer representing both private clients and the United States, and a senior advisor to the President. While Mr. Kavanaugh's record has been mischaracterized by some, the facts point to a well-qualified nominee who deserves to be confirmed by the Senate.

Myth: Brett Kavanaugh does not have enough experience to be a judge on the D.C. Circuit – he's never tried a case.

Facts on Experience:

- The ABA rated Mr. Kavanaugh "Well Qualified" for a position on the U.S. Court of Appeals for the D.C. Circuit. A rating of Well Qualified means:

  "To merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

- Mr. Kavanaugh would bring a broad range of experience to the D.C. Circuit. He has substantial experience in the appellate courts, both as an attorney and clerk. From his work in the executive branch, he brings a wealth of knowledge about the inner workings of the federal government.

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit; Ninth Circuit Judge Alex Kozinski of the U.S. Court of Appeals; and, U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.

- Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.

- Mr. Kavanaugh's legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.

Myth: Mr. Kavanaugh's legal career has consisted largely of partisan activities, making him unsuited to the federal bench.

Facts on Suitability for the Bench:

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." Letter to Chairman Hatch, April 26, 2004.

- Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy

- As every lawyer is required to do, Mr. Kavanaugh has zealously represented his clients' positions and made the best arguments on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

Myth: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts on the Judicial Nominations Process:

- The President selects judicial nominees. Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats' "Gold Standard." One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

Myth: Mr. Kavanaugh is out of the mainstream because he publicly praised Miguel Estrada and Priscilla Owen, along with the rest of President Bush's first 11 nominees to the U.S. Courts of Appeal.

Facts about President Bush's Nominees:

- At the time of their nomination, Democrat senators had positive things to say about President Bush's first group of nominees.
  - ✓ Senator Leahy said that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work." *NPR: All Things Considered* (Radio Broadcast May 9, 2001).
  - ✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations." Amy Goldstein and Helen Dewar, *11 Judicial Nominees Named*, Wash. Post, May 10, 2001, at A2.
- Miguel Estrada and Priscilla Owen, both unanimously rated "Well Qualified" by the ABA, enjoyed widespread bipartisan support and would have been confirmed if given an up-or-down vote by the full Senate.
- Each of the first 11 nominees was rated "Well Qualified" or "Qualified" by the ABA – the Democrats' "Gold Standard."

Myth: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts about the Starr Report:

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – grounds for impeachment – was required by law.
  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- The Independent Counsel's report did not conclude that President Clinton should have been impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.

  - ✓ The House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- Democrat senators agreed with the Independent Counsel that President Clinton gave false or misleading testimony.

  - ✓ Senator Feinstein introduced a censure resolution that stated President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." Senators Durbin, Kennedy, Kohl, Schumer, Daschle, and Kerry co-sponsored the resolution. S.Res. 44, 106th Cong. (1999).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

  - ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- The U.S. Senate already has confirmed judicial and executive branch nominees who worked for Independent Counsel Ken Starr. If the work these nominees performed for the Office of Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.

  - ✓ Individuals confirmed to judicial positions include: Steven Colloton – 8th Circuit; John Bates – D.C. District Court; Amy St. Eve – Northern District of Illinois.

Myth: Mr. Kavanaugh returned to the Office of Independent Counsel ("OIC") when the Monica Lewinsky scandal broke because he wanted to participate in the investigation.

Facts about Mr. Kavanaugh's Return to the OIC:

- Mr. Kavanaugh came back to the OIC to handle a Supreme Court argument regarding privilege, which he had worked on before returning to private practice.
  - ✓ From the May 8, 1998 Washington Post: Washington lawyer Brett M. Kavanaugh has left private practice at Kirkland & Ellis for another temporary stint at the office of Whitewater independent counsel Kenneth W. Starr, also a Kirkland & Ellis lawyer. Kavanaugh is working on the Vincent Foster attorney-client privilege case to be argued at the Supreme Court June 8.

Myth: Brett Kavanaugh has praised Independent Counsel Starr despite Starr's partisan tactics, including his release of the entire report on President Clinton with a description of wide array of questionable facts that were highly offensive.

Facts about the Release of the Report and Support of Judge Starr:

- The House of Representatives, not the OIC, publicly released the Independent Counsel's Report.
- Mr. Kavanaugh criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.
- Judge Starr was unfairly criticized for his work as independent counsel. Even the Washington Post editorial page acknowledged that much of the criticism was unwarranted:
  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

Myth: Mr. Kavanaugh is willing to twist legal theories to best serve his own partisan interests. The best example of this is his flip-flop on executive branch privilege from his arguments against the Clinton Administration's assertions of privilege to his drafting of the Bush Administration's Executive Order 13233, which gives both sitting and former presidents authority to claim privilege over records.

Facts about Mr. Kavanaugh's Work on Executive Branch Privilege:

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
  - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Myth: Mr. Kavanaugh has argued extreme right wing positions on behalf of clients. For instance, he submitted an amicus brief in a school prayer case.

Facts about Mr. Kavanaugh's Work on First Amendment Issues:

- In the amicus brief Mr. Kavanaugh filed on behalf of his clients in *Santa Fe Independent School District*, he acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.

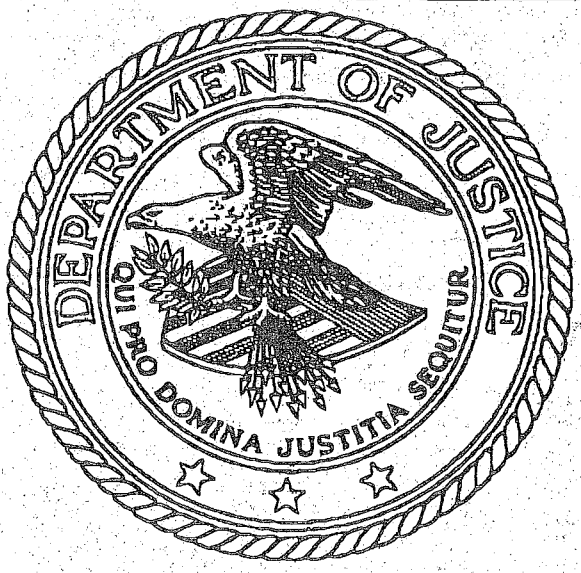
- However, Mr. Kavanaugh argued that a school district's policy that permitted high school students to choose whether a statement would be delivered before football games and who would give that statement did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement.

- Mr. Kavanaugh's brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."

- Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

- As an attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.



Office of Legal Policy
United States Department of Justice
10th and Constitution Ave. NW
Washington, D. C. 20530

TO: Dabney Friedrich

FAX: 202-456-7528

FROM: David Best

VOICE: (202) 514-2061
FAX: (202) 616-3180

Total Pages (including this cover): 10

Additional Message:

William P. Barr
Executive Vice President and General Counsel

verizon

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May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

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May 10, 2005

By Facsimile

Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing to support President Bush's nomination of Brett Kavanaugh to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Mr. Kavanaugh for a long time. We attended college at Yale together; we both clerked for Justice Kennedy at the Supreme Court; and, most recently, we spent two years working closely together in the White House Counsel's Office during the first two years of President George W. Bush's first term. I have thus had an opportunity to observe Mr. Kavanaugh in a variety of settings, personal and professional, and feel well-qualified to help inform the views of open-minded Senators concerning Mr. Kavanaugh's fitness for office.

Brett Kavanaugh is one of the finest lawyers of my generation. He has a keen intellect, a deep appreciation for our institutions of government and for the role of the judiciary within it, and a judicious and moderate temperament. He is legendarily hard-working and always committed to the highest ideals of public service. I represent clients in all manner of civil and criminal disputes, and I would be relieved and gratified to find Mr. Kavanaugh on a panel in any case in which I was involved, no matter who my client was or what the issue was: he can absolutely be relied upon to be fair and impartial and to bring to the task a clear and thorough understanding of the law.

I understand that some Senators are inclined to doubt his fair-mindedness based on his association over the years with prominent Republican political figures, such as Judge Kenneth Starr and President Bush. However, as Senators no doubt understand, those who steer completely clear of contact with the political world -- which I am sure you and your colleagues would agree is an honorable and worthy field of endeavor -- are unlikely ever to find themselves appointed to a federal judgeship. That an individual has been allied with politicians or political

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causes in one party or the other is not a fair or wise basis for disqualifying an individual for a judgeship; rather, the important question is how the individual has fulfilled his responsibilities in those matters.

In this regard, it is my firm opinion that Mr. Kavanaugh has always adhered to the highest ideals of his profession. In my observation, he has never acted as a raw partisan; he always articulates all relevant considerations on both sides of an issue for his clients, and his ultimate legal judgment has always been sound and based on the merits. Although I am disabled from discussing specifics, I can assure you that he has often been a voice of moderation and reason within the councils of government. I know that there are those who dealt with him as adversaries when he was working for Independent Counsel Starr who would confirm that among the Starr prosecutors, he had a consistent and well-deserved reputation for courtesy, professionalism, and fair-mindedness.

The country is fortunate that Mr. Kavanaugh is willing at his age to enter upon a lifetime of public service as a member of the third branch. It would be a great shame if reflexive or narrow-minded opposition were permitted to deny the nation his services. I sincerely hope the Senate will vote to confirm him.

Sincerely,

Bradford A. Berenson

cc: Honorable Patrick Leahy

bcc: David Best (202-616-3180)

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PAUL R. CONNOLLY (1922-1978)

CAROLYN H. WILLIAMS
(202) 434-5530
cwilliams@wc.com

May 11, 2005

Via Facsimile (202.228.1698)

Senator Arlen Spector
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Brett Kavanaugh

Dear Senator Spector:

I am a partner in the law firm of Williams & Connolly LLP, and I respectfully submit this letter in enthusiastic support of the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit. It is a great honor to support the candidacy of a person who has all the qualities lawyers and litigants would hope to find in a judge – superb intellect, fundamental decency and impartial respect for the rights and dignity of all people.

I have been following Brett's career since 1990, when he was a student at Yale Law School and I was chair of Williams & Connolly's hiring committee. Brett did come to work for us, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. He did such spectacular work that we have been trying to hire him back ever since.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. Your Committee has his curriculum vitae before you, and I do not need to summarize it. He is universally respected for his comprehensive knowledge of the law, his brilliant analytical abilities and his ability to listen, to reflect and to make difficult decisions

based on the law and the facts. Despite his extraordinary intellect and talent, Brett Kavanaugh never exhibits a trace of arrogance. He is always professional in his dealings with others. His calm demeanor and unquestionable integrity compel even his adversaries to like and respect him.

Brett Kavanaugh would make an ideal judge. Indeed, the judicial system and the citizens whose lives are affected by it will be greatly enriched by his willingness to serve. He will uphold the law with honor, probity and common sense. I have no doubt that those whose cases he decides will feel that they received justice from a judge who followed the law without bias or predilection.

Respectfully submitted,

Carolyn H. Williams

Carolyn H. Williams

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Thomas D. Yannucci, P.C.
To Call Writer Directly:
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May 12, 2005

Via Facsimile and Hand Delivery

Senator Arlen Specter
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett Kavanaugh for Appointment to the United States Court of Appeals for the District of Columbia Circuit*

Dear Senator Specter:

I am writing to support the nomination of Brett Kavanaugh to become a judge on the United States Court of Appeals for the District of Columbia Circuit. By way of background, I clerked on the D.C. Circuit in 1976-77 for the Honorable John A. Danaher. After my clerkship, I worked in the United States Department of Justice, Civil Rights Division from 1977-80. I joined Kirkland & Ellis LLP in 1980 and I am currently serving as Chair of the Firm's Management Committee, a position I have held since 2001.

During my years at Kirkland, I worked with Brett Kavanaugh on a number of matters. I can say, without qualification, that Brett Kavanaugh is eminently qualified to be a judge on the DC Circuit. He possesses a first-rate intellect and exceptional analytical skills. He possesses superior writing skills and is a very persuasive oral advocate as well. He brings sound judgment and nuance to difficult and complex legal matters. In short, his skills as a lawyer are among the best I have ever seen.

On a personal level, Brett Kavanaugh was well liked by people who worked with him, whether they were more senior or junior in experience. He has a great sense of humor and prides himself on getting along with everyone. He is also unflappable even when working under difficult and stressful circumstances. He is a balanced person with interests outside work. My experience with Brett convinces me that he has the strength of character, compassion and judgment to be an excellent judge, especially when coupled with his outstanding legal abilities.

KIRKLAND & ELLIS LLP

I would be happy to provide you with further information on Brett Kavanaugh at your convenience. Please feel free to call me if I can be of any further service to you or the Committee with regard to this nomination.

Very truly yours,

Thomas D. Yannucci, P.C.

TDY/mmc

bcc: Brett Kavanaugh, Esq.
David Best, Esq.

Ms. Pamela Harris

(b)(6)

April 27, 2004

Via Facsimile and First Class Mail
The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Brett M. Kavanaugh to D.C. Circuit*

Dear Chairman Hatch:

I have known Brett well for over fifteen years, since we were students together at Yale Law School. I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed, and on many legal issues, as well. But not once in that time has Brett been anything less than fully respectful of my views, or unwilling to hear and take seriously what I have to say.

One of Brett's most notable characteristics is what is sometimes referred to as his "affability." That doesn't quite do it justice. Brett is, of course, friendly and pleasant, but there is more to it. At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.

At another political moment, this might have seemed faint praise; good manners and a separation of the political from the personal ought to be something we can take for granted. Today, though, the traits Brett exemplifies seem to be in short supply, and it does not strike me that all potential judicial nominees could lay claim to the same characteristics. I am confident that Brett would bring to the bench the same personal attributes he has displayed so consistently for so many years, and that he would contribute significantly to the collegiality and civility of the court.

Sincerely,

Pamela Harris

cc: The Honorable Patrick J. Leahy
Office of Legal Policy (*via facsimile only*)

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April 23, 2004

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett M. Kavanaugh to the District of Columbia Circuit

Dear Mr. Chairman:

I am writing to recommend the prompt confirmation of Brett M. Kavanaugh, whom the President has nominated to the United States Court of Appeals for the District of Columbia Circuit. I have known Brett for more than a decade in both professional and personal capacities. He would make a wonderful addition to the D.C. Circuit.

Brett is obviously one of the most distinguished lawyers of his generation. He clerked for three federal judges, including Justice Anthony M. Kennedy of the Supreme Court; he served in the Solicitor General's Office of the Department of Justice in both the first Bush Administration and the Clinton Administration; he has held two important position in the White House; he was a partner at an elite national law firm; and he has argued at the Supreme Court on behalf of an independent counsel. Such a resume is rare among lawyers with twice his years of legal practice. It is to Brett's immense credit that so many prominent lawyers have recognized Brett's abilities and talents throughout his career. This includes the American Bar Association, which has given Brett its highest rating, "well qualified."

Brett also has extensive experience in the area of appellate litigation—experience that would directly benefit him as a circuit judge. Brett has argued cases in both the Supreme Court and the federal courts of appeals. His clerkships for not one but two federal circuit judges as well as Justice Kennedy provide him with unparalleled background for a judgeship on the D.C. Circuit. Brett's experience with a wide variety of legal issues provides a firm foundation for service on the D.C. Circuit.

Brett has repeatedly demonstrated his dedication to public service. Despite the healthy salary he can command in the private sector, he has been a public servant for the great majority of his career. And even when in private practice, he has devoted substantial time to pro bono clients and non-legal community activities.

Finally, Brett is also well within the legal mainstream. Everyone who has met Brett—Democrats and Republicans alike—knows that he is thoughtful, considerate, and fair. Brett is not an "extremist" on legal issues or anything else. In fact, he would be the consummate judge—listening carefully to both sides, considering all aspects of a case without preconceived notions, respecting the limitations inherent on judges, and deferring appropriately to the policy decisions of the Congress and the Executive. Brett Kavanaugh is precisely the type of lawyer who should serve on the federal appellate courts.

Thank you for this opportunity to comment on Brett's nomination.

Respectfully yours,

Adam H. Charnes

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary

The Honorable Daniel J. Bryant (via facsimile)
Assistant Attorney General for Legal Policy
United States Department of Justice

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law
P.O. Box 7206
Winston-Salem, NC 27109

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

April 26, 2004

Dear Mr. Chairman,

I write in support of the nomination of Brett Kavanaugh to become a judge of the United States Court of Appeals for the D.C. Circuit.

As a former law clerk to judges on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and in my current capacity as a law professor, I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance.

My comments about Mr. Kavanaugh's qualifications are based on having known him in a personal capacity for a number of years. Through that contact, I have come to learn that he is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities – intelligence, experience, diligence, and open-mindedness – I whole-heartedly support his nomination.

I hope that these brief remarks help to shed some useful light. Please do not hesitate to contact me for further information.

Very truly yours,

Professor Robert M. Chesney

cc by fax:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Department of Justice

APR-26-04 MON 06:02 PM WFU SCH. OF LAW FAX NO. P. 01/01
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Mr. Chairman:

I write in support of Brett Kavanaugh's nomination to the District of Columbia Circuit.

I have known Mr. Kavanaugh since 1994 and have worked with him on numerous legal and professional matters over the last ten years. He is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice. Mr. Kavanaugh's work at the Office of Independent Counsel (Whitewater), his service as Deputy Counsel to the President, as well as his prior work in the Solicitor General's Office, and his private practice at Kirkland & Ellis, all reflect a blend of superior legal abilities and a cautious application of the principles of justice and fairness to legal disputes.

In 1995, after completing a year of service as President of the District of Columbia Bar, I was asked by Ken Starr (and encouraged by Robert Fiske) to assume the position of Principal Deputy Independent Counsel, a position which I held for one year, and in that capacity, I was responsible for the hiring and supervision of Mr. Kavanaugh. In every respect during our relationship, Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan.

I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

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April 26, 2004

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Senate Office Building
Washington, DC 20510

Re: *Brett Kavanaugh*

Dear Senator Leahy:

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I respectfully urge favorable consideration. The administration of justice will be well served by his appointment. Thank you for your consideration.

Sincerely,

Mark H. Tuohey III

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
  - ✓ **In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
  - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious." See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➢ **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➢ **The U.S. Senate has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.

✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002 by a voice vote.

✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.

- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

Brett Kavanaugh and Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.

- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

  ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).

  ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.

- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.

  ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."

- ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

- With respect to the issuance of Executive Order 13233 concerning executive privilege, the President makes the decision on all matters regarding the scope and exercise of executive privilege. The decision is not made by his staff or anyone else in his Administration.

- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
  - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents**.
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools**. A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – *Good News Club v. Milford Central School*

Allegation: In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Facts:

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations**. It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the unsuccessful nominations of Miguel Estrada and Priscilla Owen.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.
- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."
- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.
- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

Brett Kavanaugh – Products Liability

Allegation: In *Geier v. American Honda Motor Company*, Mr. Kavanaugh filed an amicus brief on behalf of the Alliance of Automobile Manufacturers to preclude a woman who received serious injuries in a car accident from recovering damages from the car manufacturer. The car manufacturer had not installed airbags in the car even though Washington, D.C. law required such airbags. 529 U.S. 861 (2000).

Facts:

- **In an opinion written by Justice Breyer, the U.S. Supreme Court agreed with a position taken by Mr. Kavanaugh's client in its brief.**
  - ✓ The Supreme Court held that safety standards promulgated by the Department of Transportation, pursuant to an Act of Congress, preempted the D.C. law requiring airbags, and that therefore the plaintiff could not bring an action under the D.C. law. *Geier v. American Honda Motor Company*, 529 U.S. 861, 875 (2000).
  - ✓ Federal Motor Vehicle Safety Standard (FMVSS) 208 required that auto manufacturers equip some but not all of their 1987 vehicles with passive restraints.
  - ✓ Because a universal airbag requirement like that in place in D.C. would directly conflict with the safety purposes behind enactment of FMVSS 208, the long-standing principle of preemption applied and the D.C. requirement could not be enforced.
  - ✓ The plaintiff's car in this case contained a restraint system explicitly authorized by Standard 208, and thus was in full compliance with the Federal regulation.
- **All of the circuit courts to consider the issue, including the 9th Circuit, agreed with either the implied or express preemption arguments set forth in the brief Mr. Kavanaugh filed on behalf of his client.**
  - ✓ District Judge William Bryant, appointed by President Johnson, granted American Honda summary judgment in this case based on the express preemption argument later set forth in the brief.
  - ✓ The D.C. Court of Appeals affirmed the lower court decision on implied preemption grounds in a unanimous opinion written by Clinton appointee Judge Judith Rogers.
  - ✓ Four other circuits came to the same conclusion as the D.C. Circuit.

- ✓ The 9th Circuit adopted the express preemption argument set forth in the brief submitted by Mr. Kavanaugh, that the Motor Vehicle Safety Act expressly preempted state tort suits brought on the basis of a lack of an airbag.

- ➢ **The Clinton Administration, through the office of Solicitor General, also argued in its brief that the state law claims were impliedly preempted by the federal standards promulgated by the Department of Transportation.**

Brett Kavanaugh – Product Liability

Allegation: Mr. Kavanaugh took the side of big business by filing an amicus brief before the Supreme Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1998), in an attempt to deny recovery to a family who lost its daughter when she fell off a boat and was killed by the propeller.

Facts:

- **The amicus brief filed by Mr. Kavanaugh's client, General Motors Corporation, was consistent with the unanimous opinion of the court below – the Eleventh Circuit – and with the decisions of many other courts across the country.**
  - ✓ The Eleventh Circuit held that the Georgia law was impliedly preempted because the Coast Guard – which had exclusive authority in boat and equipment safety standards – determined that propeller guards should not be required because their use could actually increase the danger to boaters.
- **Numerous courts, both state and federal, already had adopted the position taken by Mr. Kavanaugh in the amicus brief – that state common law claims for negligence or product liability were either expressly or impliedly preempted by the Federal Boat Safety Act.**
  - ✓ At the time the amicus brief was submitted, courts in California, Georgia, Connecticut, Ohio, Illinois, and Michigan had come to the conclusion argued in the brief filed by Mr. Kavanaugh.
  - ✓ The district court judge in *Lewis v. Brunswick*, Carter appointee Judge Dudley Bowen, also came to the conclusion that the plaintiff's negligence and strict liability claims based on the lack of a propeller guard were preempted by the Boat Safety Act.
  - ✓ The U.S. Supreme Court did not decide the case because the parties settled the claims before a decision was issued.
- Mr. Kavanaugh's client was interested in the case only because it manufactured vehicles subject to the Motor Vehicle Safety Act, which included language identical to the Boat Safety Act preemption language at issue in *Lewis v. Brunswick.*
  - ✓ Congress, in the legislative history of the Boat Safety Act, explained that the preemption provision "also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." *Id.* at 1503 (citing S.Rep. No. 92-248).
- Although nearly four years later the Supreme Court did effectively overrule this Eleventh Circuit decision in another case, *Sprietsma v. Mercury Marine*, 537 U.S. 52 (2002), the Court did state that the arguments made by Mr. Kavanaugh's clients in the *Lewis* case - that such claims are implicitly preempted by the statute and by the Coast Guard decision not to regulate propeller guards - "[b]oth are viable pre-emption theories." *Id.* at 64.

Brett Kavanaugh – Product Liability

Allegation: In *Green v. General Motors Corp.*, Mr. Kavanaugh once again represented big business attempting to overturn a jury verdict in favor of a 24-year-old who became a quadriplegic due to the defective design of the car manufactured by defendant. 310 N.J. Super. 507 (1998).

Facts:

- **Mr. Kavanaugh relied on Third Circuit precedent that supported his client's position on appeal, that the judge had made an improper jury instruction.**
  - ✓ The defendant argued that the jury should have been able to consider the plaintiff's own negligence in speeding, which was conceded by the defendant.
  - ✓ The defense urged the Superior Court of New Jersey to accept a Third Circuit holding that juries had to be allowed to consider factors such as speed and the plaintiff's driving. *Huddell v. Levin*, 537 F.2d 726, 741 (3rd Cir. 1976).
  - ✓ Ultimately, the Superior Court of New Jersey "respectfully disagreed" with the Third Circuit's speed analysis. *Green v. General Motors Corp.*, 310 N.J. Super. 507, 523 (1998).
- **The court ruled in favor of Mr. Kavanaugh's clients, General Motors, on a number of issues that were argued on appeal.**
  - ✓ The appellate court agreed with Mr. Kavanaugh's client's position that the trial court had wrongly awarded prejudgment interest on future medical expenses and lost earnings. This amount had exceeded $8.5 million. *Id.* at 533.
- **As a member of the appellate team, Mr. Kavanaugh had a duty to zealously advance his client's positions. He did so by making reasonable arguments that relied on established precedent.**
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

- Mr. Kavanaugh was asked to represent, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court.

- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he were returned.

  - ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States… may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

  - ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

  "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

  "The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate

human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

Brett Kavanaugh – Race

Allegation: In a friend of the court brief, Kavanaugh joined Robert Bork in opposing a voting scheme that was intended to assist native Hawaiians by ensuring that only they could vote for board members overseeing a trust for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495 (2000). Before the case was heard, he was quoted as saying that "this case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of the government." Warren Richey, *New Case May Clarify Court's Stand on Race*, THE CHRISTIAN SCIENCE MONITOR (Oct. 6, 1999).

Facts:

- **The Supreme Court agreed with the position taken by Mr. Kavanaugh's client, that limiting voting for candidates to a statewide office that disbursed state and federal funds based on racial ancestry violated the Constitution. The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any other State on account of race, color, or previous condition of servitude." U.S. CONST. Amend. XV § 1.**
  - ✓ **In a 7 to 2 decision, with the majority including Justices Breyer, Souter, and O'Connor**, the Court reaffirmed the basic premise upon which the brief was based: that "[t]he National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race." *Rice*, 120 S. Ct. at 1054.
  - ✓ The Court explained, "The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Id.* at 523.
  - ✓ The Court added, "Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others." *Id.*
- The brief submitted by Mr. Kavanaugh on behalf of his clients sought to enforce the Fifteenth Amendment against a state law that prohibited citizens from voting in a statewide election based on their race.
  - ✓ When Hawaii was admitted as the 50th State of the Union in 1959, the state adopted the Hawaiian Homes Commission Act, passed by Congress, as part of its Constitution. The Act set aside 200,000 acres of public lands and granted the state over 1.2 million additional acres of land to be held "as a public trust."

- The proceeds and income from the lands were to be used for one or more of five purposes: (1) support of public schools and other public educational institutions, (2) betterment of native Hawaiians, (3) development of farm and home ownership, (4) public improvements, and (5) provisions of land for public use.

✓ In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer special trust revenues "for the betterment of the conditions of native Hawaiians," and any appropriations that were made for the benefit of "native Hawaiians" and/or "Hawaiians."

- The term "native Hawaiian" and "Hawaiian" are defined as descendants of aboriginal peoples or races inhabiting the Hawaiian Islands previous to 1778.

✓ The Hawaii Constitution limited membership on the OHA board of trustees to "Hawaiians," and explicitly provided that the trustees shall be "elected by … Hawaiians."

✓ Although petitioner was a citizen of Hawaii, and his ancestors were residents of the Hawaiian Islands prior to U.S. annexation in 1959, he did not meet the statutory definitions and was thus precluded from voting.

➢ The racial qualification in the Hawaiian law categorically excluded members of certain racial minorities, such as African-Americans and Japanese-Americans, who were members of groups historically discriminated against in the U.S.

➢ One of Mr. Kavanaugh's clients on the brief was the New York Civil Rights Coalition, a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste or discrimination.

➢ Mr. Kavanaugh's statement regarding the Rice case was consistent with statements made by Justice O'Connor in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), where the Supreme Court upheld the University of Michigan Law School's race-conscious admissions policy. Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

BRETT M. KAVANAUGH
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  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

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  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

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Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.
  - ✓ The federal courts of appeals agreed with Mr. Kavanaugh's position in those cases.
  - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
  - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges**. *See* Section 2(b).
  - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
  - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings."

Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2171 (1998).

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney's energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

- **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**

  - ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).

  ✓

- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**

  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.

  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.* at 2171.

  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.

- **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

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  - ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – Age

Allegation: Brett Kavanaugh is too young to be a federal appellate judge – he's only 39 years old.

Facts:

- Mr. Kavanaugh would bring a broad range of experience to the court.
  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.
  - ✓ Mr. Kavanaugh has clerked at two of the U.S. Courts of Appeal, the Third and Ninth Circuits, and at the Supreme Court. He would bring to the D.C. Circuit his experience with those courts.
  - ✓ In private practice and during his service as a prosecutor, Mr. Kavanaugh participated in appellate matters in a number of the federal courts of appeal.
- All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. All have been recognized as distinguished jurists.
  - ✓ Justice Kennedy was appointed to the 9th Circuit when he was 38 years old.
  - ✓ Judge Kozinski was appointed to the 9th Circuit when he was 35 years old.
  - ✓ Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.
- There are many examples of judges who were appointed to the bench at a young age and have had illustrious careers.

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Anthony Kennedy (later	9th	38

appointed to the Supreme Court)		
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

- Age should not be a measure of a person's experience. Many distinguished senators began their service at a young age.
  - ✓ Senators Biden and Kennedy were elected to the Senate at the age of 30, and Senator Leahy was elected at 34.

Setting the Facts Straight on Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

Brett Kavanaugh is a highly respected attorney with a broad background in both government service and private practice. His legal experience makes him uniquely suited to serve on the D.C. Circuit. Over the course of his career, Mr. Kavanaugh has served as a federal appellate law clerk, a federal prosecutor, an appellate lawyer representing both private clients and the United States, and a senior advisor to the President. While Mr. Kavanaugh's record has been mischaracterized by some, the facts point to a well-qualified nominee who deserves to be confirmed by the Senate.

Myth: Brett Kavanaugh does not have enough experience to be a judge on the D.C. Circuit – he's never tried a case.

Facts on Experience:

- The ABA rated Mr. Kavanaugh "Well Qualified" for a position on the U.S. Court of Appeals for the D.C. Circuit. A rating of Well Qualified means:

  "To merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

- Mr. Kavanaugh would bring a broad range of experience to the D.C. Circuit. He has substantial experience in the appellate courts, both as an attorney and clerk. From his work in the executive branch, he brings a wealth of knowledge about the inner workings of the federal government.

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit; Ninth Circuit Judge Alex Kozinski of the U.S. Court of Appeals; and, U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.

- Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.

- Mr. Kavanaugh's legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.

Myth: Mr. Kavanaugh's legal career has consisted largely of partisan activities, making him unsuited to the federal bench.

Facts on Suitability for the Bench:

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." Letter to Chairman Hatch, April 26, 2004.

- Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy

- As every lawyer is required to do, Mr. Kavanaugh has zealously represented his clients' positions and made the best arguments on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

Myth: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts on the Judicial Nominations Process:

- The President selects judicial nominees. Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats' "Gold Standard." One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

Myth: Mr. Kavanaugh is out of the mainstream because he publicly praised Miguel Estrada and Priscilla Owen, along with the rest of President Bush's first 11 nominees to the U.S. Courts of Appeal.

Facts about President Bush's Nominees:

- At the time of their nomination, Democrat senators had positive things to say about President Bush's first group of nominees.

  - ✓ Senator Leahy said that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work." *NPR: All Things Considered* (Radio Broadcast May 9, 2001).

  - ✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations." Amy Goldstein and Helen Dewar, *11 Judicial Nominees Named*, Wash. Post, May 10, 2001, at A2.

- Miguel Estrada and Priscilla Owen, both unanimously rated "Well Qualified" by the ABA, enjoyed widespread bipartisan support and would have been confirmed if given an up-or-down vote by the full Senate.

- Each of the first 11 nominees was rated "Well Qualified" or "Qualified" by the ABA – the Democrats' "Gold Standard."

Myth: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts about the Starr Report:

- The section of the Independent Counsel's report Mr. Kavanaugh co-authored – grounds for impeachment – was required by law.

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- The Independent Counsel's report did not conclude that President Clinton should have been impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.

  - ✓ The House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- Democrat senators agreed with the Independent Counsel that President Clinton gave false or misleading testimony.

  - ✓ Senator Feinstein introduced a censure resolution that stated President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." Senators Durbin, Kennedy, Kohl, Schumer, Daschle, and Kerry co-sponsored the resolution. S.Res. 44, 106th Cong. (1999).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

  - ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- The U.S. Senate already has confirmed judicial and executive branch nominees who worked for Independent Counsel Ken Starr. If the work these nominees performed for the Office of Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.

  - ✓ Individuals confirmed to judicial positions include: Steven Colloton – 8th Circuit; John Bates – D.C. District Court; Amy St. Eve – Northern District of Illinois.

Myth: Mr. Kavanaugh returned to the Office of Independent Counsel ("OIC") when the Monica Lewinsky scandal broke because he wanted to participate in the investigation.

Facts about Mr. Kavanaugh's Return to the OIC:

- Mr. Kavanaugh came back to the OIC to handle a Supreme Court argument regarding privilege, which he had worked on before returning to private practice.
  - ✓ From the May 8, 1998 Washington Post: Washington lawyer Brett M. Kavanaugh has left private practice at Kirkland & Ellis for another temporary stint at the office of Whitewater independent counsel Kenneth W. Starr, also a Kirkland & Ellis lawyer. Kavanaugh is working on the Vincent Foster attorney-client privilege case to be argued at the Supreme Court June 8.

Myth: Brett Kavanaugh has praised Independent Counsel Starr despite Starr's partisan tactics, including his release of the entire report on President Clinton with a description of wide array of questionable facts that were highly offensive.

Facts about the Release of the Report and Support of Judge Starr:

- The House of Representatives, not the OIC, publicly released the Independent Counsel's Report.
- Mr. Kavanaugh criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.
- Judge Starr was unfairly criticized for his work as independent counsel. Even the Washington Post editorial page acknowledged that much of the criticism was unwarranted:
  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

Myth: Mr. Kavanaugh is willing to twist legal theories to best serve his own partisan interests. The best example of this is his flip-flop on executive branch privilege from his arguments against the Clinton Administration's assertions of privilege to his drafting of the Bush Administration's Executive Order 13233, which gives both sitting and former presidents authority to claim privilege over records.

Facts about Mr. Kavanaugh's Work on Executive Branch Privilege:

- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.
  - ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
  - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.
  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Myth: Mr. Kavanaugh has argued extreme right wing positions on behalf of clients. For instance, he submitted an amicus brief in a school prayer case.

Facts about Mr. Kavanaugh's Work on First Amendment Issues:

- In the amicus brief Mr. Kavanaugh filed on behalf of his clients in *Santa Fe Independent School District*, he acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.

- However, Mr. Kavanaugh argued that a school district's policy that permitted high school students to choose whether a statement would be delivered before football games and who would give that statement did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement.

- Mr. Kavanaugh's brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."

- Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

- As an attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.

Brett Kavanaugh – Defense of Ken Starr

Allegation: Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr "an American hero," written that Starr's "record is one of extraordinary accomplishment and integrity," and praised Starr for "consistently perform[ing] with the highest skill and integrity." This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh's right-wing views.

Facts:

➢ **Many have expressed that the public criticism directed at Independent Counsel Kenneth Starr was vicious and unwarranted.**

✓ The Washington Post editorial page said of Judge Starr:

- "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

- "The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service." Editorial, Wash. Post, Oct. 20, 1999, at A28.

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr's integrity were belied by the fact that President Clinton's attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

- Rotunda stated: "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself." *Id.*

✓ In a prescient editorial published shortly after Judge Starr's appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: "If Starr's investigation turns up no evidence of wrongdoing, he

may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution." Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*, PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➢ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.** (2)

✓ The Washington Post editorial page said, upon Judge Starr's appointment, "he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno's own short list of likely candidates for independent counsel when she picked Mr. Fiske." Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr's appointment as Independent Counsel, Mark Gitenstein, former chief Democratic counsel to the Senate Judiciary Committee, said: "Starr was a good, fair judge, and I think he will be fair in this proceeding." Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative ... but he's wholly undevious and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.

✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37. ★

➢ **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**

✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.

✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

➢ **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**

- ✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:
  - The creation of a "protective function privilege" that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).
  - The claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).
  - The claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

➢ **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).
- ✓ The Independent Counsel's report detailed substantial and credible information that may have constituted grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.

➢ **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

- ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
- ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- ➢ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

  - ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that ''it is clear that the President lied when he testified before the grand jury.''

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice. (1)

- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

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➢ **The U.S. Senate already has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.

- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002 by a voice vote.

- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.

- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

(1) ➢ **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

(2) ➢ **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

- ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.
- ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 11 years, to public service.

➢ **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

- ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.
- ✓ In private practice Mr. Kavanaugh focused on appellate matters and as part of his practice, he filed amicus briefs on behalf of clients with the U.S. Supreme Court.

(3) ➢ **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

- ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.
- ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.
- ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.
- ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

(4)

- **Only 3 of the 19 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

  - ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

- In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

  - ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

  - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

  - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996

Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997
Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

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Counsel's Office, White House

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Brett M. Kavanaugh [13] - [14]

Brett M. Kavanaugh

Nominee
to the
United States
Circuit Court of Appeals
for the
District of Columbia

Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

I. Background
   1. Experience

II. Office of Independent Counsel
   1. Starr Report
   2. Vince Foster Investigation
   3. Executive Privilege Article
   4. Executive Order 13233
   5. Defense of Ken Starr

III. Elian Gonzalez

IV. Separation of Church and State
   1. Good News Club
   2. Santa Fe Independent School District
   3. Florida School Vouchers

V. Race

VI. Product Liability Cases
   1. Lewis
   2. Geier
   3. Green

VII. Judicial Nominations

I. Background

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the DC Circuit

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

- ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

- ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

  - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 11 years, to public service.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

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  - ✓ In private practice Mr. Kavanaugh focused on appellate matters and as part of his practice, he filed amicus briefs on behalf of clients with the U.S. Supreme Court.

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  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

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  - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

  - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996

Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997
Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh – Age

Allegation: Brett Kavanaugh is too young to be a federal appellate judge – he's only 39 years old.

Facts:

- Mr. Kavanaugh would bring a broad range of experience to the court.
  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.
  - ✓ Mr. Kavanaugh has clerked at two of the U.S. Courts of Appeal, the Third and Ninth Circuits, and at the Supreme Court. He would bring to the D.C. Circuit his experience with those courts.
  - ✓ In private practice and during his service as a prosecutor, Mr. Kavanaugh participated in appellate matters in a number of the federal courts of appeal.
- All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. All have been recognized as distinguished jurists.
  - ✓ Justice Kennedy was appointed to the 9th Circuit when he was 38 years old.
  - ✓ Judge Kozinski was appointed to the 9th Circuit when he was 35 years old.
  - ✓ Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.
- There are many examples of judges who were appointed to the bench at a young age and have had illustrious careers.

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Anthony Kennedy (later	9th	38

appointed to the Supreme Court)		
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

- Age should not be a measure of a person's experience. Many distinguished senators began their service at a young age.
  - ✓ Senators Biden and Kennedy were elected to the Senate at the age of 30, and Senator Leahy was elected at 34.

II. Office of Independent Counsel

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel's Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanaugh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- ✓ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).
  - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.
- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **The U.S. Senate already has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.
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The Washington Post, February 26, 1999

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February 26, 1999, Friday, Final Edition

SECTION: OP-ED; Pg. A27

LENGTH: 1274 words

HEADLINE: First Let Congress Do Its Job; A deep structural flaw in the independent counsel statute.

BYLINE: Brett M. **Kavanaugh**

BODY:
To many of us, including many who have worked in the independent counsel's office, it seemed clear long ago that the independent counsel statute is a dubious idea. But why exactly is the statute so bad? After all, are independent counsel investigations really more aggressive than the often bare-knuckled Justice Department investigations of political figures such as Mayor Marion Barry or Rep. Joseph McDade? The answer is almost certainly no, as any honest defense lawyer would concede.

But there is a deeper structural flaw with the statute. It permits Congress to enlist an outside agency within the executive branch (the independent counsel) to conduct an intensive investigation of a president or his administration and then report to Congress and the public on the results. The statute thus allows Congress to avoid its own investigative and oversight responsibilities and thereby avoid (or at least defer) responsibility for unpopular or politically divisive investigations. The Lewinsky matter is the clearest example yet of this unfortunate phenomenon.

To begin with, after allegations of presidential obstruction of justice landed in the public domain in January 1998, the House did nothing for nearly eight months, but instead deferred to the independent counsel's investigation. That is not what the Constitution contemplated. When Congress learns of serious allegations against a president, it must quickly determine whether the president is to remain in office, for only Congress (not an independent counsel) has the authority to make that initial and fundamental decision.

In the Lewinsky case, for example, the House Judiciary Committee could have questioned Monica Lewinsky, Betty Currie, Vernon Jordan and perhaps even the president in early 1998 (an approach this author publicly advocated at that time), granted immunity where necessary and gotten to the truth. There simply was no need for this mess to have occupied the country for 13 months.

The constitutional confusion continued when the independent counsel submitted his referral to Congress in September. Consistent with the independent counsel statute, the referral identified several possible "grounds for impeachment," the statutory prerequisite for an independent counsel to directly submit grand jury information involving presidential misconduct to Congress. But that raises a serious question: Why does the statute authorize an independent counsel, a member of the executive branch, to describe the possible grounds for impeachment of the president, a decision in the exclusive province of Congress. (Disclosure: I worked on that part of the independent counsel's referral that identified possible legal grounds for impeachment.)

The constitutional confusion persisted after the referral arrived in Congress. Most assumed

that the Judiciary Committee would, at a minimum, carefully review the referral before authorizing any public release. Some thought that the committee might not release materials submitted by the independent counsel at all, but instead simply use the referral as a springboard to plan and conduct its own investigation. Indeed, the Rodino Judiciary Committee apparently never released the 1974 Jaworski referral, and the Senate Judiciary Committee carefully guards the somewhat analogous FBI background reports on presidential nominees.

In this instance, however, after an overwhelming bipartisan vote, the House publicly released the independent counsel's report without even reviewing it beforehand -- notwithstanding widespread recognition that the referral necessarily would describe extraordinarily sensitive evidence and personal information. The House's immediate and unscreened release of the referral and subsequent release of truckloads of sensitive grand jury material -- the president's grand jury videotape, grand jury transcripts, the Tripp-Lewinsky audiotapes and the like -- obviously caused unnecessary harm to Congress, the presidency, the independent counsel and the public discourse.

The referral process also exposed yet again the fundamental flaw in the statute's requirement that independent counsels file substantive reports, as opposed to simply providing Congress raw evidence. The reports divert attention from the evidence to the perceived accuracy and fairness of the report. Because independent counsel cases involve political figures, the prosecutorial reports are inevitably attacked as politically motivated documents. We now have plenty of examples: the McKay report (attacked as unfair to Edwin Meese), the Walsh report (attacked as unfair to presidents Reagan and Bush) and the Starr report (attacked as unfair to President Clinton). Congress's original conception of independent counsel reports -- that the independent counsel's recitation and interpretation of the evidence would be accepted as gospel by all -- reflects a post-Watergate naivete that has been flatly disproved by two decades of experience.

In this case, moreover, the House's massive public release of the referral and backup evidence not only was unwise on its own terms, but also suggested that the independent counsel -- not the House -- was defining the impeachment process. Of course, after the public release of the referral, many believed that constitutional normality would return -- that the Judiciary Committee would conduct its own investigation and probe witnesses directly, a seemingly necessary ingredient before impeaching and removing a president of the United States. But that, too, never happened. Instead, to the chagrin of constitutional purists, both the House and the Senate rendered their judgments without a full and independent congressional investigation in either body.

So now that it is over, whom do we blame for the morphing of constitutional roles we witnessed over the last year? No one can legitimately blame the independent counsel: He followed the statute and the mandate given him by the attorney general and three-judge court (Sam Dash's reinterpretations notwithstanding), and it obviously was not his role to tell the House that it should be more aggressive in conducting its own impeachment process. Nor can one place much criticism on the House Judiciary Committee, for it deferred to a process seemingly ordained by the independent counsel statute. Rather, the blame lies squarely on the independent counsel statute itself -- the hydraulic force that facilitated, and even caused, the unfortunate blending of constitutional roles throughout the impeachment process. Yet another reason to end this statute and revert to a system more closely resembling the tried-and-true discretionary system of administration-appointed special prosecutors -- one in which Congress does its job and oversees the executive.

To be clear, my criticism of the process the country underwent over the past year is not to say whether President Clinton should or should not have been removed from office. One can argue that the president would have been removed had the proper constitutional process been followed. Alternatively, one can argue that he never would have been impeached. Regardless, the procedure that Congress followed in this case, pursuant to the independent counsel statute, was deeply flawed in that it required a single quasi-executive branch officer

-- who was, on the one hand, defenseless against relentless and orchestrated political assaults and, on the other hand, unaccountable to the people -- to define the impeachment process.

The writer, a Washington attorney, served as an associate counsel for independent counsel Kenneth W. Starr.

GRAPHIC: ILL,,TIM BRINTON

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Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
  - ✓ **In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
  - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious." See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➢ **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➢ **The U.S. Senate has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

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Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney's energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

- **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**

  - ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).

  ✓

- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**

  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.

  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.* at 2171.

  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.

- **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanaugh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Georgetown Law Journal
July, 1998

Symposium: The Independent Counsel Act: From Watergate to Whitewater and Beyond
Contribution

*2133 THE PRESIDENT AND THE INDEPENDENT COUNSEL

Brett M. Kavanaugh [FNa1]

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TABLE OF CONTENTS

INTRODUCTION 2134

I. BACKGROUND 2138

A. THE CURRENT LEGAL SCHEME 2138

1. The Policy Justification for a Special Counsel 2138

2. Two Statutory Mechanisms for Appointment of Special Counsels 2139

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY? 2140

1. An Illusory Debate 2140

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors 2142

3. Outside Federal Prosecutors are Necessary in Some Cases 2145

II. IMPROVING THE SYSTEM 2145

A. APPOINTMENT AND REMOVAL OF THE SPECIAL COUNSEL 2146

1. Appointment of the Special Counsel 2146

2. Removal of the Special Counsel 2151

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED 2152

C. JURISDICTION 2153

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D. REPORTS 2155

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT 2157

F. THE PRESIDENT'S PRIVILEGES 2161

1. Non-Constitutional Executive Privileges 2163

2. Constitutionally Based Executive Privileges 2166

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege 2172

4. The Policy of Executive Privileges 2173

CONCLUSION 2177

*2134 INTRODUCTION

Officials in the executive branch, including the President and the Attorney General, have an incentive not to find criminal wrongdoing on the part of high-level executive branch officials. A finding that such officials committed criminal wrongdoing has a negative, sometimes debilitating, impact on the President's public approval and his credibility with Congress--and thus ultimately redounds to the detriment of his political party and the social, economic, military, and diplomatic policies that the President, the Attorney General, and other high-ranking members of the Justice Department champion. [FN1] For those reasons, the criminal investigation and prosecution of executive branch officials by the Justice Department poses an actual conflict of interest, as well as the appearance thereof.

In addition, when the law of executive privilege is unclear or involves the application of a balancing test, the Attorney General labors under a further conflict of interest. When the Justice Department seeks access to internal executive branch communications, the Attorney General simultaneously must perform two potentially contradictory functions. First, she must act as the chief legal advisor to the executive branch (a role in which she generally would seek to protect the confidentiality of executive branch communications). Second, she must serve as a prosecutor (a role in which she generally would seek to cabin privileges so as to secure relevant evidence). As former Watergate prosecutor Archibald Cox recognized and as Attorney General Reno's role in the privilege disputes between the President and the Whitewater Independent Counsel has revealed, those dual roles place the Attorney General in a difficult, if not impossible, position in determining when the President's assertion of privileges should be challenged. [FN2] This conflict alone necessitates an outside prosecutor *2135 (unless the Attorney General announces at the outset of the investigation that she will not accede to any executive privilege claim other than national security). Otherwise, the public cannot be sure that the Attorney General has not improperly sacrificed law enforcement to the President's assertion of executive privilege.

The conflicts of interest under which the Attorney General labors in the investigation and prosecution of executive branch officials, particularly high- level executive branch officials, historically have necessitated a statutory mechanism for the appointment of some kind of outside prosecutor for certain sensitive investigations and cases. As the Watergate Special Prosecution Task Force stated in its report, "the Justice Department has difficulty investigating and prosecuting high officials," and "an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." [FN3] This article agrees that some mechanism for the appointment of an outside prosecutor is necessary in some cases.

Nonetheless, Congress can improve the current "independent counsel" system, which was established by the Ethics in Government Act of 1978. [FN4] Several problems have been identified with the current system, including the following: (1) the appointment mechanism, by attempting to specify situations where an independent counsel is necessary, requires the President and Attorney General to seek appointment of an independent counsel in cases

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where it is not warranted and permits the President and Attorney General to avoid appointment of an independent counsel in cases where it is warranted; (2) the appointment and removal provisions (which do not involve the President) are contrary to our constitutional system of separation of powers and, both in theory and perception, lead to unaccountable independent counsels; (3) the investigations last too long; (4) an independent counsel can investigate matters beyond the initial grant of jurisdiction; and (5) independent counsel investigations have become "politicized" (a commonly used but rarely defined term).

This article suggests that those problems--to the extent they are unique to an independent counsel and do not apply to federal white-collar investigations more generally--result primarily from the uneasy relationship between the President and the independent counsel that the independent counsel statute creates. This article advances several proposals that would clarify the President's role in independent counsel investigations, thereby reducing the number of investigations and expediting those that are necessary. Each of these proposals stands on its own; the adoption of any one proposal does not necessitate or depend upon the adoption of any other.

First, Congress should change the provision for appointing an independent *2136 counsel. A "special counsel" [FN5] should be appointed in the manner constitutionally mandated for the appointment of other high-level executive branch officials: nomination by the President and confirmation by the Senate. Currently, an independent counsel is appointed by a three-judge panel selected by the Chief Justice of the United States. Although this unusual procedure survived constitutional scrutiny in Morrison v. Olson, [FN6] it is unwise to assign a small panel of federal judges to select the special counsel because the prosecutor, no matter how qualified, will lack the accountability and the instant credibility that comes from presidential appointment and Senate confirmation. Appointment by the President, together with confirmation by the Senate, would provide greater public credibility and moral authority to the independent counsel and would dramatically diminish the ability of a President and his surrogates, both in Congress and elsewhere, to attack the independent counsel as "politically motivated." In addition, any supposed concerns about "accountability" would be alleviated if the independent counsel were appointed (and removable) in the same manner as other high-level executive branch officials.

Second, the President should have absolute discretion (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel. The current statute, by attempting to specify in minute detail the precise situations requiring an independent counsel, is largely overinclusive, thus producing too many investigations. At the same time, the statute is underinclusive because it allows an Attorney General to use the law as a shield in situations that by any ordinary measure would warrant the appointment of a special counsel.

For example, Attorney General Janet Reno appointed an independent counsel to investigate whether Secretary of Agriculture Michael Espy accepted illegal gratuities--a very important investigation, but one that Congress and the people might have entrusted to the Justice Department. [FN7] On the other hand, the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the independent counsel statute's triggering mechanism. That approach ignores the broader question that should be the issue (and historically has been the issue): At the end of the day, will the American people and the Congress have confidence in the credibility of the Justice Department investigation if it culminates in a no-prosecution decision against those high-level executive branch officials under investigation?

Third, with respect to an independent counsel's jurisdiction, Congress should *2137 codify and expand upon the Eighth Circuit's 1996 decision in United States v. Tucker [FN8] to ensure that the President and the Attorney General, rather than any court, define and monitor the independent counsel's jurisdiction. Such a clarification would place sole responsibility for the independent counsel's jurisdiction on these publicly accountable officials. Congress will exercise sufficient oversight to deter the President and Attorney General from illegitimately restricting the independent counsel's jurisdiction. This change would greatly expedite special counsel investigations. Jurisdictional challenges have caused severe delays. For example, a specious challenge to the Whitewater Independent Counsel's jurisdiction delayed a trial of Arkansas Governor Jim Guy Tucker for over two and one-half years before he and his codefendants finally pled guilty.

Fourth, Congress should eliminate the statutory reporting requirement. The reporting requirement adds great time and expense to independent counsel investigations, and the reports are inevitably viewed as political documents. The

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ordinary rules of prosecutorial secrecy should apply to evidence gathered during an independent counsel investigation, except that the special counsel should be authorized to provide the President and the House Judiciary Committee with a classified report of any evidence regarding possible misconduct by current officers of the executive branch (including the President) that might dictate removal by the President or impeachment by the Congress.

Fifth, Congress can answer a question that the Constitution does not explicitly address, but that can greatly influence independent counsel investigations: Is the President of the United States subject to criminal indictment while he serves in office? Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate. Removal of the President is a process inextricably intertwined with its seismic political effects. Any investigation that might conceivably result in the removal of the President cannot be separated from the dramatic and drastic consequences that would ensue. This threat inevitably causes the President to treat the special counsel as a dangerous adversary instead of as a federal prosecutor seeking to root out criminality.

Whether the Constitution allows indictment of a sitting President is debatable (thus, Congress would not have the authority to establish definitively that a sitting President is subject to indictment). Removing that uncertainty by providing that the President is not subject to indictment would expedite investigations in which the President is involved (Watergate, Iran- Contra, and Whitewater) and would ensure that the ultimate judgment on the President's conduct (inevitably wrapped up in its political effects) is made where all great national political judgments ultimately must be made--in the Congress of the United States.

Sixth, Congress should codify the current law of executive privilege available in criminal litigation to the effect that the President may not maintain any executive privilege, other than a national security privilege, in response to a ***2138** grand jury or criminal trial subpoena sought by the United States. That rule strikes the appropriate balance between the need of federal law enforcement to conduct a thorough investigation and the need of the President for confidential discussions and advice. Codifying the law of executive privilege in this manner would expedite investigations of executive branch officials and ensure that such investigations are thorough and effective (at least, unless the courts were to reverse course and fashion a broader privilege as a matter of constitutional law).

These six proposals together would reduce the number of special counsel investigations and expedite those investigations that do occur. The proposals would enhance the public credibility of special counsel investigations, reduce the inherent tension between the President and the special counsel, and better enable a special counsel to conduct a thorough and effective law enforcement investigation of executive branch wrongdoing. Finally, the changes would ensure that a specific entity (Congress) is directly and solely responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether that conduct warrants a public sanction.

I. BACKGROUND

A. THE CURRENT LEGAL SCHEME

1. The Policy Justification for a Special Counsel

The theory behind the appointment of an outside federal prosecutor is that the Justice Department cannot be trusted to investigate an executive branch official as thoroughly as the Justice Department would investigate some other similarly situated person. [FN9] Regardless whether the Justice Department is actually capable of putting political self-interest aside and conducting a thorough investigation, the problem remains. In cases in which charges are not brought, Congress and the public will question whether the investigation has been as thorough and aggressive as it would have been absent the political incentive not to indict. There is no real or meaningful check to deter an under-aggressive or white-washed Justice Department investigation of executive branch officials or their associates.

On the flip side, however, contrary to the claims of some critics, there is a real check against an over-aggressive special prosecutor--the same check that deters an over-aggressive Justice Department prosecutor. It is the jury. As

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Professor Katy Harriger correctly noted:

Prosecutors, both independent and regular, must have sufficient evidence to ***2139** convince a jury that a crime has been committed. One clear constraint on independent counsel ... is one that is on all prosecutors. They must ask themselves whether their case will pass the "smell test" in front of a jury. Will they find criminal action beyond a reasonable doubt? There is virtually no incentive for any prosecutor, independent or otherwise, to pursue a criminal case that fails that test. To argue then that there are no checks on the independent counsel is, to say the least, disingenuous for it ignores the fact that independent counsel do not operate outside the established legal system in their pursuit of criminal cases. They cannot escape the requirement that their case against an individual be reviewed by an impartial judge and a jury of his peers. [FN10]

Indeed, an acquittal is far more damaging for an independent counsel (whose record will be judged on, at most, a handful of prosecuted cases) than for the Justice Department prosecutor who will handle dozens if not hundreds of cases in his career and for whom one acquittal is ordinarily not a significant blemish.

2. Two Statutory Mechanisms for Appointment of Special Counsels

Commentators do not always appreciate that current federal law provides two different mechanisms for appointment of special counsel to investigate and prosecute a particular matter. First, under the discretionary "special attorney" provisions, the Attorney General may directly select a special attorney to conduct a particular investigation where she deems it appropriate. [FN11] Consistent with this authority, Attorneys General throughout our history have looked outside the Justice Department to appoint special attorneys to handle particular high-profile or politically charged cases. [FN12] For example, the Watergate special prosecutors and the first Whitewater outside counsel were appointed directly by the Attorney General under this authority.

Second, under §§ 591-599 of Title 28, the mandatory "independent counsel" statute, Congress has specified a number of covered persons as to whom the Attorney General must seek the appointment of an independent counsel if, after a preliminary investigation, she finds "reasonable grounds to believe that further investigation is warranted." [FN13] The Attorney General does not select an independent counsel herself, but instead applies to a panel of three judges (the "Special Division") preselected by the Chief Justice of the United States. [FN14] The panel of judges then selects an independent counsel. [FN15] The independent counsel's ***2140** jurisdiction is technically defined by the Special Division, [FN16] although the Special Division defines it in the manner requested by the Attorney General. [FN17] The independent counsel is to conduct all investigations and prosecutions "in the name of the United States," [FN18] and is to conclude his investigation by notifying the Special Division and filing a report on "the work of the independent counsel." [FN19] The independent counsel may not expand his jurisdiction to cover unrelated matters except upon application to the Attorney General and approval by the Special Division. [FN20] Pursuant to this statute, nearly twenty independent counsel have served since 1978, most notably in the Iran-Contra and Whitewater matters.

There are two important differences between the discretionary "special attorney" statute and the mandatory "independent counsel" statute. First, the special attorney is appointed by the Attorney General, not by a panel of judges. (Neither system involves the Senate.) Second, the Attorney General possesses unfettered discretion whether to seek a special attorney for a particular case, whereas the independent counsel statute requires that the Attorney General seek an independent counsel in certain cases.

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY?

1. An Illusory Debate

Let's briefly put aside the questions of who should appoint the outside federal prosecutor as well as the question of under what circumstances the outside prosecutor should be appointed. The initial, fundamental issue is whether Congress should provide any statutory mechanism for authorizing the selection of persons outside the Justice Department to lead particular federal criminal investigations and prosecutions. Indeed, the rhetoric spewed and the ink spilled over the independent counsel law often frame the question in these terms--namely, whether an outside prosecutor is ever necessary for the investigation of executive branch officials.

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This supposed debate is, however, entirely illusory. Even the most severe ***2141** critics of the current independent counsel statute concede that a prosecutor appointed from outside the Justice Department is necessary in some cases.

For example, Professor Julie O'Sullivan has criticized many aspects of the mandatory independent counsel regime. She nonetheless concedes that "[a]s in the past, in extraordinary cases where the appearance or reality of a genuine conflict of interest requires that a matter be referred to someone outside the DOJ, that referral should be made to a regulatory IC" appointed from outside the Justice Department by the Attorney General. [FN21] In other words, Professor O'Sullivan agrees that there must be some legal mechanism for appointing an outside special counsel to handle high-profile investigations of executive branch officials.

Similarly, former Justice Department official Terry Eastland has criticized the independent counsel statute in a lengthy analysis of the history and policy of special prosecutors. But Mr. Eastland, too, believes that "[i]nsofar as criminal investigation and prosecution goes, Presidents or their Attorneys General could exercise their discretionary authority in cases of conflict of interest and name Watergate-type prosecutors." [FN22]

Theodore Olson, head of the Office of Legal Counsel under President Reagan, has criticized the statute but also has stated that "there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation because public integrity requires that." [FN23] Mr. Olson noted that Attorney General William Barr, for example, had selected special prosecutors from outside the Justice Department to ensure that the lead prosecutor was not a "permanent direct subordinate of the Attorney General or the President." [FN24]

The Bush Administration lobbied against the independent counsel statute in 1992. However, the Deputy Attorney General conceded that "we all recognize that there is a need" for the Attorney General to appoint an outside counsel on occasion, and explained that Attorney General Barr "has on two occasions availed himself of the statute [28 U.S.C. § 515] that allows him to appoint an outside authority as a special counsel." [FN25]

Finally, the most famous critic of the independent counsel statute is Justice Antonin Scalia. His dissent in Morrison v. Olson, [FN26] the decision upholding the constitutionality of the independent counsel statute, is largely an analysis of the Constitution's separation of powers, including the requirements of the Appointments Clause and the Court's jurisprudence regarding the removal power of the ***2142** President. Notwithstanding the length and force of his dissent, Justice Scalia's objection to the independent counsel statute was really quite simple: The President must be able to appoint and remove at will the independent counsel. If the President can select the independent counsel, and the President can remove the independent counsel at will, then Justice Scalia would have no objection. [FN27]

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors

It is not surprising that most critics of the current mandatory independent counsel statute accept the appointment of prosecutors from outside the Department of Justice in certain cases. This Nation possesses a deeply rooted tradition of appointing an outside prosecutor to run particular federal investigations of ***2143** executive branch officials. Outside counsels are not a modern phenomenon. Between 1870 (the birth of the Justice Department) and 1973, presidential administrations appointed outside prosecutors on multiple occasions. [FN28]

In 1875, for example, President Ulysses S. Grant named a special counsel to prosecute the St. Louis Whiskey Ring--a scandal involving a close friend of President Grant. President Grant later ordered the firing of the special prosecutor because the prosecutor was allegedly too aggressive. [FN29]

During President Theodore Roosevelt's Administration, two outside counsels were appointed. In 1902, the Attorney General appointed a Democrat as special counsel to prosecute a land fraud implicating a high-level executive branch officer. The following year, President Roosevelt appointed a special counsel to investigate charges of corruption in the Post Office. [FN31] In so doing, President Roosevelt stated that "I should like to prevent any man getting the idea that I am shielding anyone." [FN30]

In 1924, following a Senate resolution calling for appointment of a special prosecutor, [FN32] President Calvin Coolidge appointed two special prosecutors, one Republican and one Democrat, to jointly conduct the criminal

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investigation of the Teapot Dome scandal. [FN33] The special prosecutors subsequently obtained the conviction of the former Secretary of Interior for taking a bribe. [FN34]

In 1952, President Harry Truman's Attorney General appointed a Republican as special counsel to investigate allegations of criminal wrongdoing within the administration, including within the Justice Department. [FN35] Like President Grant over seventy years earlier, President Truman's Attorney General eventually fired the special prosecutor.

In 1973, President Nixon's Attorney General named a Democrat, Archibald Cox, as special prosecutor to investigate and prosecute the Watergate cases. President Nixon fired Mr. Cox, but subsequently appointed another Democrat, Leon Jaworski. The prosecutor eventually obtained the convictions of numerous members of the Nixon Administration.

In the wake of Watergate, Congress enacted the Ethics in Government Act of 1978, [FN36] which required the appointment of an independent counsel in certain cases. Since then, Presidents and Attorneys General have sought the appointment ***2144** of nearly twenty independent counsels under the statute but also continued to appoint special prosecutors outside the mandatory independent counsel mechanism in cases where that statute did not apply or had lapsed.

During President Bush's Administration, for example, Attorney General William Barr appointed retired Judge Frederick Lacey as special counsel to investigate allegations related to Iraqi involvement in an American bank, the so-called BNL investigation. He also appointed Judge Nicholas Bua to investigate the Inslaw case, which involved allegations directed at the Justice Department. [FN37]

In 1994, during a brief period when the independent counsel statute had lapsed, President Clinton asked the Attorney General to appoint a special counsel to investigate the Whitewater matter, which involved criminal referrals and allegations against former business partners of the President (James B. McDougal and Susan H. McDougal) and a separate, specific allegation of wrongdoing against the President by former Arkansas businessman and Judge David L. Hale. The Attorney General selected Robert B. Fiske, Jr., who served until the independent counsel statute was reauthorized, at which time the panel of judges determined that the statute required appointment of an independent counsel who was not an administration official. [FN38]

This extensive history demonstrates a clear "tradition" of "naming special prosecutors in certain, exceptional circumstances." [FN39] It shows that criminal investigations of executive branch officials or their associates were handled either "through normal channels, within the Justice Department, or outside them through counsels specially appointed by the President or the Attorney General and therefore accountable to the President for their exercise of power." [FN40]

***2145** 3. Outside Federal Prosecutors are Necessary in Some Cases

American legal history has clearly demonstrated the necessity of a mechanism to appoint an outside prosecutor to conduct certain sensitive investigations of executive branch officials. In light of this consistent historical practice, it would take an extraordinarily compelling justification for Congress to turn its back on history and common sense by eliminating all mechanisms for appointing a prosecutor from outside the executive branch.

Such a case has not been made--nor has anyone really attempted to make it. And although there is no scientific answer to the question, it is rather untenable as a matter of common sense to contend that an outside prosecutor is never necessary--that an ordinary Justice Department prosecutor should always preside over a Justice Department investigation. What if the allegation of wrongdoing is directed against the Attorney General herself? What if the allegation of wrongdoing is against the President's spouse or his best friend or the White House Counsel? Would any rational American in such a case believe that the Attorney General and the Justice Department would pursue the matter as vigorously as an outside prosecutor whose personal and professional interests would not be adversely affected by a thorough and vigorous investigation? Two centuries of experience inform us that the citizens (as represented by Congress and the media) will not accept such a procedure. Indeed, the fact that there have been so

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many outside prosecutors appointed throughout our history demonstrates their importance and necessity. And the further fact that even the strongest critics of the mandatory independent counsel statute concede that an outside prosecutor is necessary in some cases is telling evidence that some mechanism for appointment of an outside prosecutor is appropriate.

For these reasons, future debates should not focus on whether a special counsel statute is necessary, but rather on the more pertinent questions of by whom and under what conditions a special counsel should be appointed.

II. IMPROVING THE SYSTEM

This article proposes that Congress enact the following statutory language in lieu of the current independent counsel statute.

Section 1. Appointment and Jurisdiction of a Special Counsel

(a) When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

(b) The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

***2146** Section 2. Reports by a Special Counsel.

The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

This article also proposes that Congress adopt two provisions not inextricably linked to special counsel investigations, but which have a substantial impact on them.

Presidential Immunity.

The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

Presidential Privileges.

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by a federal statute or rule that refers specifically to the privileges available to government officials or agencies in grand jury or criminal trial proceedings.

A. Appointment and removal of the special counsel

The single most important change this article proposes concerns the appointment and removal of an independent counsel. Congress should eliminate §§ 591-599 of Title 28, and adopt a new statutory provision:

When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

This seemingly simple change in appointment and removal would greatly change the perception of the appointed prosecutor and thus would satisfy many opponents of the current statute.

1. Appointment of the Special Counsel

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There are two current statutory alternatives for selecting an independent counsel. Under § 515 and § 543 of Title 28, the Attorney General has the *2147 discretion to select a special attorney herself (as Robert Fiske was selected). If the mandatory independent counsel statute is triggered, under § 592, the Attorney General applies to the Special Division and the three-judge panel selects an independent counsel (as Kenneth Starr was selected).

Neither alternative suffices in the kind of investigations of executive branch officials and their associates likely to cause the President and Attorney General, in the exercise of discretion, to seek a special counsel. Congress, therefore, should repeal the provision in the independent counsel statute providing for appointment of an independent counsel by the Special Division and should instead provide that a special counsel be appointed in the manner constitutionally mandated for high-level executive branch officials: appointment by the President and confirmation by the Senate. [FN41]

Section 515, by which the Attorney General directly selects a special attorney, is problematic because there is no check to prevent the President or Attorney General from handpicking a "patsy" prosecutor. Section 592, the current independent counsel statute by which the Special Division selects a special counsel, is problematic for different reasons.

First, the judges selecting the independent counsel may be perceived as politically motivated partisans because of their previous careers and affiliations. (Sure enough, the current Special Division panel repeatedly has been attacked as excessively partisan.) If the selection process is perceived as political, the credibility of the independent counsel will suffer. [FN42]

Second, because of its isolation and its inability to conduct a searching inquiry of the candidates, the panel may select someone who does not possess the qualifications that a special counsel should possess--simply because the panel of judges is not able to conduct the kind of search and inquiry that would produce the best possible person.

Third, neither § 515 nor § 592 provides the independent counsel with the moral authority and public credibility that will insulate him from the inevitable political attacks. The need for a special counsel to have the greatest possible insulation against erroneous charges of political partisanship has been demonstrated time and again. Whether it is Ron Ziegler complaining that the Watergate *2148 Special Prosecution Task Force is a hotbed of liberals or President Clinton agreeing that the Whitewater Independent Counsel is out to get him, charges of political partisanship are almost sure to occur during independent counsel investigations.

Such attacks are inevitable because they are built into the system. The very point of an outside federal prosecutor is to counter the assumption that the investigation has been whitewashed because of political kinship (the charge to which the Department of Justice has been subject in the campaign fundraising investigation). [FN43] For that reason, outside special counsels historically have been selected from the party other than that of the President. [FN44] But the appointment of someone from the party opposing the President inevitably sparks doubts whether the outside counsel--theoretically a political "foe" of the President in some sense--possesses too much of a partisan agenda against the President.

Watergate Special Prosecutor Archibald Cox is perhaps the most notorious example. He had worked in the Kennedy Administration and was a very close friend and ally of Senator Edward Kennedy (an opponent of President Nixon). But in virtually all cases, the independent counsel will be quite vulnerable to attacks of political partisanship by the President and his allies simply by virtue of his known political affiliation.

This is not an idle problem. The glib answer that the independent counsel should just "take it" when he is criticized as politically motivated is a nice theory, but it does not work in practice. Although many prosecutors receive complaints that they are politically motivated, those complaints take on a different order of magnitude when they emanate from the Oval Office. [FN45] Sustained presidential (and presidentially directed) criticism of an independent counsel eventually will have an impact on a large percentage of the citizens and on their opinion of the independent counsel. Those citizens include both potential witnesses and potential jurors. The decision by witnesses whether to volunteer the full truth (or not) often may depend on their impressions of the credibility and integrity of the special counsel. As to juries, a truly energetic political campaign to destroy the credibility of an independent

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counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but *2149 the most clear-cut cases of guilt. [FN46]

Congress can and should make it harder for future Presidents and presidential allies to attack the credibility of outside federal prosecutors. The best way to ensure as much insulation as possible, consistent with our constitutional structure, is to require presidential appointment and Senate confirmation. This process would serve many purposes.

First, the President could not credibly attack the special counsel whom the President had appointed. Similarly, Senate confirmation would make it difficult for anyone to claim that the special counsel is excessively partisan, for any person likely to put politics above law and evidence would not navigate the confirmation process.

Second, presidential appointment and Senate confirmation would ensure that the credentials of a special counsel are extraordinarily high. And particular issues regarding the nominee's past could be fleshed out and explained rather than being dredged up years down the road by the subjects of the investigation.

Third, unlike the special attorney provision of § 515, Senate confirmation would prevent charges that the special counsel is too sympathetic to the incumbent administration. Before the independent counsel statute was reauthorized in 1994, Robert Fiske was selected by the Attorney General as a special attorney for Whitewater. Like Kenneth Starr after him, Mr. Fiske possessed precisely the kind of superb credentials one would hope for in a special counsel. Yet Mr. Fiske was not subject to Senate confirmation, and Republicans such as Senator Lauch Faircloth were subsequently able to attack Fiske as soft on the administration. [FN47] These attacks on Fiske's supposed partisanship would have seemed ludicrous had those same Senators been forced to vote for him during the confirmation process.

Senate confirmation "serves both to curb executive abuses of the appointment power ... and to promote a judicious choice of persons for filling the offices of the union." [FN48] As Alexander Hamilton noted, "the necessity of their concurrence would have a powerful ... operation. It would be an excellent check upon a spirit of favoritism in the President. ... The possibility of rejection would be a strong motive to care in proposing." [FN49] The Supreme Court similarly noted that " b y requiring the joint participation of the President and *2150 the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." [FN50]

To be sure, presidential appointment and Senate confirmation is not a fool- proof method of insulating a special counsel from unfair political attacks. But it would render the special counsel "accountable," in theory and appearance, and would give the special counsel greater ability to pursue his tasks without being subject to unfair and unrelenting political attack. In short, it would provide the aura of moral and political authority that the special counsel needs if he is to do his job as aggressively as we would hope.

There no doubt will be some objections to this proposal. Some might argue that the President would not be inclined to appoint a truly independent and aggressive prosecutor because the allegations almost by definition would involve the activities of his close associates. But that is the wisdom of Senate confirmation. Indeed, the President would be wise to and likely would consult closely not only with his Attorney General and perhaps his White House Counsel, but also with Senate leaders, before even nominating a special counsel. Moreover, the media no doubt would aggressively probe the background and credentials of the individual selected by the President. The danger of the President appointing, and the Senate confirming, a crony or patsy as special counsel seems almost nonexistent.

As noted above, some might oppose this proposal by arguing that a prosecutor should not worry about attacks on his reputation. That, too, is a naive view. Attacks on the prosecutor's reputation ultimately are designed to scare potential witnesses and to infect the jury pool with negative feelings towards the prosecution. It is no secret that many defense attorneys engage in these smear tactics. The prosecutor, as a representative of the people of the United States, must take appropriate steps to counter such attacks lest they allow an injustice to occur--namely, a guilty person being erroneously acquitted because of the jury's negative view of the prosecutor. By means of this proposal, Congress can help to prevent such dangerous reputational attacks on a special counsel.

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Others might oppose this proposal on the ground that Senate confirmation is a slow and unwieldy process or that it could turn into a political circus. Neither argument is ultimately persuasive. When the Senate considers nominees for important positions as to which there are severe time constraints, the Senate can and does act very quickly. For example, the Senate proceeds with extraordinary expedition to confirm the Cabinet of a newly elected President so that the Cabinet is in place when the President takes office. A respected individual selected as special counsel would be promptly considered and confirmed.

To be sure, certain Senators might use the opportunity to attack the subject of the investigation, or alternatively to attack the nominee. The first scenario seems unavoidable, but not particularly costly. As to the second, that is the point of the process. Any special counsel who would engender significant opposition should ***2151** not be nominated in the first place--or should be withdrawn if serious opposition develops.

2. Removal of the Special Counsel

Currently, an independent counsel can be removed for "good cause," [FN51] a term undefined as a matter of law or practice. A special attorney appointed directly by the Attorney General can be removed at will. [FN52]

The "good cause" provision strikes many commentators as unconstitutional or, at least, unwise. As Justice Scalia intimated in Morrison, at first blush it is somewhat difficult to understand why the President does not have the authority to dismiss any executive branch official at will. [FN53] In any event, Justice Scalia also argued that a federal prosecutor should be removable at will for more practical reasons--that "the primary check against prosecutorial abuse is a political one" and that the independent counsel system thwarts this traditional check on a prosecutor's actions. [FN54] If there is an out-of-control prosecutor, Justice Scalia reasons that the President should possess the authority and the responsibility to remedy the situation.

The notion that the independent counsel is "unaccountable" has become the mantra of subjects of the investigation who inevitably attempt to denigrate the investigation as partisan and out of control. Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him. Congress should give back to the President the full power to act when he believes that a particular independent counsel is "out to get him." Such a step not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up.

The objection to "removal at will" is that the independent counsel might be too timid because of fear that he could be fired. That objection overstates the danger. After all, a number of special prosecutors have been appointed throughout our history, and there is simply no persuasive evidence that the threat of removal adversely affected their investigations. Indeed, in a perverse way, removal is a sure way to immortality, as Archibald Cox learned. Moreover, ***2152** President Nixon's firing of Cox--the last occasion when a President removed a special counsel--created an enormous controversy and triggered impeachment proceedings. [FN55] History clearly demonstrates that the President will pay an enormous political price if he does not have a persuasive justification for dismissing a special counsel. The deterrent to a President dismissing a special counsel thus would be the same as the deterrent to his firing the Attorney General--a practical and political (as opposed to legal) deterrent requiring the President to be able to explain his decision to Congress and the public.

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED

As noted above, this article proposes the following statutory language.

When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

Congress should no longer try to specify in advance the circumstances requiring a special counsel. The triggering mechanism of the current mandatory independent counsel statute can be grossly over-or under-inclusive depending on the circumstances. In some cases, the Attorney General is required to request an independent counsel even when

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it seems evident that Congress and the public would accept the credibility of a Justice Department investigation (for example, the investigation of Secretary of Labor Alexis Herman). In other cases, such as the Democratic campaign fundraising matter, the mandatory appointment provision of the statute is not triggered, even though there seems an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation.

Indeed, the campaign fundraising matter has revealed a series of heretofore unforeseen flaws in the triggering mechanism of the statute. First, the decision whether to appoint an independent counsel has degenerated into a debate between the Attorney General and her critics over the precise features of the triggering mechanism--for example, whether a sufficiently specific and credible allegation has been made against a "covered person." This dispute has focused on the question of which telephones were used to make certain fundraising calls. The debate over such technicalities has obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries. [FN56]

***2153** Second, at least at the outset of the investigation, Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive. Over the reported objection of FBI investigators, Justice Department officials prohibited certain investigative techniques because the threshold for triggering the independent counsel statute was not met. [FN57] Thus, the Attorney General (or, at least, her delegates) has used the statute not as a sword against executive branch officials, but as a shield to protect them.

Of course, the precise specificity and credibility of allegations against covered persons should be irrelevant. For purposes of the independent counsel statute, the important question should not be whether certain technical requirements have or have not been met. Instead, it should be the following: Will the Congress and the public have confidence in the credibility and thoroughness of the investigation if the investigation results in a determination that such officials did not violate the criminal law?

There can be no definitive answer to this question, but that is the point. Depending on the circumstances--who committed the alleged offense, the nature of the offense, the credibility of the Attorney General, the confidence of the Congress in the Justice Department--there may be more or less of a perceived need for a special counsel to take over. It has proved wildly unwise for Congress to try to anticipate those situations; the debate over whether an independent counsel should be appointed for the campaign fundraising issues has only highlighted the flaws in the current triggering mechanism.

Some might contend that the statute should still be mandatory against certain officials such as the President and Attorney General. As will be discussed further below, an independent counsel should never be appointed to prosecute the President (because a sitting President should not be subject to criminal indictment until he leaves office or is removed by impeachment proceedings). If the Attorney General is the subject of a truly serious allegation and remains in office, the people can be confident that the President or the Congress will ensure that a special counsel is appointed.

In sum, the decision whether to appoint a special counsel should be at the President's discretion as informed by the Congress and the media. That is as it should be--those audiences are the two primary representatives of the citizens, and the citizens are the persons who ultimately must be persuaded that an investigation resulting in a no-prosecution decision was thorough and credible.

C. JURISDICTION

The following proposed statutory language relates to jurisdiction.

When the public interest requires, the President may appoint, by and with ***2154** the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

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The current mandatory independent counsel statute authorizes the Attorney General to delineate the independent counsel's jurisdiction, to refer related matters to the counsel, and to seek expansion of the counsel's jurisdiction. The statute is silent on the question of whether a criminal defendant or subpoena recipient can challenge the jurisdiction of the prosecutor. In United States v. Tucker, however, the Eighth Circuit ruled that the independent counsel's jurisdiction, as specified by the Attorney General, is not subject to judicial review. [FN58]

Congress should clarify the jurisdictional provisions in a manner consistent with Tucker, such that only the President and Attorney General, and not the courts, define and monitor the independent counsel's jurisdiction. This clarification would ensure direct oversight over the independent counsel's jurisdiction by the official primarily affected (the Attorney General), but should not unduly hamper the investigation.

As explained by the Eighth Circuit in Tucker, the Attorney General, on behalf of the President, has the competence and authority to monitor an independent counsel's jurisdiction. Ordinarily, she is the "traffic cop" who decides whether a particular investigation should be handled by Main Justice or by a local United States Attorney's Office. She also resolves clashes between different United States Attorneys' offices. So, too, with respect to a special counsel's jurisdiction, the Attorney General should play the role of traffic cop, the role she already performs to some degree. Of course, there is always a danger that the President or Attorney General will attempt to limit an independent counsel's investigation to protect the administration. Regular congressional oversight of the independent counsel's jurisdiction should deter the imposition of such restraints, however.

To be sure, one can expect that there will be some friction at the margins between the special counsel and the Attorney General. [FN59] The Attorney General must take pains not to hamstring the special counsel, not to make his investigation less effective than an ordinary Justice Department investigation. In particular, it is, of course, common and accepted (and even necessary) police and prosecutorial practice to attempt to investigate and prosecute witnesses for other ***2155** crimes, thereby inducing the witness to tell the truth in the primary investigation. As Robert Fiske has correctly noted, it would be unwise in the extreme for the Attorney General to take that authority away from a special counsel: "I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation." [FN60]

Codifying Tucker thus would not only clarify the role of the Attorney General and special counsel, but also would greatly expedite special counsel investigations. Judicial challenges to independent counsel jurisdiction have caused severe delays in the Michael Espy and Whitewater independent counsel investigations. For example, a trial of Arkansas Governor Jim Guy Tucker in the Whitewater investigation was delayed well over two and one-half years because of a challenge to the independent counsel's jurisdiction.

D. REPORTS

Congress should enact the following statutory language regarding the special counsel's duty to provide information regarding the evidence developed during his investigation.

The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

The most illogical part of the current independent counsel statute is its final report requirement. The provision was originally designed to ensure that the special prosecutor did not "whitewash" the investigation. That rationale does not justify a report; the fear of whitewashing is the reason that a special counsel is appointed in the first place. If anything, the supposed justification for the reporting requirement would call for the Justice Department to provide a report in those high-profile investigations where there is a potential for a conflict, but where the Department nonetheless conducts the investigation.

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In any event, § 594(h) of the current statute requires that an independent counsel's final report set forth "fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." [FN61] ***2156** Before the 1994 amendment, the statute also required that the final report set forth "the reasons for not prosecuting any matter within the prosecutorial jurisdiction" of the independent counsel. [FN62]

Section 595(c) of Title 28 also requires that the independent counsel report to the Congress on any information that "may constitute grounds for an impeachment." [FN63] The latter provision codifies the process by which Leon Jaworski transmitted a report to Congress during the Watergate investigation. As far as is publicly known, however, a report under § 595(c) has never been issued since its enactment in 1978.

As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process. A report discussing facts and evidence would make sense if the prosecutor's goal was to establish publicly by a preponderance of the evidence what happened with respect to a particular event--as often is the case in congressional or inspector general investigations, or in civil litigation. That is not the goal of the independent counsel. Instead, an independent counsel is appointed only to investigate certain suspected violations of federal criminal law in order to determine whether criminal violations occurred, and to prosecute such violations if they did occur. That goal--to determine whether criminal violations occurred--is quite different from the goal of issuing public conclusions regarding a particular event. [FN64]

On the other hand, as is reflected in § 595(c), there is a strong sense that evidence of the conduct of executive branch officers should not be concealed, at least not from Congress, which is constitutionally assigned the duty to determine their fitness for office. Thus, any information gathered with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress (not dissimilar to the manner in which FBI background information is disclosed when a nomination is pending). The statutory language proposed by this article thus attempts to incorporate the best of § 594(h) and § 595(c), to eliminate the worst, and to ensure that, on the one hand, miscreants not serve in the executive branch, and on the ***2157** other, that personal privacy and reputation not be sacrificed unnecessarily and unwisely.

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT

This article proposes the following statutory language to establish that a sitting President cannot be indicted.

The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

The supposed "politicization" of independent counsel investigations occurs primarily in those investigations where the President is a target or a potential defendant; those investigations quickly become politicized because of the threat that the President might be indicted. As will be explained, a serious question exists as to whether the Constitution permits the indictment of a sitting President. Regardless how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation. [FN65]

In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated--whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party--and thus also for the political, economic, social,

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diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed, beg, an all-out attack by the innumerable ***2158** actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr--the four modern special prosecutors to investigate presidents.

The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate--and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office. [FN66]

Watergate Special Prosecutor Jaworski concluded, for example, that "the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused." Accordingly, he thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him:

[Tlhe impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts. [FN67]

President Nixon similarly argued that "[w]hatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them." [FN68] As Solicitor General, Robert Bork reached the same conclusion, arguing that a Vice President could be criminally prosecuted, but that the President could not. [FN69] Judge George MacKinnon, too, argued that "a President is subject to the criminal ***2159** laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office." [FN70] To indict and prosecute a President or to arrest him before trial "would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties." [FN71] Therefore, he concluded, " t he real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties." [FN72]

The Supreme Court's decision in Clinton v. Jones [FN73] indicated that the President is subject to private lawsuits to remedy individuals harmed. But the Court's decision does not apply to criminal proceedings against the President, which seek to enforce public, not private, rights. The Court thus repeatedly referred in its opinion to "private" actions against the President. [FN74]

The constitutional mechanism of impeachment recognizes, at least implicitly, that criminal prosecution of a sitting President is fraught with peril-- virtually untenable as a matter of practice and unwise as a matter of policy. The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President's political party (and the causes he champions) would almost certainly be devastated. Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor--whether it be the Attorney General or special counsel--and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. [FN75] Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made--in the Congress of the United States.

***2160** The words of Alexander Hamilton ring as true today as they did two centuries ago:

[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of

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some public trust ... are of a nature which may with peculiar propriety be denominated POLITICAL .... The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other.... [FN76]

Investigation of the President, Hamilton stated, is a kind of "NATIONAL INQUEST" and "[i]f this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves." [FN77]

The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion "to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." [FN78] In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards. [FN79] The Federalist Papers similarly point out that:

the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. [FN80]

Hamilton further noted that the checks on a President include that he shall be "liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." [FN81]

Thus, the Framers explained the wisdom, and perhaps also the constitutional necessity, of the idea that public judgment with respect to the President be ***2161** rendered not by a prosecutor or jury, but by the Congress. A prosecutor acts to vindicate harm to the public, not to any private individual (unlike in a civil case such as Clinton v. Jones). The decision to vindicate harm to the public caused by the President, no matter how he caused it, should belong to the Congress in the first instance.

Why is the President different from Members of Congress or Supreme Court Justices or Cabinet officials? The Constitution vests the entire executive power in a single President: the powers of the Commander in Chief of the Army and the Navy, the power to command the Executive Departments, the power shared with the Senate to make treaties and to appoint Ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant reprieves and pardons. [FN82]

While federal prosecutors have credibly prosecuted Cabinet officers, White House officials, and other friends and associates of the President, a credible determination by a federal prosecutor to indict (or not indict) the President himself would be nigh impossible. The experience of recent years has only reinforced the wisdom of the Framers.

What, then, should happen? When nonfrivolous allegations or evidence of wrongdoing by the President is received by a prosecutor, that evidence should be forwarded to the House of Representatives. If Congress declines to investigate, or to impeach and remove the President, there can be no criminal prosecution of the President at least until his term in office expires. [FN83] (Most criminal investigations include multiple potential defendants, so the criminal investigation as a whole generally might proceed, depending on the circumstances.) As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President. There is simply no danger that such crimes would go criminally unpunished; the only question is when they can be punished.

F. THE PRESIDENT'S PRIVILEGES

The following statutory language is proposed:

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United

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States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by federal statute or rule that refers specifically to the privileges *2162 available to government officials or agencies in grand jury or criminal trial proceedings.

One major cause of delay in independent counsel investigations has been the repeated assertion of various executive privileges. The privilege assertions not only force the President and various independent counsels into adversary postures, but they also have undermined the independent counsel's ability to conduct an expeditious and thorough investigation. During the last quarter- century, the federal courts have resolved many of the executive privilege issues that have arisen during criminal investigations. [FN84] In particular, the Supreme Court's 1974 decision in United States v. Nixon, [FN85] the Eighth Circuit's 1997 decision in In re Grand Jury Subpoena Duces Tecum, [FN86] and Judge Silberman's 1990 concurrence in United States v. North [FN87] (as well as a subsequent 1997 D.C. Circuit decision in In re Sealed Case [FN88]) have essentially defined the boundaries of the executive privileges that the President may assert in federal grand jury or criminal proceedings. The result of those cases is clear: the courts may not enforce a President's privilege claim (other than one based on national security) in response to a grand jury subpoena or a criminal trial subpoena sought by the United States.

Any dire claims that this rule disables the Presidency are overstated, moreover, because the President is always free to withhold other sensitive or critical information if he finds it necessary. [FN89] To do so, a President must order the federal prosecutor not to seek the information and must fire the prosecutor if he refuses (as President Nixon fired Archibald Cox). [FN90] Such action would surely focus substantial public attention on the President's privilege claims, but if the President's argument is as strong as he purportedly believes, he should (and must) be able to explain it to the Congress and the public. But Nixon, and the cases since Nixon, establish that the President cannot rely on the courts to protect him except with respect to national security information. [FN91]

*2163 The current law of governmental privileges available in criminal proceedings derives from two sources: (1) Section 535 of Title 28, which requires all executive branch officials to disclose any information to law enforcement regarding possible criminal activity by a member of the executive branch, thus overriding any purported common-law privileges available to the President; and (2) the Supreme Court's decision in Nixon regarding the scope of the constitutional executive privilege for presidential communications available to the President under article II of the Constitution.

1. Non-Constitutional Executive Privileges

Federal Rule of Evidence 501 provides that privileges in federal criminal trials and grand jury proceedings are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except as "provided by Act of Congress" or the Constitution. Section 535(b) of Title 28 makes clear for purposes of federal criminal proceedings that the President may not maintain any common-law privilege claim such as the governmental attorney-client and work product privileges that President Clinton asserted in the Whitewater investigation. The statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reportedly to the Attorney General by the head of the department or agency.... [FN92]

In its decision in In re Grand Jury Subpoena, the Eighth Circuit labeled the statute "significant," and stated that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. [FN93]

Some have attempted to dismiss this statute, arguing that it contains an implicit exception for information received by government attorneys. [FN94] That *2164 argument contravenes the clear and all-encompassing language of the statute. The statute contains no distinction between information obtained by government attorneys and that obtained by other government employees. In addition, Congress included a specific exception to this disclosure obligation for "class es of information" as to which the Attorney General "directs otherwise," [FN95] and the Attorney General has not exempted information obtained by government attorneys representing the government. As a matter of elementary

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statutory construction, that explicit exception confirms the statute's plain meaning--and no further exceptions can be judicially inferred or created. [FN96]

The legislative history supports that conclusion as well. The House Committee Report accompanying § 535 stated that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." [FN97] The report emphasizes that " i f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have complete cooperation from the department or agency concerned." [FN98] The Justice Department supported the legislation:

The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law- enforcement officer of the Government is to have free access to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office. [FN99]

In addition, the President's official counsels have traditionally recognized this obligation. For example, Lloyd Cutler, who served as White House Counsel in two Administrations, has stated that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." [FN100] Mr. Cutler noted that there is a "Government rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible ***2165** violation of a criminal statute." [FN101] Mr. Cutler further remarked that " w hen you hear of a charge and you talk to someone in the White House ... about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" [FN102]

Similarly, twenty-five years ago, after White House Counsel John Dean had resigned, Robert Bork was asked whether he would consider becoming President Nixon's official White House Counsel. Bork asked Chief of Staff Alexander Haig whether he would be on the government payroll and was told that he would be. He then explained to Haig that "[a] government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the president, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." [FN103] (Bork ultimately did not receive the job).

In the same vein, the 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a possible violation of law. If there is a reasonable suspicion of a crime ... about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." [FN104]

Some have argued against this commonsense conclusion, pointing for apparent support to several unpublished Office of Legal Counsel (OLC) memoranda--but the Eighth Circuit quickly and correctly concluded they were totally inapposite. [FN105] The OLC memoranda do not apply to situations where a government attorney represents a government agency and learns information during ***2166** the course of her official representation of that agency. [FN106]

In short, § 535 refutes any claim of an executive common-law privilege (including a governmental attorney-client or work product privilege) in federal criminal proceedings in response to a grand jury or trial subpoena sought by the United States.

2. Constitutionally Based Executive Privileges

Section 535, of course, does not prevent the President from asserting constitutionally based privileges. In United States v. Nixon, [FN107] the Supreme Court applied the executive privilege for presidential communications, which the President had asserted in response to a criminal trial subpoena sought by the United States. For purposes of criminal cases where the United States has sought a subpoena, the Court concluded that executive privilege protects only national security and foreign affairs information. [FN108]

The dispute in Nixon arose in connection with a criminal trial of seven individuals, including former White House officials. The District Court issued a trial subpoena sought by the United States (represented by the special

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prosecutor) to obtain tape recordings of conversations among President Nixon and various high-level White House officials, including White House Counsel John Dean. [FN109] President Nixon resisted production of the tapes, citing the executive privilege for presidential communications.

In the Supreme Court, President Nixon argued that the subpoena did not meet the threshold requirements under Federal Rule of Criminal Procedure 17 of relevance and admissibility. [FN110] He also asserted executive privilege, citing article II of the Constitution. [FN111] President Nixon contended that the executive privilege for presidential communications was absolute and that the courts could not compel production of the tapes. Even if the privilege were not absolute and "even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items," President Nixon argued that "the Special Prosecutor must demonstrate a unique and compelling need to overcome *2167 the privileged nature of the materials." [FN112] President Nixon thus argued in the alternative for some heightened showing, not dissimilar to the standard applied by the D.C. Circuit in Nixon v. Sirica, where the Court of Appeals held that the privilege claim of President Nixon was overcome by the "uniquely powerful" showing made by the special prosecutor. [FN113]

The Supreme Court found that the special prosecutor had met the relevance and admissibility requirements of Federal Rule of Criminal Procedure 17 for trial subpoenas: "there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment" and there was "a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment." [FN114]

The Court recognized, based on Article II, a "presumptive privilege for Presidential communications." [FN115] The privilege derived, the Court said, from the Constitution and from the "valid need for protection of communications between high Government officials and those who advise and assist them"--the "importance" of which "is too plain to require further discussion." [FN116] The Court stated that " t he expectation of a President to the confidentiality of his conversations and correspondence ... has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." [FN117] The privilege, the Court said, was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." [FN118]

However, the Court stated that the tapes, by President Nixon's concession, did not reveal military or diplomatic secrets and thus did not implicate the President's authority "as Commander-in-Chief and as the Nation's organ for foreign affairs." [FN119] The Court therefore found that the President possessed only a "generalized interest in confidentiality." [FN120]

The Court then struck the balance between the President's generalized interest in confidentiality and the "need for relevant evidence in criminal trials." [FN121] In this regard, the Court said it was important to distinguish the need for evidence in criminal proceedings from the need for evidence in congressional proceedings, civil cases, or Freedom of Information Act (FOIA) actions. In the latter situations, it may well be that the executive privilege for presidential *2168 communications is absolute (or in the case of congressional subpoenas, a nonjusticiable question). However, the criminal context is different. As the Court emphasized, the traditional commitment to the rule of law is "nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." [FN122] The Court further noted that " t he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. ... To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." [FN123]

The Court then held that the need for relevant evidence in criminal proceedings outweighed the President's "generalized interest in confidentiality" unless the executive privilege claim was founded on a claim of state secrets:

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair

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adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. [FN124]

The Court thus accepted neither President Nixon's primary argument that the privilege was absolute, nor his secondary argument that the Special Prosecutor must show a "unique and compelling need" to obtain the tapes. The Court found that the showing under Rule 17 itself demonstrated a need sufficient to obtain non-state secret presidential communications in criminal proceedings. The Court thus ordered that, upon remand, "[s]tatements that meet the test of admissibility and relevance" must be produced to the special prosecutor. [FN125] Nixon, in short, held that the showing required under Rule 17 (relevance and admissibility for a trial subpoena; relevance for a grand jury subpoena) itself demonstrates the specific need for evidence that overrides the President's ***2169** general need for confidentiality. [FN126]

Lest there be any doubt about the meaning of Nixon, a foray into internal memoranda available from the Library of Congress provides historical confirmation. The Court specifically and consciously rejected the suggestion of President Nixon and the D.C. Circuit in Nixon v. Sirica that there be a case-by-case balancing test in which the prosecutor or grand jury must make some particularized, compelling showing in addition to the showing required by Rule 17. The memoranda among the Justices reveal some initial disagreement regarding this precise question, with Justice Byron White being in favor of the position ultimately adopted and Justice Lewis Powell favoring some undefined higher showing of need. The case was argued on July 8, 1974. On July 12, Justice Powell wrote to the Justices that "[w]e were not entirely in agreement as to the standard to be met in overcoming the privilege." [FN127] Justice White wrote on July 15, 1974:

[T]he privilege does not extend to evidence that is relevant and admissible in a criminal prosecution. The public interest in enforcing its laws and the rights of defendants to make their defense supply whatever necessity or compelling need that may be required to reject a claim of privilege when there has been a sufficient showing that the President is in possession of relevant and admissible evidence. ... I, therefore, differ with Nixon v. Sirica insofar as it held that the Special Prosecutor must make some special showing beyond relevance and admissibility. Necessarily, then, the trial judge, who followed Nixon v. Sirica, did not apply the correct standard in this case. [FN128]

After the Chief Justice circulated a new draft that still did not fully accord with Justice White's views, Justice White wrote the Conference on July 18, 1974:

[The current draft] impl[ies] that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, my view is that relevance and admissibility themselves provide whatever compelling need must be shown. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and admissibility. [FN129]

***2170** Justice White felt sufficiently strong about this issue to add that "it is likely that I shall write separately if your draft becomes the opinion of the Court." [FN130]

On July 22, Justice Potter Stewart circulated an alternative draft on the privilege issue containing the suggestions of Justice White. The draft no longer contained any reference to a heightened standard, and the cover memo indicated that the opinion had received the approval of Justices White and Thurgood Marshall. The Chief Justice then quickly incorporated the Stewart section into his opinion and recirculated the entire draft the next day, July 23. All of the Justices then joined, and the opinion was issued on July 24, 1974. [FN131]

This interpretation of Nixon was advanced by Judge Silberman in his 1990 concurrence in United States v. North.

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[FN132] The district court in that case, Judge Silberman noted, had interpreted Nixon as "constructing a very high barrier to a criminal defendant who wishes to call a President or ex- President who, it is asserted, will give evidence relevant to the defense." [FN133] Finding "it instructive to note how easily the Court in Nixon was satisfied that the tapes sought by the Special Prosecutor ... were relevant," Judge Silberman indicated that in cases where national security is not asserted, no special showing other than relevance is necessary even after executive privilege is claimed. [FN134] Judge Silberman continued:

To be sure, the Court used the language "essential to the justice of the pending criminal case" and "demonstrated specific need for evidence" in describing what was needed to overcome the President's qualified privilege. But the Court does not appear to have meant anything more than the showing that satisfied Rule 17(c). Nowhere in the opinion does the Court ever describe any offer by the Special Prosecutor other than the rather perfunctory showing of relevance .... Even in the section of the opinion dealing with executive privilege, the Court stated that "the President's broad interest in confidentiality ***2171** of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." [FN135]

In the 1997 dispute between President Clinton and the Whitewater Independent Counsel over the governmental attorney-client privilege, the Eighth Circuit addressed President Clinton's contention that Nixon set forth some higher standard for executive branch documents than that required by Rule 17. The Court concluded otherwise, stating that "Nixon is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." [FN136] The Court stated that it "doubt ed " that a case-by-case need determination "constitutes the proper need threshold" set forth in Nixon. [FN137]

The D.C. Circuit also addressed an executive privilege dispute between the President and Independent Counsel Donald Smaltz in the investigation of former Secretary of Agriculture Michael Espy. [FN138] The decision is essentially in accord with the above analysis, although certain parts advance a slightly different articulation. In particular, noting Judge Silberman's opinion in North, the court first opined that it would be "strange" if Nixon required nothing more to overcome the presidential privilege than the showing required by Rule 17, because then the privilege "would have no practical benefit." [FN139] Of course, Nixon indicated that the privilege may well be absolute in civil, congressional, and FOIA proceedings; it is only in the discrete realm of criminal proceedings where the privilege may be overcome. [FN140]

In any event, any difference between Judge Silberman and this D.C. Circuit panel is more apparent than real, more procedural than substantive. At the outset, it is significant that the Court specifically rejected the President's argument that "the information sought must be shown to be critical to an accurate judicial determination." [FN141] That argument, the Court said, "simply is incompatible with the Supreme Court's repeated emphasis in Nixon on the importance ***2172** of access to relevant evidence in a criminal proceeding." [FN142] The court concluded that in grand jury cases where national security is not at issue and where the Rule 17 standard is satisfied, presidential communications can be obtained, first, if "each discrete group of the subpoenaed materials likely contains important evidence," and, second, if the evidence "is not available with due diligence elsewhere." [FN143]

The court stated that this first component "can be expected to have limited impact." [FN144] In the grand jury setting, moreover, "the fact that evidence covered by the presidential communications privilege may be inadmissible should not affect a court's determination of the grand jury's need for the material." [FN145] The court further stated that the second component also will be "easily" satisfied when "an immediate White House advisor is being investigated for criminal behavior." [FN146] Even in cases where a person outside the White House is under investigation, the court said that this second component still will be satisfied when the proponent can "demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove." [FN147] Of course, that showing can be made in virtually all investigations--few facts are ever fully confirmed or disproved. The court further stated that this standard would not impose "too heavy" a burden on the subpoena proponent. [FN148]

In short, the D.C. Circuit opinion does not deviate in substance from Nixon, the Eighth Circuit's opinion, or Judge Silberman's approach; it differs, if at all, only with respect to the time when relevant information can be obtained, as the court itself recognized. [FN149]

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege

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Nixon is important not only for constitutionally based privileges, but also because it establishes a principle that applies to other common law privilege claims that the President might raise. For example, even if § 535 of Title 28 were erased from the U.S. Code, Nixon itself demonstrates, as the Eighth *2173 Circuit held, that any claim of governmental attorney- client or work product privilege would be similarly overcome in federal criminal proceedings.

The judicial process in this country is deeply committed to the principle that "the public ... has a right to every [person's] evidence." [FN150] Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." [FN151] Privileges thus "are not lightly created nor expansively construed." [FN152] In light of these settled principles, the Supreme Court has recognized privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the states, and is justified by overriding public policy considerations.

In criminal proceedings, a governmental attorney-client or work product privilege has no roots whatsoever. There is no case, statute, rule, or agency opinion suggesting that a department or agency of the United States (or any state governmental entity) can maintain a full-blown governmental attorney- client or work product privilege in federal criminal or grand jury proceedings. [FN153]

Nixon, moreover, held that even the deeply rooted and constitutionally mandated executive privilege for presidential communications did not override the need for relevant evidence in criminal proceedings, except when a specific claim of national security was at issue. The decision in Nixon demonstrates that a governmental attorney-client and work product privilege (the other two privileges that have been at issue in investigations of executive branch officials) also cannot overcome the need for relevant evidence in criminal proceedings. If the constitutionally rooted executive privilege for presidential communications is overcome by the need for relevant evidence in criminal proceedings, the result cannot be different for a newly conceived governmental attorney-client and work product privilege. A fortiori, a governmental attorney-client or work product privilege fails in federal criminal proceedings.

4. The Policy of Executive Privileges

Section 535, the Eighth Circuit decision, and the Supreme Court decision in Nixon demonstrate as a matter of law that the only executive privilege currently valid against the United States in federal criminal proceedings is a national security/state secrets privilege. As a policy matter, that rule reflects the proper *2174 balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings.

Government officials, even government attorneys, are public officials who work for the people. Any claim to confidentiality against the United States stands on a radically different footing than a claim made by a private party. The Supreme Court recognized the difference between such public and private responsibilities in declining to apply an attorney-like privilege to an accountant's work papers:

The Hickman work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. ... [T]he independent auditor assumes a public responsibility transcending any employment relationship with the client. ... This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [FN154]

For this same reason, in addressing the narrow question of a governmental attorney-client privilege, respected commentators and the American Law Institute (ALI) reject equating private corporations with public entities. The McCormick treatise states that "[w]here the entity in question is governmental ..., significantly different considerations appear." [FN155] Professors Wright and Graham note that "the costs of the government privilege may be very high. ... L egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information." [FN156] Indeed, the ALI's Restatement (Third) of the Law Governing Lawyers states that the rules for private lawyers do not translate to public lawyers; instead, " m ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for

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information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." [FN157]

These commonsense propositions led the Eighth Circuit flatly to reject any claim that a governmental or executive attorney-client or work product privilege could be asserted against the federal grand jury. The court stated that the "general duty of public service calls upon government employees and agencies ***2175** to favor disclosure over concealment." [FN158] Citing Arthur Young, the court explained that " t he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." [FN159] The court added:

[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. [FN160]

If the law embodied the contrary position, a government official (including the President or White House Counsel) safely could tell a White House or other agency attorney (or other official) that he destroyed subpoenaed documents, paid off potential witnesses, erased a subpoenaed tape, or concealed subpoenaed materials--or worse. The courts have rightly rejected the executive's attempt to conceal such information, and Congress should codify those results to prevent future Presidents from trying the same gambit.

Supporters of broad executive privileges contend that limiting privileges will have a chilling effect--that the presidency might be disabled and that governmental officials might be less forthcoming to a President or government attorney if they knew that the information could be disclosed in criminal proceedings. This argument, however, was rejected by the Supreme Court in Nixon (in the context of the all-encompassing presidential communications privilege) and was rejected by the Eighth Circuit (in the context of governmental attorney-client and work product privileges).

It is surely true that a President and government attorneys must be able to obtain information in order to perform their functions, but that assertion proves nothing. The interest in gathering facts to perform those functions does not require the further step of concealing facts from a federal grand jury if they are (or become) relevant to a federal criminal investigation.

As noted above, the dire claims about the disabling of the presidency are false, moreover, because the President is always free to withhold other information if he finds that necessary. To do so, a President must simply order the federal prosecutor not to seek the information and fire him if he refuses, thus taking political responsibility for his privilege claims. [FN161]

The chilling-effect argument is illusory, in any event, because executive branch employees and attorneys know that they do not control the ultimate ***2176** assertion of privilege in any forum. [FN162] As a result, the government employee can have no expectation of confidentiality and no assurance that his communications or work product will remain confidential if called for in federal criminal proceedings. Thus, government employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.

In addition, the frequency of disclosure will be low. Even in today's environment, the overwhelming majority of White House business and federal agency work never comes under grand jury scrutiny. [FN163] Grand jury investigations obviously occur more often than criminal trials, but grand juries operate in secret and thus present little risk of chilling particular conversations, as the Supreme Court has emphasized. [FN164]

Finally, the debate over privileges, particularly a governmental attorney- client privilege, often is framed in generalities and fails to consider actual situations where the issue might arise. There are three basic situations where a government attorney or official might obtain information from other government employees and where the information might become relevant to a subsequent criminal investigation.

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The first situation occurs when the employee seeks advice from a government attorney or official about his possible future course of conduct. If the employee follows the advice and does not commit a criminal act, it is hard to see what chill or harm might be caused by subsequent disclosure of the information. On the other hand, if the employee ignores the advice and commits a criminal act, then what possible governmental interest is there in protecting the employee from the charge that he knew his activity was criminal? Moreover, if the attorney mistakenly advises the employee that a proposed course of conduct is not criminal, even the employee will wish that communication disclosed if he is subsequently prosecuted. In the end, the only employee seeking advice about proposed conduct who will be chilled is the employee who hopes to obtain a government attorney's blessing for potentially criminal conduct. That scenario, however, hardly justifies creation of a far-reaching privilege.

The second category arises where the employee seeks to discuss past conduct that might be criminal. In that situation, of course, the primary interest of the United States is and must be in detecting and prosecuting crime, as the OLC repeatedly has emphasized. The United States has no interest in harboring criminals in government employment, even at high levels. Agency attorneys employed by and representing the United States are not authorized to act as criminal defense attorneys against the United States.

***2177** The OLC thus has long rejected any suggestion that the United States can participate on both sides of a criminal investigation. [FN165] That explains why there is no tradition suggesting that a government attorney can consult with an employee about the employee's past criminal conduct and then refuse to disclose that information to the federal grand jury. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States, so an agency cannot be adverse to the United States in a criminal prosecution. When an agency becomes aware of internal wrongdoing, the agency's sole interest is to ferret it out, and there can be no risk of endangering a governmental interest by doing so and by disclosing the results to federal law enforcement authorities.

The third situation occurs not where the employee initiates conversation, but where the agency elicits information from its employees about some event. Government agencies and government agency attorneys often have a legitimate interest in obtaining facts about a particular event; the fact- gathering process enables an agency head (or delegate) to discipline employees, institute new policies that will prevent similar errors in the future, inform the Congress or the public of the facts, or merely deal with the latest political controversy. Thus, the White House has conducted numerous internal investigations, as have many agencies and inspectors general. Given the number of such investigations, a far-reaching and novel governmental attorney-client privilege is, by definition, unnecessary to encourage such activity. [FN166] Unlike a corporation (which is subject to indictment), no legitimate government agency would be, or has been, discouraged from conducting internal factfinding by the knowledge that any evidence of crime uncovered will in fact be presented to the relevant law enforcement authorities. Indeed, this was the premise behind the enactment of Section 535 (and the many inspector general statutes as well).

CONCLUSION

Outside federal prosecutors are here to stay. They have existed at least since President Grant's Administration. As we have seen over the last twenty- five ***2178** years, the system of outside prosecutors can make an extraordinary difference in how our nation is governed. As Justice Scalia stated, the debate over a special counsel is about power--that is, "[t]he allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish ...." [FN167]

The fundamental flaw with the current independent counsel statute is that it creates, almost by definition, a scenario whereby the President and the independent counsel are adversaries. From that basic mistake flows most of the other problems that critics identify in the statute. Clarifying the role of the President in the manner proposed in this article would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.

[FNa1]. Mr. Kavanaugh served as Associate Counsel in the Office of the Whitewater Independent Counsel from 1994 to 1997 and also for a period in 1998. The views reflected in this article are his own.

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[FN1]. The Attorney General is a political actor, as are all high officials of the Justice Department. In other words, the Attorney General supports not only the ideas and policies of the incumbent administration but also publicly supports candidates for elective office who espouse those policies.

[FN2]. Mr. Cox has noted that the "normal position" of the Justice Department is "one for defending an expanding executive privilege," whereas the Special Prosecutor in Watergate and other subsequent investigations "were challenging executive privilege. So there are some real conflicts." 67th Annual Judicial Conference of the United States Court of Appeals for the Fourth Circuit, The Independent Counsel Process: Is It Broken and How Should It Be Fixed?, at 138 (June 27, 1997) [hereinafter Fourth Circuit Judicial Conference] (emphasis added). The Justice Department's brief in the litigation between the President and the Whitewater Independent Counsel Kenneth W. Starr demonstrated this point. The Justice Department has agreed with neither the White House nor the Independent Counsel about the proper scope of privilege. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Office of the President v. Office of Independent Counsel at 20, 117 S.Ct. 2482 (1997) (No. 96-1783) ("The United States has compelling interests in investigating and prosecuting crimes--inside or outside the government--and the Justice Department's performance of those tasks is aided by the duty of the President and other government officials to report evidence of criminal violations to the Attorney General. At the same time ... the President must have access to legal advice that is frank, fully informed, and confidential.").

[FN3]. 1975 REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, at 137- 38.

[FN4]. 28 U.S.C. §§ 591-99 (1994).

[FN5]. The Olympian term "independent counsel" has always promised more than it could deliver. Moreover, the term would be inappropriate under the regime proposed here because "independent" connotes a counsel appointed outside the Executive Branch and accountable to no one. The Ethics in Government Act initially called for the appointment of a "special prosecutor," but Congress changed the name in 1982 to "independent counsel." The term "special counsel" best captures the position and is used here in describing the proposed regime.

[FN6]. 487 U.S. 654 (1988).

[FN7]. See George D. Brown, The Gratuities Offense, and the RICO Approach to Independent Counsel Jurisdiction, 86 GEO. L.J. 2045, 2049 (1998).

[FN8]. 78 F.3d 1313 (8th Cir.), cert. denied, 1 17 S.Ct. 76 (1996).

[FN9]. The Justice Department is a department within the executive branch whose head is appointed by the President. See 28 U.S.C. § 501 (1994) ("The Department of Justice is an executive department of the United States at the seat of Government."); 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

[FN10]. KATY J. HARRIGER, THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 153 (1992) (emphasis added) (quotation marks omitted).

[FN11]. 28 U.S.C. § 515 (1994); 28 U.S.C. § 543 (1994).

[FN12]. See infra text accompanying notes 28-40.

[FN13]. 28 U.S.C. § 592(c)(1)(A). The Attorney General's decision is judicially unreviewable, however, which means that threat of impeachment or other congressional retaliation is the only legally enforceable check requiring the Attorney General to enforce the law.

[FN14]. 28 U.S.C. § 592(c).

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[FN15]. Id. § 593(b).

[FN16]. Id. § 593(b)(3).

[FN17]. Morrison, 487 U.S. at 679.

[FN18]. 28 U.S.C. § 594(a)(9). The symbolism of this nomenclature is important and should be retained in any future legislation. Criminal defendants (and other critics) inevitably try to imply to juries (and the public) that the appointed counsel is somehow an extra-governmental official who does not warrant the same respect as prosecutors representing the United States. In the 1996 trial of Jim Guy Tucker, James McDougal, and Susan McDougal, for example, the defendants refused to refer to the prosecutors as the "United States," arguing that "they are independent Counsel appointed under a special act." The Court put a quick end to this tactic: "The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins." United States v. McDougal, Tucker, and McDougal, No. LR-CR-95-173, Tr. at 4525-27 (E.D. Ark. Apr. 11, 1996).

[FN19]. 28 U.S.C. § 594(h).

[FN20]. Id. § 593(c).

[FN21]. Julie R. O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 505 (1996).

[FN22]. TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL 134 (1989).

[FN23]. Fourth Circuit Judicial Conference, supra note 2, at 133.

[FN24]. Id.

[FN25]. Reauthorization of the Independent Counsel Law: Hearing on S. 3131 Before the Subcomm. on Oversight of the Senate Comm. on Governmental Affairs, 102nd Cong. 15 (1992) (testimony of George J. Terwilliger III Deputy Attorney General of the United States).

[FN26]. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[FN27]. In the final pages of his dissent, Justice Scalia also pointed out what he termed the "[un]fairness" of an independent counsel investigation, and he did so in broad terms that arguably seem to apply to all special counsel, whether appointed by a court or by the President (or Attorney General). In comparing a special counsel to an "ordinary" Justice Department prosecutor, however, Justice Scalia appeared to rely on a romantic vision of "ordinary" federal prosecutors. In fact, an "ordinary" federal prosecutor is at least as likely to engage in hardball, near-the-edge tactics as a special counsel whose every move is publicly tracked, analyzed, and criticized. Moreover, the only concrete measure of over-aggressiveness is the prosecutor's conviction rate. A careful prosecutor should not bring many cases that end in outright acquittal on all counts. As it turns out, the record of independent counsels appointed under the statute is better than that of the Justice Department. Only one independent counsel appointed under the statute has ever suffered an outright jury acquittal, which is an impressive record, particularly given the skilled attorneys retained by the defendants in such cases.

Justice Scalia also pointed out that ordinary federal prosecutors suffer from constraints on resources and that independent counsels generally do not. Morrison, 487 U.S. at 727-33 (Scalia, J., dissenting). That is not an entirely accurate or persuasive argument. First, the fact that some federal prosecutors' offices may be understaffed and thus unable to prosecute federal crimes that should be prosecuted is hardly a model for investigations of possible crimes by our highest national officials. Indeed, that is the kind of backwards logic that Justice Scalia ordinarily ridicules. Second, in allocating its enormous annual appropriation, the Department of Justice regularly determines that certain kinds of crimes warrant intensive investigation and prosecution, whether it be drug distribution or health care fraud

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or abortion clinic bombings or church burnings or the like. By means of the independent counsel statute, Congress has simply made the altogether rational judgment that public corruption by high federal officials should be one such area of concentration. That policy judgment hardly warrants condemnation. It is worth noting, in that regard, that the United States Attorney's office for the District of Columbia recently has received severe public criticism for devoting insufficient resources to public corruption cases. See, e.g., Paul Butler, Why Won't the Prosecutor Prosecute?, LEGAL TIMES, Jan. 19, 1998, at 19 (discussing the lack of prosecutions for corruption among public officials). Third, contrary to the implicit undercurrent of Justice Scalia's discussion of "fairness," the Justice Department itself devotes extraordinary resources to numerous high-profile public corruption cases. The Congressman Dan Rostenkowski case, the Mayor Marion Barry prosecution, the campaign fundraising investigation, the Governor Fife Symington case in Arizona, and the Congressman Joseph McDade investigation in Pennsylvania are all recent examples of massive, single-minded, intense, and occasionally out-of-control (in the case of Congressman McDade, perhaps) investigations. The history of independent counsel investigations certainly measures up no worse than those investigations. Fourth, any true comparison of resource constraints is, in the end, virtually impossible because the Justice Department never identifies exactly how much money its prosecutors and the FBI spend on particular investigations and prosecutions; thus, the Department is able to "hide" its costs and avoid the kind of public and congressional scrutiny that independent counsels constantly face. How much money did the United States spend pursuing Congressman McDade? Governor Symington? Mayor Barry? A lot.

[FN28]. See RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT (C. Vann Woodward ed., 1974).

[FN29]. See EASTLAND, supra note 22, at 8; DAVID A. LOGAN, HISTORICAL USES OF A SPECIAL PROSECUTOR: THE ADMINISTRATIONS OF PRESIDENTS GRANT, COOLIDGE AND TRUMAN 7 (Congressional Research Service Nov. 23, 1973).

[FN31]. Id. at 8.

[FN30]. EASTLAND, supra note 22, at 8, 14.

[FN32]. S.J. RES. 54, 68th Cong. (1924).

[FN33]. This article advocates the procedure of presidential appointment and Senate confirmation used during the Teapot Dome Scandal.

[FN34]. EASTLAND, supra note 22, at 8-9.

[FN35]. Id. at 8. The Justice Department was not created until 1870, and there was very little federal criminal law before the 20th century.

[FN36]. 28 U.S.C. §§ 591-99 (1994).

[FN37]. See Reauthorization Hearings, supra note 25, at 15 (1992).

[FN38]. The independent counsel statute states: "The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States." 28 U.S.C. § 593(b)(2). This provision on its face disqualified Mr. Fiske from appointment as independent counsel under the statute. In the public law reauthorizing the statute in 1994, however, Congress stated that the usual disqualification did not apply to persons appointed as regulatory independent counsel, thus granting the Special Division discretion whether to appoint Mr. Fiske. See Pub. L. No. 103-270, §§ 7(a), (h). The court chose not to appoint Mr. Fiske on the theory that, notwithstanding Congress' ad hoc suspension of § 593(b)(2), the policy, if not the strict terms of the provision, still disqualified Mr. Fiske because he was an administration official.

[FN39]. EASTLAND, supra note 22, at 8. This tradition is not confined to the federal system. The state of New York also has a tradition of appointing special prosecutors (Thomas Dewey, for example) to investigate and prosecute

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public corruption cases. See Harriger, supra note 10, at 3.

[FN40]. Id. at 15. At the same time, there is a long tradition of congressional investigation of executive branch malfeasance. These investigations often occur simultaneously with criminal investigations of executive branch officials. Some of these congressional investigations have led to the resignation of executive branch officials, and sometimes efforts have been made to impeach (although no executive branch official has been impeached by the House and convicted by the Senate). Congressional investigations historically have been the primary manner in which the public learns whether executive branch officials have committed malfeasance in office. This tradition has continued to the present day. This article argues that Congress must continue to have primary responsibility for determining whether the President should be removed.

[FN41]. Although the Supreme Court upheld the system of court-appointed outside counsel in Morrison v. Olson, the separation of powers analysis in that case is quite inconsistent with the analysis in more recent cases such as Edmond v. United States, 117 S.Ct. 1573 (1997). In particular, Morrison held that the independent counsel was an "inferior officer" whose appointment thus could be wrested from the President. Morrison, 487 U.S. at 671-72. In Edmond, however, the Court said that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." Edmond, 117 S.Ct. at 1581. Under this mode of analysis, an independent counsel could not realistically be considered an inferior officer. Thus, if the issue were presented today and there were no stare decisis concerns, there is little telling how the Court would resolve the issue. Justices Anthony Kennedy, Clarence Thomas, David Souter, Ruth Bader Ginsburg, and Stephen Breyer have been appointed to the Court since the decision in Morrison.

[FN42]. This was a foreseeable flaw that Justice Scalia correctly identified in his dissent. See Morrison, 487 U.S. at 730 (Scalia, J., dissenting).

[FN43]. See, e.g., CNN Capital Gang (CNN Television Broadcast, Dec. 13, 1997) (Senator Orrin Hatch questioning Attorney General Reno's decision not to appoint an independent counsel to investigate Vice President Al Gore's fundraising, calling it a "conflict of interest").

[FN44]. Some might say that we should find totally apolitical persons to serve as independent counsel. But even if that were desirable (in our democracy, one would hope, all people would be active participants in a variety of political and social causes), "[n]early everybody who is qualified to be independent counsel has some kind of political involvement in their background." Fourth (Circuit Judicial Conference, supra note 2, at 39 (comments of Special Division Judge David B. Sentelle).

[FN45]. Even with respect to ordinary cases, Eric Holder, a former United States Attorney for the District of Columbia and now Deputy Attorney General, has written that a prosecutor cannot remain publicly silent in the face of challenges to the prosecutor's ethics and motivations. Eric H. Holder & Kevin A. Ohlson, Dealing With the Media in High-Profile White Collar Crime Cases: The Prosecutor's Dilemma (on file with author).

[FN46]. In the Whitewater investigation, the independent counsel obtained the convictions of Jim Guy Tucker, James McDougal, and Susan McDougal in June 1996 despite sustained attacks on his credibility. In a subsequent August 1996 Arkansas trial of two bankers, the result was a hung jury.

[FN47]. See, e.g., Ruth Marcus, The Prosecutor: Following Leads or Digging Dirt?, WASH. POST, Jan. 30, 1998, at A1 (calling Faircloth a "leading crusader" against Fiske).

[FN48]. Edmond v. United States, 117 S.Ct. 1573, 1579 (1997) (quotations omitted). As Justice Joseph Story noted, "If [the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favur." 3 Joseph Story, Commentaries on the Constitution of the United States 375 (1833).

[FN49]. THE FEDERALIST NO. 76, at 457-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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[FN50]. Edmond, 117 S.Ct. at 1579.

[FN51]. 28 U.S.C. § 596(a)(1).

[FN52]. Id. § 515; id. § 543.

[FN53]. Morrison, 487 U.S. at 723-24 & n.4 (Scalia, J., dissenting). Justice Scalia stated that "the President must have control over all exercises of the executive power" and that "failure to accept supervision" constitutes "good cause" for removal. Id. at 724 n.4 (Scalia, J., dissenting). That, in essence, defines "good cause" such that it means little more than "at will." Although Justice Scalia disclaimed the logical conclusion of his position, it would seem that he believes, as the Court described his position, that "every officer of the United States exercising any part of [the Executive power] must serve at the pleasure of the President and be removable by him at will." Id. at 690 n.29 (majority opinion describing Justice Scalia's position).

[FN54]. Id. at 728-29 (Scalia, J., dissenting).

[FN55]. President Grant and President Truman's Attorney General also ordered dismissal of special prosecutors. See EASTLAND, supra note 22, at 14, 16.

[FN56]. See CNN Capital Gang, supra note 43 (Senator Hatch argued: "Who cares about the phone calls ... It's all the other stuff that ought to be investigated.").

[FN57]. Susan Schmidt & Roberto Suro, Troubled from the Start; Basic Conflict Impeded Justice Probe of Fundraising, WASH. POST, Oct. 3, 1997, at A1.

[FN58]. United States v. Tucker, 78 F.3d 1313, 1316-19 (8th Cir.1996).

[FN59]. That friction revealed itself, for example, in the investigation conducted by Independent Counsel Donald Smaltz.

[FN60]. Fourth Circuit Judicial Conference, supra note 2, at 91.

[FN61]. 28 U.S.C. § 594(h)(1)(B).

[FN62]. 28 U.S.C.A. § 594(h)(1) (West 1993), as amended by Pub. L. No. 103-270 § 3(o) (1994). After the 1994 revision, the statute also requires that the independent counsel submit to Congress "annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made." 28 U.S.C. § 595(a)(2).

[FN63]. 28 U.S.C. § 595(c).

[FN64]. See, e.g., The Independent Counsel Reauthorization Act of 1993: Hearing on S. 24 Before the Comm. on Governmental Affairs, 103d Cong. 49 (1993) (Professor Samuel Dash, Georgetown University Law Center, stating: "Independent counsel investigations and prosecutions carry out the responsibilities of the executive branch to enforce the Federal criminal laws. The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel.").

[FN65]. Congress has the power to provide privileges or immunities regardless whether they are constitutionally required. See Clinton v. Jones, 117 S.Ct. 1636, 1652 (1997) ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). On the other hand, Congress would not have the power to definitively say that a President is subject to indictment. The courts have the final word on the minimum level of immunity the Constitution affords the President. See id. ("If the Constitution embodied the rule

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that the President advocates, Congress, of course, could not repeal it.").

[FN66]. See U.S. CONST, art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

[FN67]. REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, supra note 3, at 122.

[FN68]. See Brief for Respondent, Cross-Petitioner at 101, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834) [hereinafter Brief for President Nixon].

[FN69]. Brief for the United States, Agnew v. United States (D. Md. 1974) (No. 73-0535).

[FN70]. Nixon v. Sirica, 487 F.2d 700, 757 (D.C. Cir.1973) (MacKinnon, J., concurring in part, dissenting in part).

[FN71]. Id.

[FN72]. Id.

[FN73]. 117 S.Ct. 1636 (1997).

[FN74]. See id. at 1639 (noting that suit was brought by "private citizen" for damages); id. at 1642 n.12 (noting that question presented involved "litigation of a private civil damages action"); id. at 1645 ("With respect to acts taken in his 'public characte '--that is official acts--the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts."); id. at 1648 n.36 (referring to "suits against the President for actions taken in his private capacity"); id. at 1650 ("We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office."); id. (referring to "burdens of private litigation"); id. at 1651 (referring to private plaintiff's "interest in bringing the case to trial"); id. at 1652 (referring to possibility that Congress could provide for "deferral of civil litigation").

[FN75]. Determining how to conduct an investigation or whether to seek an indictment is not a ministerial task, but involves the exercise of judgment and discretion. The exercise of judgment and discretion inevitably means that the decision cannot be separated, in the eyes of the public, from its political consequences.

[FN76]. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN77]. Id. at 397.

[FN78]. Id. at 398. This passage was written largely with respect to a debate over whether the Senate or the Supreme Court should try an impeachment. But the ideas and themes discussed in explaining why the Senate was superior to the Supreme Court in passing public judgment upon the conduct of the President apply, a fortiori, to a single prosecutor attempting to do so.

[FN79]. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966).

[FN80]. THE FEDERALIST NO. 65, supra note 76, at 398-99 (Alexander Hamilton).

[FN81]. THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).

[FN82]. U.S. CONST. art. II.

[FN83]. As indicated in the statutory language proposed by this article, Congress should take appropriate steps to

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ensure that the statute of limitations would not prevent prosecution of a President after he leaves office.

[FN84]. President Clinton has litigated privilege claims against both the Whitewater and Espy independent counsels. He also has raised privilege claims against the Justice Department. See S.Rep. No. 104-280, at 67-70, 82-83 (1996). The Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R.Rep. No. 104-849, at 152-53 (1996).

[FN85]. 418 U.S. 683 (1974).

[FN86]. 112 F.3d 910 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

[FN87]. 910 F.2d 843, 950-54 (D.C.Cir. 1990) (Silberman, J., concurring in part, dissenting in part).

[FN88]. 121 F.3d 729 (D.C.Cir. 1997).

[FN89]. This proposed language is premised on the assumption that a special counsel's motion to enforce a subpoena would be justiciable. The Court in Nixon so held, 418 U.S. at 697, and there is no reason to revisit that decision, particularly because the President retains authority to prevent such disputes from reaching the courts.

[FN90]. Even under the current "good cause" restriction, as Justice Scalia stated in Morrison, an inferior officer such as an independent counsel is removable for cause if he refuses to accept supervision. See Morrison, 487 U.S. at 724 n.4 (Scalia. J., dissenting).

[FN91]. Notwithstanding Nixon, it is at least theoretically conceivable that the Supreme Court might rule that the Constitution provides a greater scope of executive privileges than this section would grant. If so, then the Constitution would trump. See Clinton v. Jones, 117 S.Ct at 1652. But that is unlikely, given the clarity of Nixon.

[FN92]. 28 U.S.C. § 535(b). The subsection states in full:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless--

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

[FN93]. In re Grand Jury Subpoena, 112 F.3d at 920 (emphasis added).

[FN94]. See Petition for a Writ of Certiorari, Office of the President v. Office of Independent Counsel (No. 96-1783) cert. denied, 117 S.Ct. 22, 23 n.7 (1997).

[FN95]. 28 U.S.C. § 535 (b)(2).

[FN96]. See Honig v. Doe, 484 U.S. 305, 325 (1988) (stating a court is "not at liberty to engraft onto the statute an exception Congress chose not to create"). In general, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." Brogan v. United States, 118 S.Ct. 805, 811-12 (1998).

[FN97]. H.R.Rep. No. 83-2622, at 1 (1954) (emphasis added), reprinted in 1954 U.S.C.C.A.N. 3551, 3551.

[FN98]. Id. at 3552 (emphasis added).

[FN99]. Id. at 3553 (emphasis added). In an independent counsel investigation, the independent counsel is the official who receives information about matters within his jurisdiction. "When issuing ... subpoenas, an independent

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counsel stands in the place of the Attorney General." S.Rep. No. 100-123, at 22 (1987); see 28 U.S.C. § 594(a).

[FN100]. Lloyd N. Cutler, The Role of the Counsel to the President of the United States, 8 REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 470, 472 (1980).

[FN101]. Id.

[FN102]. Id.

[FN103]. A Conversation with Robert H. Bork, 26 D.C.B.REP. No. 3, at 9 (Dec. 1997-Jan. 1998).

[FN104]. White House Travel Office Management Review, 23 (1993) (emphases added). In addition, federal regulations require each agency to have a "designated agency ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. § 2635.107 (1997). The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. § 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." Id. (emphasis added).

[FN105]. In re Grand Jury Subpoena, 112 F.3d at 921 n.10. The Attorney General has authorized an exception to § 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. § 50.15), represent government employees in their personal capacities--for example, in civil suits alleging Bivens violations. The OLC memoranda address only the exception for these personal representations. See Office of Legal Counsel Memorandum, at 5 (Mar. 29, 1985) (analyzing duty under C.F.R. § 50.15 and U.S.C. § 535(b) of an Assistant U.S. Attorney who discovered information while representing Bivens defendants); Office of Legal Counsel Memorandum, at 1 (Apr. 3, 1979) (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); Office of Legal Counsel Memorandum, at 4 (Aug. 30, 1978) (analyzing under C.F.R. § 50.15 and U.S.C. § 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); Office of Legal Counsel Memorandum, at 1 (Nov. 30, 1976) (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages" and the employee has told the Assistant U.S. Attorney information that could incriminate the employee).

[FN106]. See 6 Opinion of the Off. of Legal Couns. 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535") (emphasis added). The OLC recognizes in the crucial distinction between representation of the personal interests of a government employee and representation of the governmental interests of a government agency. See, e.g., 4B Op. of the Off. of Legal Couns. 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[FN107]. 418 U.S. 683 (1974).

[FN108]. Id. at 706-13.

[FN109]. Id. at 687-88.

[FN110]. Brief for President Nixon, supra note 68, at 122-31. Rule 17 requires that the government demonstrate relevance and admissibility when seeking a trial subpoena. The Rule 17 standard for grand jury subpoenas is more relaxed, reflecting the different goals of grand jury investigation. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297-301 (1991).

[FN111]. Brief for President Nixon, supra note 68, at 48-86.

[FN112]. Id. at 86-87.

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[FN113]. Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir.1973).

[FN114]. Nixon, 418 U.S. at 700.

[FN115]. Id. at 708.

[FN116]. Id. at 705.

[FN117]. Id. at 708.

[FN118]. Id.

[FN119]. Id. at 710 (quoting C&S Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[FN120]. Id. at 712 n.19.

[FN121]. Id.

[FN122]. Id. at 709 (quotation marks omitted).

[FN123]. Id.

[FN124]. Id. at 712-13.

[FN125]. Id. at 714.

[FN126]. The privilege considered in Nixon was the privilege for presidential communications, not the more general executive privilege for deliberative processes. The deliberative process privilege is, of course, even less weighty than the presidential communications privilege. See In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir.1997).

[FN127]. See Files of Justice Thurgood Marshall, United States v. Nixon, 418 U.S. 683 (1974) (available at Library of Congress).

[FN128]. Id.

[FN129]. Id. This memo is very important as an historical matter. Justice White stated that President Nixon would have been entitled to withhold the tapes had some higher standard been adopted. Those who currently favor the adoption of such a higher standard must come to grips with that fact--and how it might have altered the course of Watergate.

[FN130]. Id.

[FN131]. As reported in The Brethren, Justice Powell had last-minute reservations about the legal standard and said at the conference on July 23 that he was considering a last-minute concurrence because "[t]hey were ruling that any grand jury could subpoena material from the President in a criminal investigation. That was too sweeping. They could, and they should, rule more narrowly. ..." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 409 (1979). Woodward and Armstrong report that the room "erupted" and Justice William Brennan "made an impassioned plea for unanimity." Id. Justice Powell then decided to adhere to the Chief Justice's opinion, and thus the opinion rejected a Nixon v. Sirica kind of standard and instead held that evidence meeting the requirements of Rule 17 must be produced unless there was a claim of state secrets. Id. at 410.

[FN132]. United States v. North, 910 F.2d 843, 950-53 (D.C. Cir.1990) (Silberman, J., concurring in part, dissenting in part).

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[FN133]. Id. at 951. The issue arose in connection with a trial subpoena to President Ronald Reagan sought by North. The court affirmed the District Court's denial of the subpoena, ruling that such evidence would not have been material or favorable to the defense, and the majority therefore did not reach the question of privilege. Id. at 892 n.26 (per curiam).

[FN134]. Id. at 952.

[FN135]. Id. (citation omitted). Similarly, Professor Laurence Tribe has stated: "Ostensibly, United States v. Nixon suggests that, while presidential conversations are presumptively privileged, the presumption will always be overcome by a showing that the information is relevant to a pending criminal trial in federal court." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 281 (1988) (emphasis added).

[FN136]. In re Grand Jury Subpoena, 112 F.3d 910, 919 (8th Cir.1997). In his dissent on the facts of that case, Judge Richard Kopf agreed that "[a]t this elevated level of abstraction"--namely the "public interest"--"Nixon teaches that the President's general need for confidentiality ... is outweighed by a grand jury's need for evidence of the truth." Id. at 936 (Kopf, J., dissenting).

[FN137]. Id. at 918 n.9.

[FN138]. See In re Sealed Case, 121 F.3d 729 (D.C.Cir.1997).

[FN139]. Id. at 754.

[FN140]. See Nixon, 418 U.S. at 712 n.19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information ....").

[FN141]. In re Sealed Case, 121 F.3d at 754.

[FN142]. Id.

[FN143]. Id.

[FN144]. Id.

[FN145]. Id. at 757.

[FN146]. Id. at 755. See also id. at 760 (noting, in explaining standard, that "[h]ere, unlike in the Nixon cases, the actions of White House officers do not appear to be under investigation").

[FN147]. Id. at 761.

[FN148]. Id. at 756.

[FN149]. The Court said that "[i]n practice, the primary effect of this standard will be to require a grand jury to delay subpoenaing evidence." Id. at 756 (emphasis added).
Any open-ended balancing test requiring some higher need showing would violate the Supreme Court's repeated emphasis that the criminal process should not tolerate such delays. See, e.g., United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991) ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); Branzburg v. Hayes, 408 U.S. 665, 705 (1972) (under proposed heightened relevance standard, "courts would ... be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid").

[FN150]. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quotation marks omitted).

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[FN151]. Branzburg, 408 U.S. at 691 n.29, 686.

[FN152]. Nixon, 418 U.S. at 710.

[FN153]. The Office of Legal Counsel has not issued an opinion about the application of Executive privileges in criminal proceedings, as the Eighth Circuit correctly recognized. See In re Grand Jury Subpoena, 112 F.3d 910, 921 n.10 (1997). Even for purposes of congressional inquiries, moreover, the OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Opinion of the Off. of Legal Couns. 68, 78 (1986) (emphasis added).

[FN154]. United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984) (emphases added).

[FN155]. MCCORMICK ON EVIDENCE § 87.1, 321 (J. W. Strong ed. 1992).

[FN156]. 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure § 5475, 126-27 (1986).

[FN157]. Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (1996) (Proposed Final Draft No. 1) (also stating that "unlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business").

[FN158]. In re Grand Jury Subpoena, 112 F.3d at 920.

[FN159]. Id. at 921.

[FN160]. Id.

[FN161]. See supra notes 89-91 and accompanying text.

[FN162]. The President at the time the information is sought controls the privilege. With respect to the attorney-client privilege (as opposed to the Presidential communications privilege), a President no longer in office would have no authority to assert the privilege. See CFTC v. Weintraub, 471 U.S. 343, 349 & n.5 (1985) (stating that common-law privilege for entities belongs to current management, not former management).

[FN163]. See Nixon, 418 U.S. at 712; cf. Branzburg, 408 U.S. at 691.

[FN164]. See Branzburg, 408 U.S. at 700.

[FN165]. See 4B Opinion of the Off. of Legal Couns. 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

[FN166]. The President (or relevant agency head) can require that the employee cooperate in an internal agency investigation. See 4B Opinion of the Off. of Legal Couns. 421, 427 (1980) ("The obligation of public officials to answer questions related to the performance of their public duties is well- recognized"). To be sure, an agency employee questioned by an agency attorney may refuse to answer questions out of a fear of self-incrimination, although the failure to answer questions may lead to his dismissal. See LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) ("It may well be that an agency ... would take into consideration the failure of the employee to respond.").
The government employee who does not claim the Fifth Amendment and speaks to the attorney could be investigated or prosecuted based at least in part on the communications to government attorneys (Oliver North, for example). But that is a good result: Insulating government employees from criminal investigation and prosecution has never been considered a governmental interest that justifies withholding relevant information from the federal grand jury. Indeed, the only governmental interest is precisely the opposite.

[FN167]. Morrison, 487 U.S. at 699 (Scalia, J., dissenting).

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Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.
  - ✓ The federal courts of appeals agreed with Mr. Kavanaugh's position in those cases.
  - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
  - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges**. *See* Section 2(b).
  - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
  - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings."

Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2171 (1998).

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Federal Register
Vol. 66, No. 214
Monday, November 5, 2001

Presidential Documents

Title 3—

The President

Executive Order 13233 of November 1, 2001

Further Implementation of the Presidential Records Act

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. *Definitions.*

For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

(c) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

Sec. 2. *Constitutional and Legal Background.*

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

(b) In *Nixon v. Administrator of General Services,* the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." *Id.* at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure."*Id.* at 449. The Court also held that a former President, although no longer

a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448.

(c) The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a "demonstrated, specific need" for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. *Procedure for Administering Privileged Presidential Records.*

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent with or after the former President's review of the records, the incumbent President or his designee may also review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. *Concurrence by Incumbent President.*

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. *Incumbent President's Right to Obtain Access.*

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. *Right of Congress and Courts to Obtain Access.*

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. *No Effect on Right to Withhold Records.*

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. *Withholding of Privileged Records During 12-Year Period.*

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. *Establishment of Procedures.*

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. *Designation of Representative.*

The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discre tion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. *Vice Presidential Records.*

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

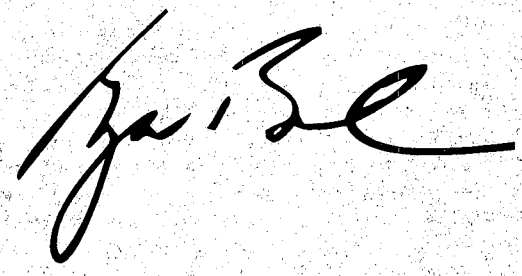
(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. *Judicial Review.*

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. *Revocation.*

Executive Order 12667 of January 18, 1989, is revoked.



THE WHITE HOUSE,
November 1, 2001.

[FR Doc. 01–27917
Filed 11–2–01; 11:23 am]
Billing code 3195–01–P

Brett Kavanaugh – Defense of Ken Starr

Allegation: Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr "an American hero," written that Starr's "record is one of extraordinary accomplishment and integrity," and praised Starr for "consistently perform[ing] with the highest skill and integrity." This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh's right-wing views.

Facts:

➢ **Many have expressed that the public criticism directed at Independent Counsel Kenneth Starr was vicious and unwarranted.**

✓ The Washington Post editorial page said of Judge Starr:

- "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

- "The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service." Editorial, Wash. Post, Oct. 20, 1999, at A28.

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr's integrity were belied by the fact that President Clinton's attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

- Rotunda stated: "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself." *Id.*

✓ In a prescient editorial published shortly after Judge Starr's appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: "If Starr's investigation turns up no evidence of wrongdoing, he

may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution." Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*, PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➢ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.**

✓ The Washington Post editorial page said, upon Judge Starr's appointment, "he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno's own short list of likely candidates for independent counsel when she picked Mr. Fiske." Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr's appointment as Independent Counsel, Mark Gitenstein, former chief Democratic counsel to the Senate Judiciary Committee, said: "Starr was a good, fair judge, and I think he will be fair in this proceeding." Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative ... but he's wholly undevious and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.

✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.

➢ **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**

✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.

✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

➢ **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**

✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:

- The creation of a "protective function privilege" that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).

- The claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

- The claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

➢ **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

✓ The Independent Counsel's report detailed substantial and credible information that may have constituted grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.

➢ **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- ➢ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

  - ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

The Washington Post, November 15, 1999

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November 15, 1999, Monday, Final Edition

SECTION: OP-ED; Pg. A23

LENGTH: 763 words

HEADLINE: To Us, Starr Is an American Hero

BYLINE: Robert J. Bittman; Brett M. **Kavanaugh;** Solomon J. Wisenberg

BODY:
Richard Cohen's Oct. 26 op-ed broadside, "So Long, Ken Starr," grossly mischaracterizes Ken Starr and his investigation. Cohen ridicules the Lewinsky case, but he ignores the following facts:

Starr uncovered a massive effort by the president to lie under oath and obstruct justice. The House impeached the president. Fifty senators voted to remove the president. Thirty-two other senators who voted to retain the president nonetheless signed a resolution that condemned Bill Clinton for giving "false or misleading testimony" and "impeding discovery of evidence in judicial proceedings" and concluded that he had "violated the trust of the American people." Judge Susan Webber Wright held the president in contempt because he intentionally provided "false, misleading and evasive answers" and "undermined the integrity of the judicial system."

Those conclusions fully vindicate Starr's findings and make Cohen's diatribes against the case ("woe is me, the Republic is in peril") look juvenile.

Cohen contends that certain information in Starr's referral to Congress should not have been made public and that Starr threw "everything out on the lawn for all the neighbors to see." But Starr submitted the report to Congress under seal. It was a bipartisan Congress that publicly released the report without even reviewing it beforehand.

Cohen argues that Starr "trapped" the president. Not so. The president "trapped" himself. Clinton knew long before his civil deposition (because Wright repeatedly so ruled) that his other sexual encounters with subordinate employees were relevant to Paula Jones's sexual harassment case. Yet the president decided to roll the dice and lie under oath and obstruct justice.

Starr did not cause this; Clinton did. Nor did Starr cause the president later to lie to the grand jury, to parse the meaning of the words "is" and "sex" and on and on. Clinton did all of this with premeditation and on his own. The word that ordinarily describes such behavior is not "trapped" but "guilty."

Cohen complains that Starr began by investigating Whitewater and "wound up" investigating the Lewinsky matter. But Janet Reno, not Starr, gave the independent counsel jurisdiction over new matters.

Cohen also notes--ominously--that Starr is a Republican. Special prosecutors traditionally have been respected lawyers of the opposite party. Archibald Cox investigated President Richard Nixon. Former senator John C. Danforth is investigating Janet Reno. The reason is simple: A decision not to indict in a politically charged case is more credible if made by a prosecutor of the opposite party. And a conviction requires that 12 citizen jurors vote for conviction, the procedural check on the "aggressive" prosecutor.

As important as what Cohen says is what he does not say. Cohen does not mention Starr's successful investigation of Madison Guaranty Savings and Loan. Starr obtained convictions of Jim and Susan McDougal, of Gov. Jim Guy Tucker (the first conviction this century of a sitting governor) and of former associate attorney general Webster Hubbell.

And Cohen ignores Starr's investigation of the Clintons' involvement in Madison and Whitewater and his investigations of the Vince Foster, travel office and FBI files issues. Why? Starr brought no criminal indictments and submitted no impeachment referrals in those matters. Starr recognized more than anyone that criminal prosecution (or an impeachment referral, in the case of the president) is not a political game--that a prosecutor should not invoke those processes unless the evidence is strong, almost overwhelming.

Cohen also skips past Starr's remarkable legal record. Starr won nearly every dispute: executive privilege, Secret Service privilege, government attorney-client privilege, jurisdictional issues, the list goes on.

Contrary to Cohen's table-thumping, the record establishes that Starr was a thorough, fair, ethical and successful prosecutor. His record is one of extraordinary accomplishment and integrity. And to us, Starr is an American hero.

Over time, fair-minded people will come to hail Starr's enormous contributions to the country and see the presidentially approved smear campaign against him for what it was: a disgraceful effort to undermine the rule of law, an episode that will forever stand, together with the underlying legal and moral transgressions to which it was connected, as a dark chapter in American presidential history.

The writers served as attorneys in the office of independent counsel Kenneth W. Starr.

LOAD-DATE: November 15, 1999

Source: News & Business > News > By Individual Publication > W > **The Washington Post** ⓘ
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7 of 9 DOCUMENTS

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October 20, 1999, Wednesday, Final Edition

SECTION: EDITORIAL; Pg. A28

LENGTH: 542 words

HEADLINE: Mr. Starr's Departure

BODY:

AS LONG AS historians remain interested in American politics in the 1990s they are likely to debate the merits of Kenneth Starr's investigation. The parameters of the debate are already stark. Mr. Starr's defenders see him as a voice of principle who stood firm for the rule of law and courageously spoke unpopular truths about a president who had disgraced his office yet remained inexplicably popular. By contrast, Mr. Starr's detractors see him as a kind of demon who embodies everything puritanical and intrusive about contemporary American conservatism and whose zeal against a president from a different party led him on a crusade to bring him down, with whatever collateral consequences.

The reality is that neither of these narratives aptly describes Mr. Starr or the very mixed legacy that he left on resigning his post this week. Mr. Starr was given an almost impossible task. He was asked to address authoritatively a set of essentially unrelated public integrity questions of varying degrees of seriousness. The impossibility of his job was partly his own fault, since he made the mistake of accepting--and sometimes seeking--additional matters to review. But it is unclear whether anyone with such broad jurisdiction could have avoided being perceived as President Clinton's personal prosecutor.

Mr. Starr's own errors contributed greatly to this perception. At times in his investigation, he clearly lacked perspective--going full throttle after relatively marginal characters and pursuing imprudent litigation and investigative strategies. He also had a maddening tendency to ignore appearances--even at the expense of the public credibility of his investigation. This was particularly regrettable because the circumstances of his own appointment, which followed the dismissal of the widely admired Robert Fiske for inadequate reasons, begged suspicion. Rather than allaying this concern, Mr. Starr seemed to taunt his doubters by maintaining his law practice and his relationship with conservative causes.

Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right.

The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service.

LOAD-DATE: October 20, 1999

Citation Search Result Rank 1515 of 1826 Database
8/[illegible]/94 PTLDOGN C07 ALLNEWS
8/17/94 Portland Oregonian C07
1994 WL 4559071
(Publication page references are not available for this document.)

Portland Oregonian
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Wednesday, August 17, 1994

FORUM

TAKE MY WORD, STARR WILL BE FAIR

GARRETT EPPS

Summary: But such reassurance shouldn't be needed for independent counsel

Lawyers familiar with federal ethics law were not entirely surprised Aug. 5 when a federal appellate panel refused to reappoint Robert Fiske, the special counsel chosen by Attorney General Janet Reno to investigate Whitewater and related matters.

Fiske had been appointed by the administration, thus raising appearance of a conflict of interest. As the panel -- called the Special Division -- noted, the Independent Counsel Reathorization Act "contemplates an apparent as well as an actual independence on the part of the counsel."

But many observers were stunned when the three-judge panel turned instead to former appellate judge and solicitor general Kenneth W. Starr.

Starr, a prominent Reagan and Bush supporter, has no prosecutorial experience and is deeply involved in politics. **Starr** openly considered a Republican bid to unseat **Democratic** Sen. Charles Robb of Virginia. He has publicly attacked President Clinton's position on possible presidential immunity from civil suit and even considered filing an amicus brief supporting Paula Jones in her sexual harassment suit against the president. And no one who knows Starr doubts that he would -- and should -- be on the GOP short list for the Supreme Court if the White House changes hands.

In other words, Starr does not embody what the Special Division (on which two of the three judges are Republican appointees) called "the intent of the act that the actor actor be protected against [illegible]rceptions of conflicts." As a political foe of the president, [illegible]rr will be seen by many as biased.

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(Publication page references are not available for this document.)

As E.J. Dionne of The Washington Post noted, it is as if a Democrat-dominated panel had named liberal professor Laurence Tribe to investigate Iran-Contra.

Make no mistake about my meaning. I know Starr personally. (Starr was a guest lecturer at the UO Law School in February.) Politically, we are chalk and cheese: I am a Democrat, a liberal and a supporter of the president; he is the direct opposite of all of these. But I admire him more than I can say, because at a level beyond politics, he is a fine lawyer, an honest judge and a good man.

I have not the slightest doubt that he will be fair, judicious and discreet in his conduct of the Whitewater investigation. You can take my word for it, or that of Reno herself, who seriously considered naming Starr to the office that eventually went to Fiske.

That, however, is precisely what made it a grievous mistake for the Special Division to offer this appointment and for Starr to accept it. The point of the independent counsel law is that neither Republicans like **Starr** nor **Democrats** like me should have to take someone else's word that -- despite appearances -- justice is being done in a nonpartisan, evenhanded manner.

The authors of the law knew that many administrations would conduct honest investigations of their own personnel, but they also knew that the public, sickened by Watergate and other scandals, would not believe that political appointees could investigate themselves or their superiors.

Thus was born the independent counsel, to ensure both fairness and the appearance of such. Previous counsels in high-profile cases have tended to be nonpolitical figures, often appointed relatively late in their careers, who could not credibly be suspected of a personal or partisan agenda.

If Starr's investigation turns up no evidence of wrongdoing, he may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution.

If the Whitewater investigation derails the president's agenda or prevents his re-election, Clinton's supporters will forever be convinced that they were defeated by a GOP judicial coup d'etat -- and they will note bitterly that Reno was forced to appoint Fiske in the first place because the Republicam blocked an effort to

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reauthorize appointment by the Special Division until after Fiske's probe was under way.

The effects of such a perception would be long-lasting and corrosive, with potentially grave effects on our politics and our heritage of government under law.

Only two people have the power to defuse this potential disaster. One is Reno, who under the act has the power to remove a counsel "for good cause . . . or any other condition that substantially impairs the performance" of the counsel's duties.

The law permits the counsel to challenge his removal in a different federal court than the one that appointed him; such a hearing would be interesting indeed. But given political reality, and the Clinton administration's record of support for the Independent Counsel Reauthorization Act, Reno is unlikely to fire Starr.

The other person who can act is Kenneth Starr himself. A beloved and respected figure, he has almost certainly accepted this post out of a sense of public service. Ironically, he stands to lose as much as Clinton if the process goes awry.

Garrett Epps is an assistant professor of law at the University of Oregon.

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Graphic - Drawing by MIKE RAMIREZ KENNETH W. STARR - Tainted by perception of partisanship

---- INDEX REFERENCES ----

EDITION: FOURTH

Word Count: 851
8/17/94 PTLDOGN C07
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Citation Search Result Rank 1816 of 1826 Database
8/6/94 WATIMES A6 ALLNEWS
8/6/94 Wash. Times (D.C.) A6
1994 WL 5486140
(Publication page references are not available for this document.)

The Washington Times
Copyright 1994

Saturday, August 6, 1994

A;NATION

Starr hailed as fair, moderate

Nancy E. Roman
THE WASHINGTON TIMES

Kenneth Starr, the new Whitewater **independent counsel**, was assessed yesterday from the left and the right as a nonpartisan, fair-minded lawyer.

"As solicitor general he bent over backwards to avoid partisanship, and as a result he incurred the wrath of conservatives on more than one occasion," said Chip Mellor, president of the libertarian Institute for Justice. "In areas of civil rights, abortion, he was definitely viewed as moderate."

Mr. Starr, 48, was **appointed** to the U.S. Court of Appeals for the D.C. Circuit by President Reagan in 1983. President Bush chose him as the Justice Department's top lawyer in 1989. When Bill Clinton was elected president, Mr. Starr went into private practice in Washington.

"Starr was a good, fair judge, and I think he will be fair in this proceeding," said Mark Gitenstein, chief Democratic counsel to the Senate Judiciary Committee when Mr. Starr was nominated to the federal bench. "I didn't agree with him on a number of his decisions, but he is fair."

Mr. Gitenstein said that when Mr. Starr was in the Justice Department, they sometimes worked together. "He was a pretty straightforward guy," he said. "He's easy to work with. He'll do a good job here. The only issue is what happens to all the work that Fiske did?"

Mr. Gitenstein said Mr. Starr should give broad deference to Mr. Fiske's work. "I believe that Starr would give him that deference."

Alan Slobodin of the Washington Legal Foundation, on whose

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legal policy advisory board Mr. Starr serves, said he is an "outstanding" choice for **independent counsel.**

"He's got Olympian credentials. To say he is well-respected is understating it," he said, adding that he bases his position on Mr. Starr's tenure on the federal bench.

"He was there during the mid-'80s, when the ideological complexion was changing. He was respected by the Democratic **appointees** to the Court of Appeals," he said. "Of course, he voted more with the conservative wing of that court, but he was viewed as more of a moderate."

When Mr. Starr was nominated to be solicitor general in 1989, press accounts quoted liberal lawyers who had tried cases in his court as saying he was the "least doctrinaire" of the Reagan **appointees** to the D.C. Circuit.

Before being named a judge, Mr. Starr served as counselor to Attorney General William French Smith.

During that time he was the only political **appointee** to argue against the Justice Department's decision to support Bob Jones University's attempt to claim tax-exempt status despite its racially discriminatory policies.

Tex Lezar, former chief of staff to Mr. Starr and now the Republican nominee for lieutenant governor of Texas, described Mr. Starr as a "very straight arrow" who demands clear evidence before taking any action.

He noted that Mr. Starr has no criminal experience and has never served as a prosecutor, but he said the former solicitor general knows a lot about conflict of interest and is "perfectly capable of being that certain someone who knows when someone is gracefully ducking."

* Major Garrett contributed to this report.

****BOX

KENNETH WINSTON STARR

BORN: Vernon, Texas, July 21, 1946. Lives in McLean.

WIFE: Alice Jean Mendell

CHILDREN: Randall Postley, Carolyn Marie and Cynthia Anne

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EDUCATION: Bachelor's from George Washington University; master's from Brown University; law degree from Duke University

CAREER HIGHLIGHTS: Law clerk to U.S. Chief Justice Warren E. Burger, 1975-77; associate and partner, Gibson, Dunn & Crutcher, 1977-81; counselor to the attorney general, 1981-83; judge, U.S. Court of Appeals for the D.C. Circuit, 1983-89; U.S. solicitor general, 1989-93; partner, Kirkland & Ellis, 1993-present.

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Box, KENNETH WINSTON STARR, By The Washington Times

---- INDEX REFERENCES ----

EDITION: 2

Word Count: 593
8/6/94 WATIMES A6
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Citation Search Result Rank 83 of 1826 Database
[redacted]/96 STLTI A3 ALLNEWS
12/4/96 Seattle Times A3
1996 WL 3695264
(Publication page references are not available for this document.)

The Seattle Times
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Wednesday, December 4, 1996

NEWS

CLOSE-UP

DID PRESIDENT ORDER ATTACK ON INVESTIGATOR?

PETER BAKER
WASHINGTON POST

ATTORNEY GENERAL Janet Reno has continued to assign independent counsel Kenneth Starr new matters to investigate and has the power to fire him. But now Starr's integrity is being attacked, and the administration says it won't interfere.

WASHINGTON - Clinton strategist James Carville has launched a [redacted]lic campaign to discredit Kenneth Starr, the independent counsel pursuing the man Carville helped put in the White House. But Carville's not doing so on the orders of the president. Really.

Nor is President Clinton secretly encouraging him. Really. And the president couldn't stop Carville even if he tried. Really.

That, at least, is the official White House line, implausible as it seems to doubters whose business cards don't list 1600 Pennsylvania Ave. as an office address.

White House officials don't seem all that unhappy about Carville's plans to set up a grass-roots, anti-Starr organization. Clinton made perfectly clear yesterday he has no intention of calling off his political consultant; when asked if he would talk to Carville about it, he answered flatly, "No."

That and other public remarks by top aides in recent days have been taken as tacit approval of the Carville counterattack, which will include campaign-style newspaper advertisements, fund-raising appeals and opposition research.

But Carville was vague on organizational details.

[redacted]Such an "all-out" assault is unprecedented in the history of

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independent counsels, according to specialists in the field. Special prosecutors have been fired (Archibald Cox during Watergate) and come under withering partisan fire (Lawrence Walsh during Iran-contra), but they have never endured an organized public-relations attack of the likes that Carville describes.

A variety of Republican leaders, legal scholars and even some Democrats have denounced Carville's effort as everything from improper to bad political strategy.

'Incendiary device'

"This is a very, very incendiary device, and it may have incendiary consequences as yet unseen," said Joseph diGenova, a former GOP federal prosecutor who also has served as an independent counsel. DiGenova said it appeared to be an attempt to shape public perceptions to influence potential jurors. "That would be the O.J. Simpson-ing of Whitewater."

Ronald Rotunda, a University of Illinois law professor who was an assistant counsel for **Democrats** on the Senate Watergate Committee, said attacks on **Starr's** integrity are belied by the fact that Clinton's own attorney general, Janet Reno, has continued to assign him new matters to investigate and has the power to fire **Starr** if he had acted unethically. "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself," Rotunda said.

The notion that the White House is uninvolved, he added, bore little credibility: "It looks to me that Carville's got his marching orders and is carrying them out."

Carville sees clear message

Carville denied that yesterday, saying he has not spoken to Clinton about his plans, nor sought permission from the White House. But he also seemed confident he was not deviating from the president's own thoughts, pointing to a PBS interview last fall when Clinton said it was "obvious" Starr was out to get him. "He's spoken, it seems to me, pretty clearly and unambiguously," Carville said of Clinton.

Even so, White House press secretary Michael McCurry on Monday went so far as to suggest that Clinton had no power over Carville, who managed his 1992 campaign and has remained close to the president.

guments against Starr

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(Publication page references are not available for this document.)

The thrust of Carville's case against Starr is that the former Reagan solicitor general is a partisan "right-wing" Republican with an ax to grind, and should be fired. In particular, Carville has cited Starr's legal representation of tobacco interests and his recent speech at a law school founded by Christian Coalition leader Pat Robertson.

Criticism of his plans, Carville added, is only likely to energize him. "It's okay to attack the president but it's not okay to defend the president?" he said heatedly. "I'm not playing by those rules!"

Carville previously said he wanted to go after Starr the day he was appointed but was talked out of it by the White House. Asked about that yesterday, he identified George Stephanopoulos and Mark Gearan as the Clinton aides who dissuaded him, adding that they feared that then-White House counsel Lloyd Cutler would resign if Carville followed through.

"The difference between last time and this time," Carville said, is that this time "I didn't ask anyone."

Starr's investigation

As independent counsel, Kenneth Starr is investigating:

-- Whitewater: The failed land-development project in which Bill Clinton, then governor of Arkansas, and Hillary Rodham Clinton invested.

-- Vince Foster: The apparent suicide in 1993 of the White House deputy counsel.

-- FBI files: The White House personnel security chief's improper collection of almost 900 FBI files, including those of Republicans no longer working for the White House.

-- Travel-office firings: 1993 dismissal White House travel office staff in what Republicans suspect was an effort to give jobs to Clinton friends from Arkansas.

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PHOTO; Caption: 1) JAMES CARVILLE 2) KENNETH STARR

---- INDEX REFERENCES ----

STORY ORIGIN: WASHINGTON

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106TH CONGRESS
1ST SESSION

S. RES. 44

Relating to the censure of William Jefferson Clinton.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1999

Mrs. FEINSTEIN (for herself, Mr. BENNETT, Mr. MOYNIHAN, Mr. CHAFEE, Mr. KOHL, Mr. JEFFORDS, Mr. LIEBERMAN, Mr. SMITH of Oregon, Mr. DASCHLE, Ms. SNOWE, Mr. REID, Mr. GORTON, Mr. BRYAN, Mr. MCCONNELL, Mr. CLELAND, Mr. DOMENICI, Mr. TORRICELLI, Mr. CAMPBELL, Mr. WYDEN, Mrs. LINCOLN, Mr. KERRY, Mr. KERREY, Mr. SCHUMER, Mr. DURBIN, Mrs. MURRAY, Mr. WELLSTONE, Mr. BREAUX, Ms. MIKULSKI, Mr. DORGAN, Mr. BAUCUS, Mr. REED, Ms. LANDRIEU, Mr. KENNEDY, Mr. LEVIN, Mr. ROCKEFELLER, Mr. ROBB, Mr. INOUYE, and Mr. AKAKA) submitted the following resolution; which was referred to the Committee on Rules and Administration

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RESOLUTION

Relating to the censure of William Jefferson Clinton.

Whereas William Jefferson Clinton, President of the United States, engaged in an inappropriate relationship with a subordinate employee in the White House, which was shameful, reckless and indefensible;

Whereas William Jefferson Clinton, President of the United States, deliberately misled and deceived the American people, and people in all branches of the United States Government;

Whereas William Jefferson Clinton, President of the United States, gave false or misleading testimony and his actions have had the effect of impeding discovery of evidence in judicial proceedings;

Whereas William Jefferson Clinton's conduct in this matter is unacceptable for a President of the United States, does demean the Office of the President as well as the President himself, and creates disrespect for the laws of the land;

Whereas William Jefferson Clinton fully deserves censure for engaging in such behavior;

Whereas future generations of Americans must know that such behavior is not only unacceptable but also bears grave consequences, including loss of integrity, trust and respect;

Whereas William Jefferson Clinton remains subject to criminal actions in a court of law like any other citizen;

Whereas William Jefferson Clinton's conduct in this matter has brought shame and dishonor to himself and to the Office of the President; and

Whereas William Jefferson Clinton through his conduct in this matter has violated the trust of the American people: Now, therefore, be it

Resolved, That—

(1) the United States Senate does hereby censure William Jefferson Clinton, President of the United States, and does condemn his wrongful conduct in the strongest terms;

(2) the United States Senate recognizes the historic gravity of this bipartisan resolution, and trusts and urges that future congresses will recognize the importance of allowing this bipartisan statement of censure and condemnation to remain intact for all time; and

(3) the Senate now move on to other matters of significance to our people, to reconcile differences between and within the branches of government, and to work together—across party lines—for the benefit of the American people.

○

H

United States District Court,
E.D. Arkansas,
Western Division.

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson, Defendants.

No. LR-C-94-290.

July 29, 1999.

After United States President was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, 36 F.Supp.2d 1118, parties submitted evidence of expenses and fees incurred by plaintiff's counsel. The District Court, Susan Webber Wright, Chief Judge, held that: (1) President would be required to pay expenses incurred by federal judge to attend tainted deposition, and (2) plaintiff's counsel were entitled to fees and expenses in amount of $79,999 and $9,485, respectively.

So ordered.

West Headnotes

[1] **Federal Civil Procedure** 1539
170Ak1539

As a sanction against United States President who was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, President would be required to pay federal judge's expenses for attending tainted deposition at President's request.

[2] **Federal Civil Procedure** 1269.1
170Ak1269.1

In proceedings to determine attorney fees and expenses that would be imposed against United States President who was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, plaintiff's counsel were not entitled to conduct limited discovery of President's attorney fees and expenses; there was no need to conduct discovery of President's fees and expenses to determine whether fees and expenses claimed by plaintiff's counsel were incurred as a result of sanctioned conduct, and resolving issue of President's contempt expeditiously and without hearings was in the public interest.

[3] **Contempt** 70
93k70

[3] **Contempt** 74
93k74

A coercive contempt sanction, such as a fine, is designed to force the offending party to comply with a court's order, whereas a compensatory sanction is designed to compensate the non-offending party for the damage they incur as a result of the offending party's contempt.

[4] **Contempt** 49
93k49

Court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.

[5] **Federal Civil Procedure** 1278
170Ak1278

Discovery sanctions may be awarded against a party after entry of summary judgment and dismissal of a case. Fed.Rules Civ.Proc.Rules 37, 56, 28 U.S.C.A.

[6] **Contempt** 74
93k74

Sanctions for compensatory contempt are not imposed to punish the contemnor, but must be based upon evidence of actual loss.

[7] **Federal Civil Procedure** 1278
170Ak1278

As a civil contempt sanction against United States President who failed to obey discovery orders in civil lawsuit brought against him, plaintiff's counsel were entitled to attorney fees and expenses of $79,999 and $9,485, respectively, rather than requested amounts of $437,825 and $58,533; plaintiff's counsel were entitled to recover only the fees and expenses that plaintiff incurred as a result of President's willful failure to obey court's discovery orders.

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***720** Donovan Campbell, Jr., Rader, Campbell, Fisher & Pyke, Dallas, TX, Gregory S. Kitterman, Little Rock, AR, for plaintiff.

Steven H. Aden, John W. Whitehead, The Rutherford Institute, Charlottesville, VA, Daniel A. Gecker, Steven Scott Biss, Maloney, Huennekens, Parks, Gecker, Parsons, Richmond, VA, Robert Batton, Jacksonville, AR, Bill W. Bristow, Seay & Bristow, Jonesboro, AR, Stephen C. Engstrom, Wilson, Engstrom, Corum & Coulter, Little Rock, AR, Kathlyn Graves, Wright, Lindsey & Jennings, Little Rock, AR, Robert S. Bennett, Skadden, Arps, Slate, Meaghen & Flom, Washington, DC, for defendants.

MEMORANDUM AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

On April 12, 1999, this Court entered a Memorandum Opinion and Order adjudging William Jefferson Clinton, President of the United States, to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2) for his willful failure to obey certain discovery Orders of this Court in a lawsuit brought against him by Paula Corbin Jones. *See Jones v. Clinton,* 36 F.Supp.2d 1118 (E.D.Ark.1999). The Court determined that the President violated this Court's discovery Orders by giving false, misleading and evasive answers that were designed to obstruct the judicial process, and that sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. *See id.* at 1127, 1131-32, 1134. The Court ordered the President to pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders, and directed plaintiff's former counsel to submit to this Court a detailed statement of any expenses and attorney's fees incurred in connection with the matter. *Id.* at 1132, 1134-35. The Court additionally ordered the President to deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over his January 17, 1998 deposition. *Id.* [FN1] However, the Court stayed enforcement of its Order for thirty days to give the President an opportunity to file a notice of appeal or to request a hearing in which to demonstrate why he is not in civil contempt of court, why sanctions should not be imposed, or why the Court is otherwise in error in proceeding in the manner in which it has. *Id.* at 1134-35. The Court stated that should the President fail to file a notice of appeal or request a hearing within the time allowed, it would enter an Order setting forth the time and manner by which the President is to comply with the sanctions being imposed. *Id.* The President subsequently notified this Court that while he disputes allegations that he knowingly and intentionally gave false testimony under oath, he will not request a hearing or file a notice of appeal. Accordingly, the Court addresses at this time the sanctions to be imposed in accordance with the April 12th Order.

FN1. In addition, the Court referred the matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any action it deems appropriate. *Id.*

I.

On May 7, 1999, this Court received in response to its April 12th Order a statement of fees and expenses totaling $437,825.00 from the law firm of Rader, Campbell, ***721** Fisher & Pike ("RCFP") and a statement of fees and costs totaling $58,533.03 from John W. Whitehead and The Rutherford Institute (collectively, "TRI"). That same day, the President, through his attorney, Robert S. Bennett, submitted a letter to this Court stating that he would timely file a formal pleading objecting to the "excessive" amount of the claim for fees and expenses by plaintiff's attorneys--characterizing the claim as "unreasonable and inconsistent with the Court's Order and governing law"--but that he did not otherwise intend to request a hearing or file a notice of appeal with respect to the April 12th Order. *See* May 7, 1999 Letter.

On May 21, 1999, the President filed his formal response to the statements of fees and expenses submitted by plaintiff's attorneys. In his response, the President states that due to the public interest in providing an expeditious resolution to this matter, and due to the urgent duties of his office, he recognizes that it is in the best interests of the country to forego his right to a hearing under the Order. [FN2] Resp. of Pres. at 1. The President further states that while he does not concur with the findings of this Court, he will pay the $1,202.00 levied by this Court for its expenses in attending his January 17th deposition at his request, and will pay the reasonable costs incurred by plaintiff as a result of those actions

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that this Court found to be at odds with its discovery Orders--his answer to Interrogatory No. 10, submitted on December 23, 1997, and certain limited portions of his January 17th deposition testimony, insofar as either pertained to his relationship with Monica Lewinsky. *Id.* at 1-2. As in his May 7th letter, however, the President contends that the fees and expenses requested by RCFP and TRI are unreasonable in that for the most part they bear no relationship to the actions that gave rise to the April 12th Order, are "demonstrably overreaching," and, with the exception of certain fees and expenses in the range of $12,300.00 to $33,700.00, should thus be denied. *Id.* at 2-3.

FN2. The Court expressed these same concerns in its April 12th Order. *See Jones v. Clinton,* 36 F.Supp.2d at 1132-34.

RCFP and TRI each filed a reply to the President's response. RCFP asserts that the work included in their statement of fees and expenses is directly related to the President's misconduct and that the President's dishonesty caused their work, both before and after the specific instances of his misconduct referenced in this Court's April 12th Order, to be rendered useless. Reply of RCFP at 2-3. TRI, in turn, asserts that the sanctions proposed by the President, "if adopted by this Court, would do precious little to 'redress the misconduct of the President in this case,' " and would not only fail to deter others who might consider emulating the President's misconduct, "but would actually serve to create an unintended incentive for such conduct by imposing *de minimus* consequences on conduct that, in the words of [this] Court, has 'undermined the integrity of the judicial system' itself." Reply of TRI at 1-2 (quoting April 12th Order).

[1] The Court has carefully considered the pleadings submitted in response to this Court's April 12th Order (doc.#'s 488-497) and, without objection, will require that the President pay the $1,202.00 levied by this Court for its expenses in attending his January 17th deposition at his request and will require that the President pay the reasonable fees and expenses incurred by plaintiff as a result of those actions that this Court found to be at odds with its discovery Orders. The Court finds, however, that the claims for fees and expenses included in RCFP's and TRI's statements are excessive and must be reduced.

A.

[2] As a preliminary matter, the Court addresses a motion filed by RCFP and ***722** joined by TRI to conduct limited discovery of the President's attorneys' fees and expenses. RCFP seeks to determine the amount of time expended by the lawyers who represented the President in connection with his contemptible conduct, the hourly rates charged for that work, and the nature and amount of the expenses incurred in connection with that work. Mot. of RCFP at 1. RCFP states that this discovery is necessary in light of the position taken by Mr. Bennett in his May 7th letter to this Court. *Id.*

The Court denies RCFP's motion. The President does not contest RCFP's and TRI's billing rate or the amount of time spent on any given task, but simply opposes their statements insofar as he claims the fees and expenses included therein were not incurred as a result of the conduct sanctioned by this Court, or because their statements are too vague to assess any possible link between the claimed costs and the sanctioned conduct. Resp. of Pres. at 2-3. There is no need to conduct discovery of the President's attorneys' fees and expenses in order for this Court to determine whether the fees and expenses claimed by RCFP and TRI were in fact incurred as a result of the conduct sanctioned by this Court. [FN3]

FN3. RCFP states that discovery of the President's attorneys' fees and expenses will make clear the appropriate magnitude of the fees which should be awarded pursuant to this Court's April 12th Order. Reply of RCFP at 14. They state that the President's expenditure of fees may well be the best evidence of his own valuation of the case, and that a sanction amounting to a mere ten percent of that value is not out of proportion. *Id.* The Court is not, however, concerned with the amount of fees expended by the President's attorneys in defending their client, but is only concerned with the amount of reasonable fees and expenses incurred by plaintiff's former counsel as a result of the President's willful failure to obey this Court's discovery Orders as described in the April 12th Order. The Court will not base any such sanction on a percentage of the President's attorney's fees and expenses.

Moreover, this Court has determined that resolving the issue of the President's contempt expeditiously and without hearings is in the public interest, *see*

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Jones v. Clinton, 36 F.Supp.2d at 1127, 1133, and granting RCFP's motion for additional discovery would only delay its resolution. Indeed, it was in the interests of bringing this matter to a speedy closure that this Court addressed in its April 12th Order only those narrow aspects of the President's contemptuous conduct with which there was no factual dispute and which were fully apparent from the record. *See id.* at 1127, 1132-33. The Court fully recognized that the President and other individuals within the jurisdiction of this Court might have engaged in additional misconduct warranting the imposition of sanctions, including violations of the Court's Confidentiality Order on Consent of all Parties. *See id.* at 1127 n. 14, 1132-33. Ascertaining whether the President or other individuals violated the Confidentiality Order or engaged in other sanctionable misconduct, however, would require hearings and the taking of evidence. *See id.* The President's misconduct as set forth in the April 12th Order, by contrast, is fully apparent from the record and can be summarily addressed without convening evidentiary hearings. Were additional discovery on the part of RCFP and TRI allowed, the Court, in fairness, would allow the President to conduct discovery of RCFP and TRI as well. The history of this case suggests that such additional discovery, rather than being limited, would be "contentious and time-consuming." *See id.* at 1121. Given that prospect, the Court would be inclined to expand the proceedings to address possible misconduct beyond that addressed in the April 12th Order, including any possible misconduct on the part of RCFP and/or TRI.

The Court finds, however, that additional discovery and expansion of the proceedings is not necessary at this time as the record is sufficiently developed for this Court to determine whether the fees and expenses claimed by RCFP and TRI were ***723** incurred as a result of the conduct sanctioned by this Court. That being so, and in the interests of bringing this matter to a speedy closure, the Court will deny RCFP's motion to conduct limited discovery.

B.
1.

[3][4][5] The Court now turns to the central issue at hand: determining whether the fees and expenses included in the statements of RCFP and TRI are within the scope of this Court's April 12th Order. There are two kinds of civil contempt sanctions a court can impose: coercive and compensatory. *Klett v. Pim*, 965 F.2d 587, 590 (8th Cir.1992) (citations omitted). A coercive sanction, such as a fine, is designed to force the offending party to comply with a court's order, whereas a compensatory sanction is designed to compensate the non-offending party for the damage they incur as a result of the offending party's contempt. *Id. See also Hartman v. Lyng*, 884 F.2d 1103, 1106 (8th Cir.1989) (a court's civil contempt power serves two purposes: to effectuate compliance with a court's order or process, and to compensate individuals from harm incurred by noncompliance); *Thompson v. Cleland*, 782 F.2d 719, 721 (7th Cir.1986) (" '[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained' ") (quoting *United States v. United Mine Workers*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947)); *In re Kave*, 760 F.2d 343, 351 (1st Cir.1985) (civil contempt sanctions can include a conditional fine to induce the purging of contemptuous conduct and "a *compensatory* fine to make whole the aggrieved party for damages caused by the contemnor's conduct") (emphasis in original). The matter of the President's contempt involves compensatory rather than coercive sanctions as the Court is not seeking to coerce the President into compliance with any pending Court order--the underlying action having been dismissed [FN4]--and sanctions are being imposed, not only to deter others who might consider emulating the President's misconduct, but to compensate the plaintiff by requiring that the President pay her any reasonable fees and expenses caused by his willful failure to obey this Court's discovery Orders. *See Jones v. Clinton*, 36 F.Supp.2d at 1131-32, 1134-35. *See also Lyng*, 884 F.2d at 1106 (a compensatory sanction "serves to make reputation to the injured party, restoring that party to the position it would have held had the court's order been obeyed") (citation omitted). Accordingly, this Court must determine the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders. [FN5]

FN4. As the Court noted in its April 12th Order, "[a] Court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Jones v. Clinton*, 36 F.Supp.2d at 1125 n. 12 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). In this regard, and contrary to the assertions of certain commentators, discovery sanctions under Fed.R.Civ.P. 37 may be awarded against a party after entry

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of summary judgment and dismissal of a case pursuant to Fed.R.Civ.P. 56. *See Heinrichs v. Marshall and Stevens Inc.*, 921 F.2d 418, 420-21 (2nd Cir.1990). Indeed, "[g]iven the Supreme Court's approval of post-judgment sanctions under Rule 11, and the support in the circuits for the practice under Rule 37, the question of post-judgment sanctions under Rule 37 is virtually moot." Stephen R. Bough, *Spitting in a Judge's Face: The 8th Circuit's Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 S.D.L.Rev. 36, 43 (1998) (footnote omitted).

FN5. The President argues that TRI's statement should be rejected in its entirety as TRI's role in this litigation was to raise funds and coordinate public relations for plaintiff, TRI did not enter an appearance until the appeal of this Court's dismissal of the case (although TRI was shown as "of counsel" on plaintiff's pleadings), TRI's statement was untimely, and the information contained in TRI's statement is "extremely vague." Resp. of Pres. at 8-9. Although the Court will not reject TRI's statement, the Court will consider any vagueness of TRI's statement, as it will with RCFP's statement, in determining the reasonable fees and expenses that plaintiff incurred as a result of the President's misconduct.

***724** 2.

This Court found that the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky--specifically, his answer to Interrogatory No. 10, submitted on December 23, 1997, and certain limited portions of his January 17th deposition testimony--were in violation of this Court's discovery Orders ruling that plaintiff was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. *See Jones v. Clinton*, 36 F.Supp.2d at 1127. Notwithstanding the narrow and specific nature of the misconduct referenced in the April 12th Order, RCFP and TRI include in their respective statements claims for fees and expenses which clearly cannot be said to have been caused by the misconduct upon which this Court's April 12th Order is based. These include fees and expenses associated with various Court proceedings and conferences; fees and expenses associated with the investigation by the Office of the Independent Counsel ("OIC") of the Lewinsky matter and OIC's involvement in this civil case; fees and expenses associated with this Court's evidentiary ruling excluding the Lewinsky evidence from trial and plaintiff's mandamus petition seeking to reverse that ruling; fees and expenses associated with various press conferences, researching and reviewing media reports, and reviewing correspondence; and fees and expenses associated with examining the Starr Report.

Both RCFP and TRI appear to justify the breadth of the fees and expenses included in their statements by arguing, at least in part, that sanctions may be imposed to punish the President's misconduct. RCFP argues, for example, that the President's willful failure to follow this Court's discovery Orders "made a mockery" of both his deposition and all of the proceedings and orders leading up to the deposition, and that he should therefore be made to pay for all of the work done and expenses incurred in the course of events leading up to his deposition and, in particular, all efforts to discover facts concerning Monica Lewinsky. Reply of RCFP at 2-4. Similarly, TRI asserts that the contemptuous conduct of the President was a "substantial factor" in each of the events for which costs and/or attorney's fees are being sought, and, as previously noted, cautions this Court against imposing *de minimis* consequences on conduct that undermined the integrity of the judicial system. Reply of TRI at 2-3.

[6] The Court rejects RCFP's and TRI's apparent understanding of the basis upon which compensatory sanctions may be imposed. Regardless of whether the President's failure to follow this Court's discovery Orders "made a mockery" of the proceedings or even was a "substantial factor" in the events for which fees and expenses are being sought, sanctions for compensatory contempt are not imposed to punish the contemnor, *see Lyng*, 884 F.2d at 1106, but must be based upon evidence of actual loss. *Law v. NCAA*, 134 F.3d 1438, 1443 (10th Cir.1998). *See also Burke v. Guiney*, 700 F.2d 767, 770 (1st Cir.1983) (a compensatory fine for civil contempt requires proof of damages). Avoiding imposition of compensatory sanctions that may be characterized as "*de minimus*" simply is not a consideration in determining whether actual loss has been shown.

The Court also rejects RCFP's argument that because this Court properly could have imposed the sanction

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of entering judgment against the President on the *725 basis of his contempt of court, [FN6] plaintiff's counsel would have been justified in seeking compensation for all of their labor and reimbursement for all of the expenses incurred following the President's false answer to Interrogatory No. 10, submitted on December 23, 1997. *See* Reply of RCFP at 12-13. Specifically, RCFP argues that upon the service of the President's false response to plaintiff's interrogatories, he had a continuing obligation as an officer of the Court and a party subject to the Court's discovery orders to disclose the falsity of his response, and that judgment could have been entered against the President upon such disclosure. *Id.* Such a judgment, argues RCFP, could have been entered against the President upon his disclosure of the falsity of his response and would have obviated the need for any further legal services to be rendered or expenses incurred by plaintiff's counsel. *Id.* RCFP's argument, however, overlooks the probability that any damages awarded to plaintiff as a result of a judgment entered against the President for his civil contempt would not have been based on any fees and expenses incurred by her counsel as a result of the conduct described in this Court's April 12th Order, but would have been damages that plaintiff herself could prove at a subsequent hearing, *i.e.,* damages for alleged deprivation of her constitutional rights and privileges, damages for alleged conspiracy to deprive her of her equal protection and privileges of the laws, and damages for alleged intentional infliction of emotional distress (Counts I-III of plaintiff's amended complaint). Even in the unlikely event that the Court would forego such a hearing on damages, the amount of the judgment would be no greater than the specific amount stated in plaintiff's amended complaint, which is $525,000. [FN7] Because the parties have already settled this case for $850,000, it is appropriate to limit fees and expenses to those incurred as a result of the misconduct upon which the Court's April 12th Order is based and not engage in speculation concerning what the Court might have ordered had its grant of summary judgment to defendants been reversed on appeal and the case remanded.

FN6. This Court noted in its April 12th Order that the Court would have considered rendering a default judgment against the President pursuant to Fed.R.Civ.P. 37(b)(2) had this Court's grant of summary judgment to defendants been reversed on appeal and the case remanded. *See Jones v. Clinton,* 36 F.Supp.2d at 1131.

FN7. Plaintiff's initial complaint sought $700,000. Following the entry of this Court's Memorandum Opinion and Order granting in part and denying in part the President's motion for judgment on the pleadings, *see Jones v. Clinton,* 974 F.Supp. 712 (E.D.Ark.1997), and following the entry of new counsel for plaintiff in this case, plaintiff filed an amended complaint (with leave of this Court) in which she sought $525,000 [doc. #176]. The Court recognizes that plaintiff's amended complaint seeks damages in an amount to be determined by a jury and that the $525,000 figure represents the minimum sought by plaintiff for the conduct referenced in Counts I-III of the amended complaint.

[7] There is no need to burden today's Memorandum and Order with an exhaustive, entry-by-entry review of the fees and expenses claimed by RCFP and TRI in determining the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders. The parties have addressed RCFP's and TRI's statements by establishing general categories of time entries, and this Court will address those statements in the same manner. [FN8]

FN8. The Court has engaged in a painstaking review of each time entry and claim for costs set forth in RCFP's and TRI's respective statements in determining whether the fees and expenses claimed therein were caused by the discovery violations referenced in the Court's April 12th Order. All claims for fees and expenses not specifically mentioned in today's Memorandum and Order have been carefully considered by the Court and are hereby denied.

a.

The Court will disallow fees and expenses incurred prior to December 23, *726 1997. Work done prior to that date *a fortiori* was not caused by the President's discovery violations on December 23, 1997, and January 17, 1998.

b.

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The Court will disallow fees and expenses associated with the hearing in Pine Bluff, Arkansas on January 12, 1998. This hearing was convened by the Court on its own initiative primarily to address the President's upcoming deposition. Monica Lewinsky's name was mentioned only briefly during the hearing in response to this Court's query regarding witnesses plaintiff anticipated calling at trial, and a wide variety of topics were addressed, including the possibility of settlement. This hearing did not result from the discovery violations referenced in the Court's April 12th Order.

c.

The Court will allow a portion of the fees and expenses associated with the President's January 17th deposition. The President objects to such an award, arguing that he would have been deposed regardless of any discovery violations and that plaintiff thus would have incurred fees and expenses associated with the deposition irrespective of any misconduct on his part. While that may be true, the President's failure to follow this Court's discovery Orders resulted in plaintiff's counsel devoting extra time, effort, and expense to certain topics that likely would have been unnecessary had he been truthful. Plaintiff therefore incurred fees and expenses in connection with the President's deposition as a result of his discovery violations.

The Court does find, however, that fees and expenses should be limited to time spent asking questions about Ms. Lewinsky. In this regard, the President claims, and the Court agrees, that approximately 20% of the President's deposition concerned Ms. Lewinsky. Plaintiff's counsel do not contest this percentage, but merely argue that the President's falsehoods infected the entire record with doubt and that plaintiff therefore is entitled to reimbursement for all fees and expenses associated with the deposition. As previously noted, however, compensatory sanctions must be based on evidence of actual loss, *see* NCAA, 134 F.3d at 1443, and the Court finds that plaintiff's counsel have established evidence of actual loss, at most, with respect to no more than 20% of their claim for fees and expenses associated with the deposition. [FN9] Accordingly, as so reduced, RCFP is entitled to $5,233.00 for fees and expenses associated with the President's deposition, and TRI is entitled to $3,136.58 for its expenses. [FN10]

FN9. RCFP and TRI argue that the President is being required to reimburse this Court the entire amount of costs incurred in attending his January 17th deposition, not just 20%, and that plaintiff likewise should be reimbursed for all fees and expenses incurred in connection with the deposition. The Court disagrees. The President was noticed for deposition prior to the actions which gave rise to the April 12th Order, and plaintiff's counsel would have incurred fees and expenses in connection with the deposition regardless of any misconduct on the part of the President. This Court, on the other hand, would not have incurred any expenses in connection with the deposition had the President not requested that the Court preside over the proceedings at which he ultimately disobeyed this Court's oral ruling that certain questions be answered. *See Jones v. Clinton,* 36 F.Supp.2d at 1127. Thus, the Court deems its expenses incurred in connection with the President's misconduct at his deposition to be the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over the proceedings. As for awarding plaintiff even 20%, this apportionment, as correctly noted by the President, reflects an assumption highly favorable to plaintiff that all of the Lewinsky matter was violative of this Court's discovery Orders.

FN10. The President argues that plaintiff's counsel has included fees for six attorneys to attend his deposition, even though only one RCFP attorney questioned the President, and that fees for such duplicative services should he disallowed. The Court notes, however, that the President himself had five attorneys--including the White House Counsel--in attendance at the deposition. Given the unique circumstances of this case, this Court does not find it unreasonable that plaintiff had more than one attorney in attendance.

***727** d.

The Court will disallow fees and expenses associated both with plaintiff's motion for this Court to reconsider its ruling excluding the Lewinsky evidence at trial and her subsequent petition for a writ of mandamus with the Court of Appeals for the Eighth Circuit seeking to overturn that ruling. [FN11]

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The Court excluded the Lewinsky evidence from trial, not in response to any misconduct on the part of the President, but in response to a motion by OIC for limited intervention and stay of discovery in this civil case. *See Jones v. Clinton,* 993 F.Supp. 1217 (E.D.Ark.1998) (Order denying motion to reconsider ruling excluding Lewinsky evidence from trial). [FN12] Thus, the fees and expenses associated with attempts by plaintiff's counsel to overturn this Court's Lewinsky ruling were not caused by the President's willful failure to obey this Court's discovery Orders and, therefore, are not compensable.

FN11. RCFP later withdrew this petition following this Court's grant of summary judgment to defendants on April 1, 1998.

FN12. OIC argued in its motion that counsel for plaintiff were deliberately shadowing the grand jury's investigation of the Lewinsky matter and that "the pending criminal investigation is of such gravity and paramount importance that this Court would do a disservice to the Nation if it were to permit the unfettered--and extraordinarily aggressive--discovery efforts currently underway to proceed unabated." *Id.* at 1218 (quoting OIC Motion, at 2-3). This Court made the decision to disallow discovery as to Ms. Lewinsky and to exclude evidence concerning her from trial because its admission would frustrate the timely resolution of this case and cause undue expense and delay, the substantial interests of the Presidency militated against any undue delay that would be occasioned by allowing plaintiff to pursue the Lewinsky matter, and the government's criminal proceedings (to which this Court generally must yield in civil matters) could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *Id.* at 1219-20. The Court noted that evidence of the Lewinsky matter, even assuming it to be very favorable to plaintiff, was not essential to the core issues in this case of whether plaintiff herself was the victim of *quid pro quo* sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress. *Id.* at 1222. *See also Jones v. Clinton,* 36 F.Supp.2d at 1122 n. 7.

RCFP, however, argues that if the President had told the truth on January 17, 1998, their discovery related to Ms. Lewinsky would then have been completed and OIC's motion would never have been filed. Reply of RCFP, at 6. They argue that this Court then would not have been asked to stay discovery related to Ms. Lewinsky because very little, if any, additional discovery related to her would have been sought, and this Court would not have had occasion to consider at that stage excluding the evidence at trial. *Id.*

While the Court does not question RCFP's representations as made in hindsight, the Court is hard pressed to conclude that plaintiff, given the intensity and contentiousness with which discovery was then being conducted, would not at that time have proceeded with depositions of Linda Tripp, Betty Currie, Vernon Jordan, and other witnesses in an effort to confirm or learn additional details of the relationship between Ms. Lewinsky and the President and, perhaps, to establish or discount through these witnesses the existence of any other relationships that might be relevant to the issues in the case. Moreover, even had the President told the truth with respect to Ms. Lewinsky, there is nothing in the record before the Court to indicate that Ms. Lewinsky would not at that time have continued to stand by her affidavit denying sexual relations between herself and the President, thus necessitating additional related discovery by plaintiff. [FN13] The ***728** Court simply cannot infer that OIC would not have intervened in this case had the President acknowledged a relationship between himself and Ms. Lewinsky on January 17th and that additional related discovery on the part of the plaintiff would thereby have ceased. [FN14] Such would require speculation and involves events that are not of record in this case. *See* n. 13, *supra.* Accordingly, the Court disallows fees and expenses associated with the attempts by plaintiff's counsel to overturn this Court's Lewinsky ruling. [FN15]

FN13. Not included in the record of this case are many materials, including the transcript of Ms. Lewinsky's grand jury testimony and transcripts of depositions generated in the course of this litigation, that might reveal additional instances of misconduct other than those described in the Court's April 12th Order. Such materials are not normally filed of record and, thus, are not part of the official record to be considered by this Court. Indeed, because such materials are not normally filed of

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record, the transcript of the President's January 17th deposition had not been filed of record until just recently. In this regard, the Court, prior to considering the issue of the President's possible contempt following his August 17, 1998 address to the Nation and prior to issuing its April 12th Order, had to expand the record by first obtaining, and then filing of record, the following items: (1) President Clinton's Responses to Plaintiff's Second Set of Interrogatories; (2) President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories; (3) the redacted transcript of the January 17, 1998 deposition of President Clinton; (4) the transcript of the August 17, 1998 videotaped grand jury testimony of President Clinton; and (5) the transcript of President Clinton's August 17, 1998 televised address to the Nation. *See* Order of April 12, 1999 [doc.#478]. While the Court certainly could further expand the record of this case and convene hearings to address other possible instances of misconduct beyond those upon which the April 12th Order is based, the Court, in the interests of the Presidency and in order to bring this matter to a speedy closure, declines to do so.

FN14. The Court notes that OIC was given authorization to investigate the President's conduct in this case prior to the January 17th deposition.

FN15. Likewise, the Court will disallow fees and expenses associated with responding to OIC subpoenas.

e.

The Court will allow fees and expenses associated with preparing to depose Ms. Lewinsky, attempting to substantiate the Lewinsky allegations, responding to her motion for a protective order, and traveling to Washington, D.C. for her deposition. The President acknowledges that fees and expenses incurred by plaintiff in seeking Lewinsky evidence subsequent to the actions upon which the Court's April 12th Order is based and prior to the decision by this Court to exclude that evidence from trial fall within the Court's Order. The Court agrees and, therefore, RCFP is entitled to $12,316.00 for fees and expenses associated with these activities, and TRI is entitled to $5,545.85 for its fees and expenses.

f.

The Court will allow fees and expenses associated with the motion for summary judgment and the subsequent appeal to the Eighth Circuit following this Court's grant of summary judgment to defendants, but only to the extent that plaintiff's brief on summary judgment and her appeal dealt with the President's falsehoods and alleged obstruction of justice concerning Monica Lewinsky. Unlike the matter involving this Court's evidentiary ruling excluding the Lewinsky evidence from trial, this Court has no difficulty in concluding that these fees and expenses would not have been incurred had the President not willfully failed to obey this Court's discovery Orders. [FN16] Accordingly, RCFP is entitled ***729** to $27,687.37 for fees and expenses associated with the motion for summary judgment and subsequent appeal, and TRI is entitled to $802.50 for its fees and expenses.

FN16. RCFP and TRI have included many general time entries with respect to the work spent on the motion for summary judgment and subsequent appeal that do not specify which hours were spent for which activities. The Court recognizes, however, that plaintiff's counsel were not anticipating at the time they recorded these time entries that they would later be asked to segregate the time spent as a result of the President's misconduct. Accordingly, rather than disallow these time entries in their entirety, the Court has reduced the total number of hours claimed in these time entries to a number of hours that this Court deems reasonable for work spent on that compensable portion of the time entry. Thus, for example, where a time entry claims compensation for, say, six hours spent drafting a response to the President's motion for summary judgment, the Court, notwithstanding RCFP's assertion that all of the time entries dealt with the President's falsehoods and alleged obstruction of justice, has reduced the hours claimed for that activity to a number that this Court would deem reasonable for time spent only on that portion of the response dealing with the President's falsehoods and alleged obstruction of justice concerning Ms. Lewinsky. While this process might not be

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exact, the Court believes it represents a fair and expeditious solution to determining the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders.

g.

The Court will allow fees and expenses associated with researching contempt and spoilation issues following the President's August 17, 1998 televised Address to the Nation, and in responding to this Court's request for a transcript of the President's deposition. Although RCFP never filed a motion for contempt following the President's August 17th Address, the fees and expenses associated with these activities would have been unnecessary had the President followed this Court's discovery Orders. Accordingly, RCFP is entitled to $22,235.25 for fees and expenses associated with these activities. [FN17]

FN17. TRI does not appear to claim any fees and expenses with respect to these activities.

h.

Finally, the Court finds that RCFP is entitled to $12,527.50 for fees and expenses associated with reviewing and responding to this Court's April 12th Order requiring plaintiff's former counsel to submit a statement of reasonable fees and expenses. [FN18]

FN18. Again, TRI does not appear to claim any fees and expenses with respect to these activities.

III.

The Court takes no pleasure in imposing contempt sanctions against this Nation's President and, no doubt like many others, grows weary of this matter. Nevertheless, the Court has determined that the President deliberately violated this Court's discovery Orders, thereby undermining the integrity of the judicial system, and that sanctions must be imposed to redress the President's misconduct and to deter others who might consider emulating the President's misconduct. *See Jones v. Clinton,* 36 F.Supp.2d at 1131-32, 1134. Accordingly, the Court hereby orders the following:

1. The President shall deposit the sum of $1,202.00 into the registry of this Court within sixty (60) days of the date of entry of this Memorandum and Order.

2. The President shall pay RCFP the sum of $79,999.12 within sixty (60) days of the date of entry of this Memorandum and Order.

3. The President shall pay TRI the sum of $9,484.93 within sixty (60) days of the date of entry of this Memorandum and Order.

IT IS SO ORDERED this 29th day of July 1999.

57 F.Supp.2d 719

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United States District Court,
E.D. Arkansas,
Western Division.

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson, Defendants.

No. LR-C-94-290.

April 12, 1999.

Following settlement of former state employee's sexual harassment action against President and the United States Senate's acquittal of President of Articles of Impeachment, the District Court sua sponte raised issue of President's contempt. The District Court, Susan Webber Wright, Chief Judge, held that: (1) court had power to hold President in civil contempt; (2) President was in contempt of court; and (3) President was liable for plaintiff's reasonable expenses caused by President's willful failure to obey discovery orders and expenses incurred by court in traveling to President's tainted deposition.

Judgment entered.

West Headnotes

[1] Damages 50.10
115k50.10

Under Arkansas law, tort of outrage requires that plaintiff prove that: (1) defendant intended to inflict emotional distress or knew or should have known that emotional distress was likely result of his conduct; (2) conduct was extreme and outrageous and utterly intolerable in civilized community; (3) defendant's conduct was cause of plaintiff's distress; and (4) plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it.

[2] United States 26
393k26

There was no constitutional barrier to federal district court holding President of the United States in civil contempt of court and imposing sanctions for his actions undertaken in his role as civil litigant in civil case that did not relate to his duties as President, but rather involved actions taken by President before his term of office began.

[3] United States 26
393k26

Necessary incident of federal court's power to determine legality of President's unofficial conduct includes power to address unofficial conduct which threatens integrity of proceedings before court.

[4] Federal Civil Procedure 2757
170Ak2757

Federal courts have inherent power necessary to exercise all other powers, including ability to dismiss actions, assess attorney fees, and to impose monetary or other sanctions appropriate for conduct which abuses judicial process.

[5] Contempt 70
93k70

In selecting contempt sanctions, court must use least possible power adequate to end proposed.

[6] Federal Civil Procedure 2756.1
170Ak2756.1

Federal district court has power to conduct independent investigation in order to determine whether it has been victim of fraud.

[7] Contempt 44
93k44

Court may make adjudication of contempt and impose contempt sanction even after action in which contempt arose has been terminated.

[8] Federal Civil Procedure 2827
170Ak2827

Court generally may act sua sponte in imposing sanctions.

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[9] Contempt 30
93k30

Federal court has inherent power to protect its integrity and prevent abuses of judicial process by holding party in contempt and imposing sanctions for violations of court's orders.

[10] Contempt 60(3)
93k60(3)

To hold party in civil contempt, clear and convincing evidence must show that court fashioned clear and reasonably specific order, and that party violated that order.

[11] Federal Civil Procedure 1278
170Ak1278

When discovery order has been violated which could be adequately sanctioned under rules, court ordinarily should turn to its inherent powers to impose sanctions only as secondary measure. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[12] Federal Civil Procedure 1456
170Ak1456

President of United States violated court orders allowing plaintiff who alleged that she was sexually harassed by President to discover information regarding any individuals with whom President had or proposed to have sexual relations and who were state or federal employees, by giving false, misleading, and evasive deposition testimony regarding whether he had ever been alone with or engaged in sexual relations with certain White House intern, and violation amounted to civil contempt. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.

[13] Federal Civil Procedure 1452
170Ak1452

[13] Federal Civil Procedure 1538
170Ak1538

Production order is generally needed to trigger rule authorizing discovery sanctions. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[14] Federal Civil Procedure 1452
170Ak1452

[14] Federal Civil Procedure 1538
170Ak1538

Federal district court's order ruling on plaintiff's motion to compel President to respond to interrogatories and court's oral ruling at President's deposition requiring President to answer questions posed by plaintiff's counsel were production orders, as required for application of rule authorizing discovery sanctions. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[15] Federal Civil Procedure 1453
170Ak1453

[15] Federal Civil Procedure 1539
170Ak1539

President's violation of court's discovery orders in sexual harassment suit warranted imposition of civil contempt sanctions, requiring President to pay plaintiff any reasonable expenses, including attorney fees, caused by President's willful failure to obey discovery orders and to reimburse district court for its expenses in traveling to Washington D.C. at President's request to preside at his tainted deposition. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.

[16] Attorney and Client 32(3)
45k32(3)

Arkansas Supreme Court has exclusive jurisdiction over conduct of Arkansas attorneys and has power to make rules regulating practice of law and professional conduct of attorneys of law. Ark.Const.Amend. No. 28.

[17] Federal Civil Procedure 2756.1
170Ak2756.1

Federal district court's referral to State Supreme Court Committee on Professional Conduct of matter regarding alleged professional misconduct of President of United States, who was licensed attorney in Arkansas, did not relinquish federal district court's jurisdiction to address matter and issue sanctions.

[18] Federal Civil Procedure 2756.1
170Ak2756.1

Authority of federal district court to sanction attorneys is independent of, and in addition to, power of review possessed by state disciplinary authorities.

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[19] Federal Civil Procedure 1456
170Ak1456

[19] Federal Civil Procedure 1542
170Ak1542

District court would utilize summary civil contempt procedures, rather than criminal contempt proceeding, to address United States President's failure to disclose his relationship with White House intern as ordered by court; court could expeditiously resolve matter and prevent any double jeopardy issues from arising by focusing on undisputed matters that were contained in record. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.; Fed.Rules Cr.Proc.Rule 42, 18 U.S.C.A.

***1119** Gregory S. Kitterman, Little Rock, AR, for Paula Corbin Jones.

Kathlyn Graves, Wright, Lindsey & Jennings, Little Rock, AR, Stephen C. Engstrom, ***1120** Wilson, Engstrom, Corum & Coulter, Little Rock, AR, Robert S. Bennett, Skadden, Arps, Slate, Meaghan & Flom, Washington, DC, for William Jefferson Clinton.

Bill W. Bristow, Seay & Bristow, Jonesboro, AR, Robert Batton, Municipal Judge, Jacksonville, AR, for Danny Ferguson.

MEMORANDUM OPINION AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

What began as a civil lawsuit against the President of the United States for alleged sexual harassment eventually resulted in an impeachment trial of the President in the United States Senate on two Articles of Impeachment for his actions during the course of this lawsuit and a related criminal investigation being conducted by the Office of the Independent Counsel ("OIC"). The civil lawsuit was settled while on appeal from this Court's decision granting summary judgment to defendants and the Senate acquitted the President of both Articles of Impeachment. Those proceedings having concluded, the Court now addresses the issue of contempt on the part of the President first raised in footnote five of the Court's Memorandum and Order of September 1, 1998. *See Jones v. Clinton*, 12 F.Supp.2d 931, 938 n. 5 (E.D.Ark.1998). For the reasons that follow, the Court hereby adjudges the President to be in contempt of court for his willful failure to obey this Court's discovery Orders.

I.

[1] Plaintiff Paula Corbin Jones filed this lawsuit seeking civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged actions beginning with an incident in a hotel suite in Little Rock, Arkansas on May 8, 1991, when President Clinton was Governor of the State of Arkansas. Plaintiff was working as a state employee on the day in question and claimed that Ferguson persuaded her to leave the registration desk she was staffing and visit Governor Clinton in a business suite at the hotel. She claimed the Governor made boorish and offensive sexual advances that she rejected, [FN1] and that her superiors at work subsequently dealt with her in a hostile and rude manner and punished her in a tangible way for rejecting those advances. [FN2]

FN1. Although the President's alleged conduct was certainly "outrageous" as that term is commonly understood, plaintiff failed to establish that the President's alleged conduct met the requirements of the *tort of outrage* which, under Arkansas law, requires that a plaintiff prove that: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized community; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it. *See Jones v. Clinton*, 990 F.Supp. 657, 676 (E.D.Ark.1998).

FN2. Additional detail on the factual background of this case can be found in the Court's Memorandum Opinion and Order of April 1, 1998. *See Jones v. Clinton*, 990 F.Supp. 657.

Plaintiff's complaint was filed on May 6, 1994. On August 10, 1994, the President filed a motion to dismiss the complaint without prejudice on grounds of immunity and to toll any statutes of limitations until he is no longer President, thereby allowing plaintiff to refile her suit after he is out of office. On

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December 28, 1994, this Court denied the President's motion to dismiss on immunity grounds and ruled that discovery in the case could proceed, but concluded that any trial should be stayed until such time as the President is no longer in office. *See* *Jones v. Clinton*, 869 F.Supp. 690 (E.D.Ark.1994). Both parties appealed. On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed this Court's Order denying the President's motion to dismiss on immunity grounds and allowing discovery to proceed, but reversed this Court's Order staying the trial of this matter for the duration of President Clinton's term in office. *See* *Jones v. Clinton*, 72 F.3d 1354 (8th Cir.1996). The President subsequently filed a petition for certiorari with the Supreme Court of the United States, which was granted, *see* *Clinton v. Jones*, 518 U.S. 1016, 116 S.Ct. 2545, 135 L.Ed.2d 1066 (1996), and on May 27, 1997, the Supreme Court handed down an opinion holding that there is no constitutional impediment to allowing plaintiff's ***1121** case to proceed while the President is in office. *See* *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

Following remand of the case to this Court, the President, joined by Ferguson, filed a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). By Memorandum Opinion and Order dated August 22, 1997, this Court granted in part and denied in part the President's motion. *See* *Jones v. Clinton*, 974 F.Supp. 712 (E.D.Ark.1997). The Court dismissed plaintiff's defamation claim against the President, dismissed her due process claim for deprivation of a property interest in her State employment, and dismissed her due process claims for deprivation of a liberty interest based on false imprisonment and injury to reputation, but concluded the remaining claims in plaintiff's complaint stated viable causes of action. *See* *id.* The Court thereupon issued a Scheduling Order setting forth a deadline of January 30, 1998, for the completion of discovery and the filing of motions.

Discovery in this case proved to be contentious and time-consuming. During the course of discovery, over 50 motions were filed, the Court entered some 30 Orders, [FN3] and telephone conferences were held on an almost weekly basis to address various disputes and resolve motions. In addition, the Court traveled to Washington, D.C. at the request of the President to preside over his civil deposition on January 17, 1998. It was at a hearing on January 12, 1998, to address issues surrounding the President's deposition and at the deposition itself that the Court first learned of Monica Lewinsky, a former White House intern and employee, and her alleged involvement in this case.

FN3. Included in these Orders was a Confidentiality Order on Consent of all Parties. The Court entered this Order on October 30, 1997, due to the salacious nature of much of the discovery and the media's intense and often inaccurate coverage of this case. *See* *Jones v. Clinton*, 12 F.Supp.2d at 935-36. The Court took this action to help insure that a fair and impartial jury could be selected in the event this matter went to trial by limiting prejudcial pre-trial publicity and to protect the interests of the various Jane Does in maintaining privacy. *Id.* at 936-37.

At his deposition, the President was questioned extensively about his relationship with Ms. Lewinsky, this Court having previously ruled on December 11, 1997, that plaintiff was "entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame [of May 8, 1986, up to the present] state or federal employees." *See* December 11, 1997 Order, at 3. [FN4] Based on that ruling, this Court overruled objections during the deposition from the President's attorney, Robert S. Bennett, that questions concerning Ms. Lewinsky were inappropriate areas of inquiry and required that such questions be answered by the President. *See* Pres. Depo. at 53-55, 66, 78. Having been so ordered, the President testified in response to questioning from plaintiff's counsel and his own attorney that he had no recollection of having ever been alone with Ms. Lewinsky and he denied that he had engaged in an "extramarital sexual affair," in "sexual relations," or in a "sexual relationship" with Ms. Lewinsky. [FN5] *Id.* at 52-53, 56-59, 78, 204. An affidavit submitted by Ms. Lewinsky in support of her motion to quash a subpoena for her testimony and made a part of the record of the President's deposition likewise denied that she and the President had engaged in a sexual relationship. ***1122** When asked by Mr. Bennett whether Ms. Lewinsky's affidavit denying a sexual relationship with the President was a "true and accurate statement," the President answered, "That is absolutely true." Pres. Depo. at 204.

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FN4. The Court's December 11th Order ruled on plaintiff's motion to compel responses to her second set of interrogatories, granting in part and denying in part the motion. However, the Court also addressed in the Order the President's upcoming deposition and concluded that for purposes of the deposition, not only was plaintiff entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees, but that the Court would possibly permit plaintiff to question the President with regard to matters that fell outside that time frame if she had an independent basis for doing so. *See* December 11, 1997 Order, at 4.

FN5. At the request of plaintiff's counsel, the term "sexual relations" was defined as follows during the deposition: "For the purposes of this deposition, a person engages in 'sexual relations' when the person knowingly engages in or causes ... contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person.... 'Contact' means intentional touching, either directly or through clothing." *See* Depo. Ex. 1.

The President's denial of a sexual relationship with Ms. Lewinsky at his deposition was consistent with his answer of "None" in response to plaintiff's Interrogatory No. 10, which requested the name of each and every federal employee with whom he had sexual relations when he was President of the United States. *See* Pres. Clinton's Resp. to Pl.'s Second Set of Int. at 5; Pres. Clinton's Supp. Resp. to Pl.'s Second Set of Int. at 2. This interrogatory was answered on December 23, 1997, after this Court had entered its December 11th Order ruling on plaintiff's motion to compel responses to her second set of interrogatories and finding that plaintiff was entitled to such information. See December 11, 1997 Order, at 3, 6. [FN6]

FN6. The President's answer to this interrogatory was made a part of the record of the President's deposition. There was no formal definition of the term "sexual relations" with respect to plaintiff's interrogatory or the President's answer.

One day prior to the President's deposition, and unknown to this Court, the Special Division of the United States Court of Appeals for the District of Columbia Circuit granted a request from Attorney General Janet Reno to expand the jurisdiction of Independent Counsel Kenneth W. Starr and entered an Order authorizing the Independent Counsel "to investigate ... whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton.*" *In re Madison Guaranty Savings & Loan Ass'n,* Div. No. 94-I, 1998 WL 472444 (D.D.C. Jan. 16, 1998). A short time later, the President's relationship with Ms. Lewinsky and OIC's investigation of that relationship broke in the national media.

On the afternoon of January 28, 1998, with less than 48 hours remaining in the period for conducting discovery, OIC filed with this Court a motion for limited intervention and stay of discovery in this civil case. OIC argued that counsel for plaintiff were deliberately shadowing the grand jury's investigation of the matter involving Ms. Lewinsky and that "the pending criminal investigation is of such gravity and paramount importance that this Court would do a disservice to the Nation if it were to permit the unfettered-- and extraordinarily aggressive--discovery efforts currently underway to proceed unabated." Motion of OIC, at 2-3. This Court convened a telephone conference the following morning and, after eliciting the views of the parties and OIC, entered an Order granting in part and denying in part OIC's motion. *See Jones v. Clinton,* 993 F.Supp. 1217 (E.D.Ark.1998) (Order denying plaintiff's motion for reconsideration). In essence, the Court concluded that the parties could continue with discovery in the short time that remained of those matters not involving Ms. Lewinsky, but that any discovery that did involve Ms. Lewinsky would not be allowed to go forward and, further, that any evidence concerning Ms. Lewinsky would be excluded from the trial of this matter. *Id.* at 1218-19. [FN7]

FN7. In so ruling, and contrary to numerous assertions, this Court did not rule that

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evidence of the Lewinsky matter was irrelevant or immaterial to the issues in plaintiff's case. Indeed, the Court specifically acknowledged that such evidence might have been relevant to plaintiff's case and, as she argued, "might possibly have helped her establish, among other things, intent, absence of mistake, motive, and habit on the part of the President." 993 F.Supp. at 1222 (citing Fed.R.Evid. 404(b), 406). At the time, however, the Court anticipated that the President and Ms. Lewinsky would both deny a sexual relationship and that plaintiff would attempt to rebut their denials with extrinsic evidence that could be inadmissable under Fed.R.Evid. 608(b). To stay discovery so that plaintiff could explore such evidence would have required extensive additional delay. In that regard, this Court made the decision to disallow discovery as to Ms. Lewinsky and to exclude evidence concerning her from trial, not because the Court considered such evidence to be irrelevant or immaterial, but because its admission would frustrate the timely resolution of this case and cause undue expense and delay, the substantial interests of the Presidency militated against any undue delay that would be occasioned by allowing plaintiff to pursue the Lewinsky matter, and the government's criminal proceedings (to which this Court generally must yield in civil matters) could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *Id.* at 1219-20. The Court noted that evidence of the Lewinsky matter, even assuming it to be very favorable to plaintiff, was "not essential to the *core issues* in this case of whether plaintiff *herself* was the victim of *quid pro quo* sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress." *Id.* at 1222 (emphasis in original).

***1123** Following the completion of discovery, the President and Ferguson each filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56. By Memorandum Opinion and Order dated April 1, 1998, this Court granted the President's and Ferguson's motions for summary judgment and entered judgment dismissing this case. *See Jones v. Clinton,* 990 F.Supp. 657 (E.D.Ark.1998). The Court concluded that there were no genuine issues for trial in this case and that defendants were entitled to judgment as a matter of law with respect to plaintiff's claims that she was subjected to *quid pro quo* and hostile work environment sexual harassment, that the defendants conspired to deprive her of her civil rights, and that she suffered emotional distress so severe in nature that no reasonable person could be expected to endure it. *Id.* The plaintiff appealed. Meanwhile, OIC's investigation of the President continued.

On August 17, 1998, the President appeared before a grand jury in Washington, D.C., as part of OIC's criminal investigation and testified about his relationship with Ms. Lewinsky and his actions during this civil lawsuit. That evening, the President discussed the matter in a televised address to the Nation. In his address, the President stated that although his answers at his January 17th deposition were "legally accurate," he did not volunteer information and that he did indeed have a relationship with Ms. Lewinsky that was inappropriate and wrong. *See* Pres. Addr., 1998 WL 14394084. The President acknowledged misleading people, in part because the questions posed to him "were being asked in a politically inspired lawsuit which has since been dismissed," and because he "had real and serious concerns about an Independent Counsel investigation that began with private business dealings 20 years ago...." *Id.* It was during the President's televised address that the Court first learned the President may be in contempt. *See Jones v. Clinton,* 12 F.Supp.2d at 938 n. 5. [FN8]

FN8. In addressing the President's objections to the unsealing of the transcript of his deposition, this Court stated in footnote five as follows: "Although the Court has concerns about the nature of the President's January 17th, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt."

On September 9, 1998, the Independent Counsel, having concluded there was substantial and credible information that the President committed acts that may constitute grounds for impeachment, submitted his findings from his investigation of the Lewinsky matter to the United States House of Representatives

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pursuant to 28 U.S.C. § 595(c). The House of Representatives thereupon commenced impeachment proceedings, ultimately passing two Articles of Impeachment against the President, one alleging perjury in his August 17th testimony before the grand jury and the other alleging obstruction of justice in this civil case. The matter then proceeded to trial in the United States Senate.

On November 13, 1998, while the impeachment proceedings were taking place in the House of Representatives, the plaintiff reached an out-of court settlement for $850,000.00 and withdrew her appeal of this Court's April 1st decision granting summary judgment to defendants. *See Jones v. Clinton,* 161 F.3d 528 (8th Cir.1998). Thereafter, on February 12, 1999, the Senate acquitted the President of both Articles of Impeachment.

Following the acquittal of the President, this Court held a telephone conference on February 16, 1999, to address the remaining issues before this Court, including the issue of attorney's fees and the issue of whether the President should be subject to contempt proceedings. *See* February 16, 1999 Order, at 2. [FN9] The Court explained to the parties that it had previously declined to address the issue of the President's contempt due to the fact that this case was on appeal at the time and Congress was conducting impeachment proceedings against the President. *See id.* at 3. [FN10] The Court explained that had this ***1124** Court's grant of summary judgment to defendants been reversed and the case remanded, there would have been available certain sanctions that are unavailable otherwise. *Id.* The Court further explained that even though this litigation begat the controversy that was the subject of the President's impeachment trial in the Senate, the interests protected by the contempt authority of the Court are significantly different from the interests protected by the impeachment process. *Id.* In essence, stated the Court, the contempt authority protects the integrity of a court's proceedings and provides a means of enforcement of its orders, while impeachment is a constitutional process in which the proper inquiry is the President's fitness to serve in office. *Id.* Given this distinction, the Court determined that it should defer to Congress and its constitutional duties prior to this Court addressing the President's conduct in this civil case.

FN9. On March 4, 1999, an agreement was reached as to allocation of the $850,000.00 settlement, thus rendering moot all issues concerning attorneys' fees. *See* March 4, 1999 Order.

FN10. After becoming aware of the President's possible contempt on August 17th, the Court learned through published reports that the House of Representatives may conduct proceedings to consider evidence of possible impeachable offenses against the President (proceedings of which in fact began on September 9th with the submission of the Independent Counsel's report to the House of Representatives). Those reports, and the fact that the matter was on appeal at the time, led to this Court's decision as stated in footnote five of the Court's September 1st Memorandum and Order to defer addressing at that time the matter of the President's contempt.

As the Court explained to the parties, however, it is now time to address the issue of the President's contempt as all other proceedings that heretofore have precluded this Court from addressing the issue have concluded. *Id.* [FN11] Accordingly, it is that issue to which the Court now turns.

FN11. The Court informed the parties that a member of the House Managers who prosecuted the impeachment trial against the President contacted the undersigned in early January of this year to let me know that he was considering calling me as a witness for the impeachment trial. I objected and was never subpoenaed or otherwise asked to testify. Later, a representative of the House Managers requested and, with my permission, received an affidavit concerning the President's deposition from my law clerk, Barry W. Ward, who attended the President's deposition. The Court allowed the parties an opportunity to request that I recuse from deciding the remaining issues in this case because of the House Manager's contact with me or because of Mr. Ward's affidavit, but none did so.

II.

[2] The threshold question in this matter is whether a President of the United States can be held in civil

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contempt of court and thereby sanctioned. Although federal courts possess the authority to impose sanctions for civil contempt pursuant to the Federal Rules of Civil Procedure and their inherent authority, *see* Fed.R.Civ.P. 37(b)(2) (providing that a court may enter an order treating as a contempt of court the failure of a party to obey the court's orders); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (noting that the power to punish for contempts is inherent in all courts), no court has ever held a President in contempt of court. *See Franklin v. Massachusetts*, 505 U.S. 788, 827, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (Scalia, J., concurring). *See also United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (noting that the issue of whether a President can be cited for contempt could engender protracted litigation). Nevertheless, this Court has considered the matter and finds no constitutional barrier to holding the President in civil contempt of court in this case and imposing sanctions.

This lawsuit involved private actions allegedly taken by the President before his term of office began, and the contumacious conduct on the part of the President was undertaken in his role as a litigant in a civil case and did not relate to his duties as President. Both the Court of Appeals for the Eighth Circuit and the Supreme Court held in this case that the Constitution does not place the President's unofficial conduct beyond judicial scrutiny. In so ruling, the Court of Appeals specifically rejected the President's argument that "because a federal court will control the litigation, the Third Branch necessarily will interfere with the Executive Branch through the court's scheduling orders *and its powers to issue contempt citations and sanctions.* " *Jones v. Clinton*, 72 F.3d at 1361 (emphasis added). Likewise, the Supreme Court explained that " '[it] is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States,' " ***1125** *Clinton v. Jones*, 520 U.S. at 705, 117 S.Ct. 1636 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)), and noted that "[i]f the judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct." *Id.*

[3][4] Although not expressly addressed by the Supreme Court, a necessary incident of the power to determine the legality of the President's unofficial conduct includes the power to address unofficial conduct which threatens the integrity of the proceedings before the court. The sanctioning provisions in the Federal Rules of Civil Procedure vest federal courts with the power to address conduct which threatens the integrity of the judicial process, *see, e.g.*, Fed.R.Civ.P. 11 (providing that sanctions may be appropriate where a claim is presented for an improper purpose) and 37 (sanctions for failure to cooperate with discovery), and the existence in the federal courts of an inherent power " 'necessary to the exercise of all others' " is likewise firmly established and "include[s] the ability to dismiss actions, assess attorneys' fees, and to impose monetary or other sanctions appropriate 'for conduct which abuses the judicial process.' " *Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir.) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812); *Chambers*, 501 U.S. at 44-45, 111 S.Ct. 2123), *cert. denied*, 510 U.S. 828, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993). *See also Spallone v. United States*, 493 U.S. 265, 276, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) (noting the axiom that courts have inherent power to enforce compliance with their lawful orders through civil contempt).

[5] Certainly the Court recognizes that significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties. *See Clinton v. Jones*, 520 U.S. at 708, 117 S.Ct. 1636. No such sanctions will be imposed, however. Throughout the history of this case, this Court has attempted to apply the law to the President in the same manner as it would apply the law to any other litigant, keeping in mind the "high respect that is owed to the office of the Chief Executive" and the Supreme Court's directive that such respect "inform the conduct of the entire proceeding...." *See id.* at 707, 117 S.Ct. 1636. In that regard, this Court will not impose greater sanctions against the President for his contumacious conduct in this case than would be imposed against any other litigant and member of the bar who engaged in similar misconduct. Moreover, this Court is aware that it is obliged to use the least possible power adequate to the end proposed in selecting contempt sanctions, *see Spallone*, 493 U.S. at 276, 110 S.Ct. 625, and will base the imposition of sanctions on a principle of proportionality, recognizing that the President's contumacious conduct occurred in a case that was both dismissed on summary judgment as lacking in merit and in which the plaintiff was made whole, having agreed to a settlement in excess of that prayed for in her

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complaint.

[6][7][8] In sum, the Court finds that the power to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process. [FN12] That established, the Court now turns to the central issue of the President's contempt.

> FN12. Every district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers,* 501 U.S. at 44, 111 S.Ct. 2123. Although this civil action has been terminated, "[a] court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). In addition, a court generally may act *sua sponte* in imposing sanctions. *Chambers,* 501 U.S. at 42 n. 8, 111 S.Ct. 2123.

A.

[9][10][11] As noted earlier, a federal district court has two principal sources of authority for finding a party in civil contempt of its discovery orders: Fed.R.Civ.P. 37(b)(2) and the court's inherent power. *See, e.g., *1126Webb v. District of Columbia,* 146 F.3d 964, 971 (D.C.Cir.1998); *Jones v. Thompson,* 996 F.2d 261, 264 (10th Cir.1993); *Cobell v. Babbitt,* 37 F.Supp.2d 6, 9 (D.D.C.1999). Pursuant to Rule 37(b)(2), a court may hold a party in contempt of court for failing to obey an order to provide discovery and may impose several specific, nonexclusive sanctions to address such misconduct, "the parameters of the available measures being 'such orders in regard to the failure as are just.' " *Cobell,* 37 F.Supp.2d at 9-10 (quoting Fed.R.Civ.P. 37(b)(2)). However, when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap. *Shepherd v. American Broadcasting Companies, Inc.,* 62 F.3d 1469, 1474 (D.C.Cir.1995) (citing *Chambers,* 501 U.S. at 46, 111 S.Ct. 2123). In this regard, a court has the "inherent power to protect [its] integrity and prevent abuses of the judicial process" by holding a party in contempt and imposing sanctions for violations of the court's orders. *Cobell,* 37 F.Supp.2d at 9 (quoting *Webb,* 146 F.3d at 971). When the source of the civil contempt is a failure to comply with a discovery order, the analysis and available remedies under Fed.R.Civ.P. 37 and the court's inherent power are essentially the same. *Id.* at 9-10. *Cf. Dillon v. Nissan Motor Corp.,* 986 F.2d 263, 268-69 (8th Cir.1993) (noting the comparability of sanctions under Fed.R.Civ.P. 37 and sanctions under the court's inherent power); *Gates Rubber Co. v. Bando Chem. Ind., Ltd.,* 167 F.R.D. 90, 107 (D.Co.1996) (noting that "Rule 37 and the inherent powers of the court may be different routes by which to reach a result, but the analysis of the criteria along the way can be exactly the same"). Two requirements must be met before a party may be held in civil contempt: the court must have fashioned an Order that is clear and reasonably specific, and the party must have violated that Order. *Cobell,* 37 F.Supp.2d at 9 (citations omitted). Generally, these two requirements must be shown by clear and convincing evidence. *Id.* Although these requirements apply whether the court is proceeding under Fed.R.Civ.P. 37 or its inherent power, *see id.* a court ordinarily should turn to its inherent powers only as a secondary measure when a discovery order has been violated. *Id.* at 10. *See also Chambers,* 501 U.S. at 50, 111 S.Ct. 2123 (noting that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power"). Accordingly, this Court addresses the President's contumacious conduct under Fed.R.Civ.P. 37(b)(2), finding that rule sufficient in its scope to redress the abuse of the judicial process that occurred in this case.

1.

Fed.R.Civ.P. 37(b)(2) sets forth a broad range of sanctions that a district court may impose upon parties for their failure to comply with the court's discovery orders. The Rule provides that if a party fails to obey an order to provide or permit discovery, the court "may make such orders in regard to the failure as are just" and, among others, impose the following sanctions: (1) the court may order that the matters regarding which the order was made or any other designated facts be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) the court may refuse to allow the disobedient party to support or oppose designated claims or defenses, or prohibit that party from introducing designated matters in evidence; (3) the court may strike any pleadings or

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parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render a judgment of default against the disobedient party; and (4) the court may, in lieu of any of the foregoing sanctions or in addition thereto, enter an order treating as a contempt of court the failure of the party to obey the court's orders. Fed.R.Civ.P. 37(b)(2). In addition to those sanctions, the Rule provides:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order ... to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially ***1127** justified or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(b)(2).

a.

[12][13][14] On two separate occasions, this Court ruled in clear and reasonably specific terms that plaintiff was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. *See* December 11, 1997 Order, at 3; Pres. Depo. at 53-55, 66, 78. [FN13] Notwithstanding these Orders, the record demonstrates by clear and convincing evidence that the President responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process. The President acknowledged as much in his public admission that he "misled people" because, among other things, the questions posed to him "were being asked in a politically inspired lawsuit, which has since been dismissed." Although there are a number of aspects of the President's conduct in this case that might be characterized as contemptuous, the Court addresses at this time only those matters which no reasonable person would seriously dispute were in violation of this Court's discovery Orders and which do not require a hearing, namely the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky. [FN14]

FN13. As a general matter, a production order is needed to trigger Rule 37(b). *See, e.g., Shepherd,* 62 F.3d at 1474; *Kropp v. Ziebarth,* 557 F.2d 142, 146 n. 7 (8th Cir.1977). Here, the Court's December 11th Order ruling on plaintiff's motion to compel and addressing aspects of the President's deposition constitutes a production order within the meaning of Rule 37(b), as does the Court's oral ruling at the President's deposition that the Lewinsky matter was, consistent with the December 11th Order, a proper subject of inquiry, and that the President was required to answer such questions from plaintiff's counsel. *Cf. Jones v. Uris Sales Corp.,* 373 F.2d 644, 647-48 (2nd Cir.1967) (proceedings before district court during which the judge issued an oral order requiring compliance with the subpoena provided a proper basis for Rule 37(b)(2) sanction).

FN14. Other possible contumacious conduct on the part of the President that the Court does not address at this time includes his possible violation of this Court's admonition not to discuss the deposition with anyone. At the conclusion of the President's deposition, the Court stated as follows: "Before he leaves, I want to remind him, and everyone else in the room, that this case is subject to a Protective Order ... and therefore all parties present, including Secret Service agents, videographers, court reporters and the witness are not to say anything whatsoever about the questions they were asked, the substance of the deposition, the length of it, objections, recess, any details, whether the President did well or did not do well, whether he is credible or not credible, [or] whether he admitted or denied any specific allegations...." Pres. Depo. at 212-13. This admonition was an oral reiteration of the Court's October 30th Confidentiality Order on Consent of all Parties and constituted an expansion of the Order to persons present at the deposition who would otherwise not have been subject to its provisions. While the President may have violated the Confidentiality Order, *see, e.g.,* Pres. GJ Test. at 54-58 (wherein the President testified that he approached his secretary the day after the deposition in order to ascertain information regarding some of the questions that were asked of him by plaintiff's counsel), the record in this case suggests that there were violations of the Confidentiality Order attributable to other individuals within the jurisdiction of

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this Court as well. Ascertaining whether the President or other individuals violated the Confidentiality Order--either with respect to the deposition or otherwise--would require hearings and the taking of evidence. For reasons to be stated, the Court determines that such hearings are not in the best interests of the President or this Court. *See* Section II(B), *infra.*

i.

At his January 17th deposition, the President responded to a series of questions regarding whether he and Ms. Lewinsky had ever been alone together by maintaining that he could not recall being alone with her. The President testified as follows:

Q. Mr. President, before the break, we were talking about Monica Lewinsky. At any time were you and Monica Lewinsky together alone in the Oval Office?

A. I don't recall, but as I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. I typically worked some on the weekends. Sometimes they'd bring me things on the weekends. She--it seems to me she brought things to me once or twice on the weekends. In that case, whatever ***1128** time she would be in there, drop it off, exchange a few words and go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do some work on one of the days of the weekends in the afternoon.

Q. So I understand, your testimony is that it was possible, then, that you were alone with her, but you have no specific recollection of that ever happening?

A. Yes, that's correct. It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there. That's possible.

* * * * * *

Q. Do you ever recall walking with Monica Lewinsky down the hallway from the Oval Office to your private kitchen there in the White House?

A.... [M]y recollection is that, that at some point during the government shutdown, when Ms. Lewinsky was still an intern but was working the chief staff's office because all the employees had to go home, that she was back there with a pizza that she brought to me and to others. I do not believe she was there alone, however. I don't think she was. And my recollection is that on a couple of occasions after that she was there but my secretary, Betty Currie, was there with her. She and Betty are friends. That's my, that's my recollection. And I have no other recollection of that.

* * * * * *

Q. At any time were you and Monica Lewinsky alone in the hallway between the Oval office and this kitchen area?

A. I don't believe so, unless we were walking back to the back dining room with the pizza. I just, I don't remember. I don't believe we were alone in the hallway, no.

* * * * * *

Q. At any time have you and Monica Lewinsky ever been alone together in any room in the White House?

A. I think I testified to that earlier. I think that there is a, it is--I have no specific recollection, but it seems to me that she was on duty on a couple of occasions working for the legislative affairs office and brought me some things to sign, something on the weekend. That's--I have a general memory of that.

Pres. Depo. at 52-53, 56-59.

At his August 17th appearance before the grand jury, the President directly contradicted his deposition testimony by acknowledging that he had indeed been alone with Ms. Lewinsky on a number of occasions during which they engaged in "inappropriate intimate contact." Pres. GJ Test. at 9-10. He stated he also was alone with her "from time to time" when there was no "improper contact" occurring. *Id.* at 134. The President began his testimony by reading a statement which reads in part as follows:

When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse. They did not constitute sexual relations as I understood that term to be defined at my January 17th, 1998 deposition. But they did involve inappropriate intimate contact. These inappropriate encounters ended, at my insistence, in early 1997.

Id. at 9-10. The President then testified as follows in response to questions regarding whether he and Ms. Lewinsky had ever been alone together:

Q. Let me ask you, Mr. President, you indicate in your statement that you were alone with Ms. Lewinsky. Is that right?

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A. Yes, sir.
Q. How many times were you alone with Ms. Lewinsky?
A. Let me begin with the correct answer. I don't know for sure. But if you would like me to give an educated guess, I will do that, but I do not know for sure. And I will tell you what I think, based on what I remember. But I can't be held to a specific time, because I don't have records of all of it.
Q. How many times do you think?
A. Well, there are two different periods here. There's the period when she worked in the White House until April of '96. And ***1129** then there's the period when she came back to visit me from February of '97 until late December '97.
Based on our records--let's start with the records, where we have the best records and the closest in time. Based on our records, between February and December, it appears to me that at least I could have seen her approximately nine times. Although I do not believe I saw her quite that many times, at least it could have happened.
There were--we think there were nine or 10 times when she was in, in the White House when I was in the Oval Office when I could have seen her. I do not believe I saw her that many times, but I could have. * * * I remember specifically, I have a specific recollection of two times. I don't remember when they were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone.
And I am frankly quite sure--although I have no specific memory, I am quite sure there were a couple of more times, probably two times more, three times more. That's what I would say. That's what I can remember. But I do not remember when they were, or at what time of day they were, or what the facts were. But I have a general memory that would say I certainly saw her more than twice during that period between January and April of 1996, when she worked there.

Id. at 30-32. In addition, the President recalled a specific meeting on December 28, 1997, less than three weeks prior to his January 17th deposition, at which he and Ms. Lewinsky were alone together. *Id.* at 34. The President went on to acknowledge that he tried to conceal his "inappropriate intimate relationship" with Ms. Lewinsky by not telling anyone about the relationship and by "do[ing] it where nobody else was looking at it," stating that he would have to be an "exhibitionist not to have tried to exclude everyone else." *Id.* at 38, 54. The President testified as follows in response to a question regarding how many times that occurred:

Well, if you go back to my statement, I remember there were a few times in '96, I can't say with any certainty. There was once in early '97. After she left the White House, I do not believe I ever had any inappropriate contact with her in the rest of '96. There was one occasion in '97 when, regrettably, that we were alone together for a few minutes, I think about 20 minutes, and there was inappropriate contact. And after that, to the best of my memory and belief, it did not occur again.

Id. at 38-39.

ii.

With respect to whether he and Ms. Lewinsky had engaged in sexual relations, the President testified at his January 17th deposition as follows:

Q. Did you have an extramarital sexual affair with Monica Lewinsky?
A. No.
Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
A. It's certainly not the truth. It would not be the truth.
Q. I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?
Mr. Bennett: I object because I don't know that he can remember -
The Court: Well, it's real short. He can--I will permit the question and you may show the witness definition number one.
A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

Pres. Depo. at 78.

The President confirmed these denials in response to questioning from his attorney regarding Ms. Lewinsky's affidavit and whether he and Ms. Lewinsky ever had a "sexual relationship":

Q. In paragraph eight of her affidavit, she says this, "I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship." ***1130** Is that a true and accurate statement as far as you know it?
A. That is absolutely true.

Id. at 204.

Consistent with his denial at his deposition of a sexual relationship with Ms. Lewinsky, the President

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had earlier answered "None" in response to plaintiff's Interrogatory No. 10, which stated as follows:

> Please state the name, address, and telephone number of each and every [federal employee] with whom you had sexual relations when you [were] ... President of the United States.

See Pres. Clinton's Resp. to Pl.'s Second Set of Int. at 5; Pres. Clinton's Supp. Resp. to Pl.'s Second Set of Int. at 2. As previously noted, this interrogatory was answered without regard to a formal definition of the term "sexual relations" after this Court had entered its December 11th Order ruling that plaintiff was entitled to such information.

At his August 17th grand jury appearance, the President directly contradicted his deposition testimony by acknowledging "inappropriate intimate contact" with Ms. Lewinsky on numerous occasions. Pres. GJ Test. at 9-10, 38-39, 54. When asked by a grand juror what he meant by "inappropriate contact," the President stated, "What I meant was, and what they can infer that I meant was, that I did things that were--when I was alone with her, that were inappropriate and wrong." *Id.* at 92-93. The President repeatedly refused to provide answers to questions regarding specific sexual activity between himself and Ms. Lewinsky, instead referring to his statement acknowledging "inappropriate intimate contact" and stating that "sexual relations" as defined by himself and "most ordinary Americans" means, for the most part, only intercourse. *Id.* at 12, 22-24, 92-94, 102-03, 110-11, 139, 168. Nevertheless, the President, while claiming that he did not engage in intercourse with Ms. Lewinsky and did not engage in any other contact with her that would fall within the definition of "sexual relations" used at his deposition, acknowledged that the nature of his "inappropriate intimate contact" with Ms. Lewinsky was such that he would have been an "exhibitionist" had it been viewed by others. *Id.* at 10, 12, 54, 96. The President went on to state that he did not believe he violated the definition of sexual relations he was given "by directly touching those parts of her body with the intent to arouse or gratify." *Id.* at 139, 168.

b.

It is difficult to construe the President's sworn statements in this civil lawsuit concerning his relationship with Ms. Lewinsky as anything other than a willful refusal to obey this Court's discovery Orders. Given the President's admission that he was misleading with regard to the questions being posed to him and the clarity with which his falsehoods are revealed by the record, [FN15] there is no need to engage in an extended analysis of the President's sworn statements in this lawsuit. Simply put, the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false, notwithstanding tortured definitions and interpretations of the term "sexual relations." [FN16]

FN15. Indeed, even though the President's testimony at his civil deposition was entirely consistent with Ms. Lewinsky's affidavit denying "sexual relations" between herself and the President, the President's attorney later notified this Court pursuant to his professional responsibility that portions of Ms. Lewinsky's affidavit were reported to be "misleading and not true" and that this Court should not rely on Ms. Lewinsky's affidavit or remarks of counsel characterizing that affidavit. *See* Letter of September 30, 1998. The President's testimony at his deposition that Ms. Lewinsky's denial in her affidavit of a "sexual relationship" between them was "absolutely true" likewise was "misleading and not true."

FN16. The President seemed to accept OIC's characterization of his improper contact with Ms. Lewinsky as "some kind of sex" and as a "physically intimate" relationship. Pres. GJ Test. at 123, 136. Although the President did not disclose any specific sexual acts between himself and Ms. Lewinsky, he did state that oral sex performed by Ms. Lewinsky on himself would not constitute "sexual relations" as that term was defined by plaintiff at his deposition. *Id.* at 93, 100, 102, 104- 05, 151-52, 168. It appears the President is asserting that Ms. Lewinsky could be having sex with him while, at the same time, he was not having sex with her.

Certainly the President's aggravation with what he considered a "politically inspired ***1131** lawsuit" may well have been justified, although the Court makes no findings in that regard. Even assuming that to be so, however, his recourse for the filing of an improper claim against him was to move for the imposition of sanctions against plaintiff. *See, e.g.,* *Clinton v. Jones,* 520 U.S. at 708-09, 117 S.Ct. 1636 (noting the

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availability of sanctions for litigation directed at the President in his unofficial capacity for purposes of political gain or harassment). The President could, for example, have moved for sanctions pursuant to Fed.R.Civ.P. 11 if, as he intimated in his address to the Nation, he was convinced that plaintiff's lawsuit was presented for an improper purpose and included claims "based on 'allegations and other factual contentions [lacking] evidentiary support' or unlikely to prove well-grounded after reasonable investigation." *Id.* at 709 n. 42, 117 S.Ct. 1636 (quoting Fed.R.Civ.P. 11(b)(1), (3)). The President never challenged the legitimacy of plaintiff's lawsuit by filing a motion pursuant to Rule 11, however, and it simply is not acceptable to employ deceptions and falsehoods in an attempt to obstruct the judicial process, understandable as his aggravation with plaintiff's lawsuit may have been. "A lawsuit is not a contest in concealment, and the discovery process was established so that 'either party may compel the other to disgorge whatever facts he has in his possession.' " *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 130 (5th Cir.1968) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

In sum, the record leaves no doubt that the President violated this Court's discovery Orders regarding disclosure of information deemed by this Court to be relevant to plaintiff's lawsuit. The Court therefore adjudges the President to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2).

2.

[15] The Court now turns to the issue of appropriate sanctions. Several of the sanctions contemplated by Fed.R.Civ.P. 37(b)(2) are unavailable to this Court as the underlying lawsuit has been terminated. The Court cannot, for example, order that the matters upon which the President gave false statements be taken as established, nor can the Court render a default judgment against the President, both of which the Court would have considered had this Court's grant of summary judgment to defendants been reversed and remanded. Moreover, as the Court earlier noted, the determination of appropriate sanctions must take into account that this case was dismissed on summary judgment as lacking in merit--a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky [FN17]--and that plaintiff was made whole, having settled this case for an amount in excess of that prayed for in her complaint. Nevertheless, the President's contumacious conduct in this case, coming as it did from a member of the bar and the chief law enforcement officer of this Nation, was without justification and undermined the integrity of the judicial system. "[O]ur adversary system depends on a most jealous safeguarding of truth and candor," *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 463 (4th Cir.1993), and "[t]he system can provide no harbor for clever devises to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." *Id.* at 457-58. Sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who, having observed the President's televised address to the Nation in which his defiance of this Court's discovery Orders was revealed, might themselves consider emulating the President of the United States by willfully violating discovery orders of this and other courts, thereby engaging in conduct that undermines the integrity of the judicial system. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (noting that "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to ***1132** flout other discovery orders of other district courts" if contumacious conduct was left unaddressed) (per curiam); *Roadway Express v. Piper*, 447 U.S. 752, 763-64, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (noting that Rule 37 sanctions must be applied diligently, both to penalize those whose conduct warrants sanctions and to deter those who might be tempted to sanctionable conduct in the absence of such a deterrent). Accordingly, the Court imposes the following sanctions:

> FN17. The Court noted that whether other women may have been subjected to workplace harassment does not change the fact that plaintiff has failed to demonstrate that she "*herself* was the victim of alleged *quid pro quo* or hostile work environment sexual harassment, [that] the President and Ferguson conspired to deprive *her* of her civil rights, or [that] *she* suffered emotional distress so severe in nature that no reasonable person could be expected to endure it." *Jones v. Clinton*, 990 F.Supp. at 678-79 (emphasis in original).

First, the President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders.

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Plaintiff's former counsel are directed to submit to this Court a detailed statement of any expenses and attorney's fees incurred in connection with this matter within twenty (20) days of the date of entry of this Memorandum Opinion and Order.

Second, the President shall reimburse this Court its expenses in traveling to Washington, D.C. at his request to preside over his tainted deposition. The Court therefore will direct that the President deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. [FN18]

FN18. The undersigned and Mr. Ward departed Little Rock, Arkansas for Washington, D.C. on January 16, 1998, and returned to Little Rock on January 18, 1998. Total expenses were incurred in accordance with the rules and regulations set forth in the *Guide to Judiciary Policies and Procedures,* Volumes I and III. In this respect, air fare was $216.00 per ticket and subsistence was $374.00 each. Remaining expenses totaled $ 22.00.

[16][17][18] In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any disciplinary action it deems appropriate for the President's possible violation of the Model Rules of Professional Conduct. [FN19] Relevant to this case, Rule 8.4 of the Model Rules provides that it is professional misconduct for a lawyer to, among other things, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or to "engage in conduct that is prejudicial to the administration of justice." The President's conduct as discussed previously arguably falls within the rubric of Rule 8.4 and involves matters that the Committee on Professional Conduct may deem appropriate for disciplinary action. [FN20]

FN19. The Committee on Professional Conduct acts as an arm of the Arkansas Supreme Court in matters relating to the supervision and licensing of Arkansas attorneys, of which the President is one, and that Court has exclusive jurisdiction over the conduct of Arkansas attorneys and has the power to make rules regulating the practice of law and the professional conduct of attorneys of law. *See* Neal v. Wilson, 920 F.Supp. 976, 987- 88 (W.D.Ark.1996), *aff'd,* 112 F.3d 351 (8th Cir.1997). In that regard, the Arkansas Supreme Court has adopted the American Bar Association's Model Rules of Professional Conduct as the State of Arkansas's code of professional responsibility. *See In re Arkansas Bar Ass'n,* 287 Ark. 495, 702 S.W.2d 326 (1985).

FN20. In referring this matter to the Committee on Professional Conduct, this Court does not thereby relinquish jurisdiction to address the matter itself and issue sanctions. Rather than having been displaced, the authority of this Court to sanction attorneys is independent of, and in addition to, the power of review possessed by the Committee on Professional Conduct. *See* Harlan v. Lewis, 982 F.2d at 1261 (noting that "[a] district judge must have the power to deal with conduct of attorneys in litigation without delegating this responsibility to state disciplinary mechanisms," and that "[s]tate disciplinary authorities may act in such cases if they choose, but this does not limit the power or responsibility of the district court").

B.

[19] In addressing only the President's sworn statements concerning his relationship with Ms. Lewinsky, this Court is fully aware that the President may have engaged in other contumacious conduct warranting the imposition of sanctions. *See* n. 13, *supra.* The Court determines, however, that this matter can be summarily addressed by focusing on those specific instances of the President's misconduct with which there is no factual dispute and which primarily occurred directly before the Court. While hearings might have been necessary were there an issue regarding the President's willfulness in failing to obey the Court's discovery Orders, the circumstances surrounding the President's failure to disclose his relationship with Ms. Lewinsky as ordered by this Court are undisputed and contained within the record. The President has essentially admitted that he intended to mislead plaintiff in her efforts *1133 at gaining information deemed by this Court to be relevant, and hearings would not assist the Court in addressing the President's misconduct

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regarding his failure to obey this Court's discovery Orders. Thus, no possible prejudice to the President can result from this Court utilizing summary procedures rather than convening hearings. Indeed, it is in the best interests of the President and this Court that this matter be expeditiously resolved. Hearings to address other possible instances of misconduct on the part of the President could possibly be quite extensive and would require the taking of evidence, including, if necessary, testimony from witnesses.

This is not to say that the Court considers other instances of possible Presidential misconduct in this case unworthy of the Court's attention. In fact, the Court fully considered addressing all of the President's possible misconduct pursuant to the criminal contempt provisions set forth in Fed.R.Crim.P. 42, but determines that such action is not necessary at this time for two primary reasons. [FN21]

> FN21. Under 18 U.S.C. § 401, federal courts possess the power to impose sanctions for criminal contempt committed in or near the presence of the court. When invoking this power, courts must follow one of two procedures set forth in Fed.R.Crim.P. 42. Pursuant to Rule 42(a), a court may punish direct contempt, *i.e.*, that contempt which occurs within the "actual presence" of the court, in a summary fashion. For conduct beyond the scope of Rule 42(a), such as indirect contempts that occur out of court, Rule 42(b) requires such other criminal contempts to be prosecuted upon notice and a hearing. *See Schleper v. Ford Motor Co.*, 585 F.2d 1367, 1372 (8th Cir.1978).

First, the summary adjudication procedures delineated in Rule 42(a) are most likely inapplicable in this case since the power summarily to convict and punish for contempt of court under that rule generally "rests on the proposition that a hearing to determine guilt of contempt is not necessary when contumacious conduct occurs in the actual presence of a judge who observes it, and when immediate action is required to preserve order in the proceedings and appropriate respect for the tribunal." *Smith v. Smith*, 145 F.3d 335, 342- 43 (5th Cir.1998) (quoting *In re Chaplain*, 621 F.2d 1272, 1275 (4th Cir.), *cert. denied*, 449 U.S. 834, 101 S.Ct. 106, 66 L.Ed.2d 40 (1980)). Here, the Court was not aware of any of the instances of the President's possible misconduct until well after this case had been dismissed on summary judgment, and immediate action was not required to preserve order in the proceedings. *See International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 832-33, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (noting that "[s]ummary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts," and that "[if] a court delays punishing a direct contempt until the completion of trial, for example, due process requires that the contemnor's rights to notice and a hearing be respected").

Second, resolving the matter expeditiously and without hearings pursuant to Rule 42(b) is in the best interests of both the President and this Court. Were the Court to delve into conduct which arguably was contumacious but which is not fully apparent from the record, this Court, as previously noted, would be required to hold hearings and take evidence, including, if necessary, testimony from witnesses. Such hearings could possibly last several weeks and might require referral of the matter to a prosecutor. *See United States v. Neal*, 101 F.3d 993, 997-98 (4th Cir.1996) (noting that when contumacious conduct occurs out of the presence of the court or does not interfere with ongoing proceedings immediately before the court, contempt power does not permit a judge to dispense with a prosecutor altogether and fill the role himself). Because much of the President's conduct has been or is being investigated by OIC, and in order to prevent any potential double jeopardy issues from arising, *see, e.g., United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (noting that protection of the double jeopardy clause applies to nonsummary criminal contempt prosecutions), this Court will forego proceeding under Fed.R.Crim.P. 42 and address the President's contempt by focusing on those undisputed matters that are capable of being summarily addressed pursuant to Fed.R.Civ.P. 37(b)(2). *See Bagwell*, 512 U.S. at 833, 114 S.Ct. 2552 (noting that certain indirect contempts are appropriate ***1134** for imposition through civil proceedings, including contempts impeding the courts ability to adjudicate the proceedings before it and those contempts involving discrete, readily ascertainable acts). [FN22]

> FN22. In electing to proceed under Fed.R.Civ.P. 37(b)(2), the Court also avoids any constitutional issues that might arise

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from addressing the matter in a criminal context. As noted in Section II of this Memorandum Opinion and Order, the Supreme Court essentially resolved the question of whether a President can be cited for civil contempt by holding, in a *civil* proceeding, that the Constitution does not place the President's unofficial conduct beyond judicial scrutiny. *See Clinton v. Jones,* 520 U.S. at 705, 117 S.Ct. 1636. Criminal contempt, however, "is a *crime* in the ordinary sense," *see Bagwell,* 512 U.S. at 826, 114 S.Ct. 2552 (quoting *Bloom v. Illinois,* 391 U.S. 194, 201, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)) (emphasis added), and the question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case. Such issues could engender protracted litigation, *see United States v. Nixon,* 418 U.S. at 692, 94 S.Ct. 3090, and consume the resources of both the President and this Court.

Nevertheless, the Court will convene a hearing at the request of the President should he desire an opportunity in which to demonstrate why he is not in civil contempt of court, why sanctions should not be imposed, or why the Court is otherwise in error in proceeding in the manner in which it has. In that regard, the Court will stay enforcement of this Memorandum Opinion and Order for thirty (30) days from the date of its entry in which to give the President an opportunity to request a hearing or file a notice of appeal. In addition, the Court will entertain any legitimate and reasonable requests from the President for extensions of time in which to address the matter. Should the President fail to request a hearing or file a notice of appeal within the time allowed, the Court will enter an Order setting forth the time and manner by which the President is to comply with the sanctions herein imposed. Should the President succeed in obtaining a hearing, however, whether at his request or by way of appeal, any interests in an expeditious resolution of this matter and in sparing the President and this Court the turmoil of evidentiary hearings will no longer be a consideration. Accordingly, the President is hereby put on notice that this Court will take evidence at any future hearings--including, if necessary, testimony from witnesses--on all matters concerning the President's conduct in this lawsuit which may warrant a finding of civil contempt. [FN23]

FN23. The scheduling of any hearings would, of course, be considerate to the President's schedule and his conducting the duties of his office. The Court is particularly mindful of the crisis in Yugoslavia and recognizes that the President must not be distracted in his attention to that situation or other issues of immense importance.

III.

The Court takes no pleasure whatsoever in holding this Nation's President in contempt of court and is acutely aware, as was the Supreme Court, that the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." *Clinton v. Jones,* 520 U.S. at 697, 117 S.Ct. 1636. As noted earlier, however, this Court has attempted throughout this case to apply the law to the President in the same manner as it would apply the law to any other litigant, keeping in mind the duties and status of the Presidency and the "high respect" that is to be accorded his office. *See Clinton v. Jones,* 520 U.S. at 707, 117 S.Ct. 1636. In that regard, there simply is no escaping the fact that the President deliberately violated this Court's discovery Orders and thereby undermined the integrity of the judicial system. Sanctions must be imposed, not only to redress the President's misconduct, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. Accordingly, the Court adjudges the President to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2) for his willful failure to obey this Court's discovery Orders and hereby orders the following:

1. The President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders. Plaintiff's former counsel are directed to submit to this Court a detailed statement of any expenses and attorney's ***1135** fees incurred in connection with this matter within twenty (20) days of the date of entry of this Memorandum Opinion and Order.

2. The President shall deposit into the registry of this Court the sum of $ 1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over his

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January 17th deposition.

In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any action it deems appropriate.

The Court will stay enforcement of this Memorandum Opinion and Order for thirty (30) days from the date of its entry in order to allow the President an opportunity to request a hearing or file a notice of appeal. Should the President fail to timely request a hearing or file a notice of appeal, the Court will enter an Order setting forth the time and manner by which the President is to comply with the sanctions herein imposed.

IT IS SO ORDERED this 12th day of April 1999.

36 F.Supp.2d 1118, 79 Fair Empl.Prac.Cas. (BNA) 1561

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C

Supreme Court of the United States

In the Matter of DISCIPLINE OF Bill CLINTON.

No. D-2270.

Oct. 1, 2001.

Bill Clinton, of New York, New York, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

122 S.Ct. 36 (Mem), 534 U.S. 806, 151 L.Ed.2d 254, 1 Cal. Daily Op. Serv. 8542

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III. Elian Gonzales

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

- Mr. Kavanaugh was asked to represent, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court.

- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he were returned.

  - ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States… may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

  - ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

  > "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

  > "The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate

human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

No. 99-2079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ELIAN GONZALEZ, A MINOR, BY AND THROUGH LAZARO GONZALEZ, AS NEXT FRIEND, OR ALTERNATIVELY, AS TEMPORARY LEGAL CUSTODIAN,

Petitioner,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 26, 2000

Attorneys for Petitioner

QUESTIONS PRESENTED

1. The Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a)(1), provides that "any alien" may "apply" for asylum and receive an asylum hearing. In contrast to the Eleventh Circuit's ruling in this case, at least five other courts of appeals – the D.C., Second, Third, Fourth, and Fifth Circuits – have held that this statute creates a liberty or property interest in petitioning for asylum that cannot be deprived without due process. The first question presented is whether an alien has a liberty or property interest in petitioning for asylum that cannot be deprived without due process – namely, a hearing and an opportunity to be heard.

2. The Refugee Act of 1980 provides, with exceptions not applicable here, that "any alien" may "apply" for asylum and receive an asylum hearing. *See* 8 U.S.C. § 1158(a)(1). Elian Gonzalez is an alien and has applied for asylum. The 1998 INS *Guidelines for Children's Asylum Claims* recognize the right of minor aliens to apply for asylum and receive asylum hearings. The second question presented is whether the INS's refusal to grant Elian Gonzalez an asylum hearing violates the plain meaning of 8 U.S.C. § 1158(a)(1).

3. The court of appeals accorded *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), deference to opinion letters and an informal memorandum of the INS. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court held that *Chevron* deference does not extend to informal agency action such as opinion letters. Contrary to the Eleventh Circuit, the D.C. Circuit recently suggested that *Christensen* may preclude courts from extending *Chevron* deference to opinion letters issued in an informal adjudication. The third question presented is whether *Chevron* deference applies to opinion letters issued in an informal adjudication.

4. The fourth question presented is whether the court of appeals otherwise erred in upholding the INS's decision not to hold an asylum hearing for Elian Gonzalez. *See infra* n.11.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this Petition are as listed in the caption of the case, with the following parties as additional Respondents:

Doris Meissner, Commissioner, United States Immigration and Naturalization Service;

Robert Wallis, District Director, United States Immigration and Naturalization Service;

United States Immigration and Naturalization Service;

United States Department of Justice.

Pursuant to Supreme Court Rule 29.6, Petitioner states that the Petitioner is not a nongovernmental corporation and therefore has nothing to disclose under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ... iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 6

JURISDICTION 6

PROVISIONS INVOLVED 6

STATEMENT OF THE CASE 7

A. Background 7

B. The INS's Administrative Process 7

C. Litigation in the District Court 9

D. Litigation in the Eleventh Circuit 10

REASONS FOR GRANTING THE WRIT 13

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER ALIENS SEEKING ASYLUM HAVE PROCEDURAL DUE PROCESS RIGHTS, AND THE ELEVENTH CIRCUIT'S DECISION DENYING SUCH RIGHTS IS ERRONEOUS 13

A. The Circuits Are Divided On the Question Whether the Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Creates Procedural Due Process Rights 14

B. Even in the Absence of Any Statutorily Created Interest, Refugees in the United States Who Apply for Asylum Possess an *Inherent* Liberty Interest in Seeking Asylum That Is a Protected Interest Under the Due Process Clause 19

C. The INS's Procedures in This Case Did Not Satisfy Due Process 21

II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AN ASYLUM HEARING FOR "ANY ALIEN" WHO "APPLIES" FOR ASYLUM, AND ELIAN GONZALEZ IS AN ALIEN WHO HAS APPLIED FOR ASYLUM 24

III. CONTRARY TO THIS COURT'S RECENT DECISION IN *CHRISTENSEN*, THE COURT OF APPEALS ERRONEOUSLY EXTENDED *CHEVRON* DEFERENCE TO THE INS's OPINION LETTERS AND MEMORANDUM 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page(s)**

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 26

Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection, 208 F.3d 1 (1st Cir. 2000) 29

Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984) 17

Bates v. United States, 522 U.S. 23 (1997) 26

Bishop v. Wood, 426 U.S. 341 (1976) 15

Board of Regents v. Roth, 408 U.S. 564 (1972) 13, 20

Califonia Dental Ass'n v. FTC, 526 U.S. 756 (1999) 24

Central Bank of Denver v. First Interstate Bank, 511 U.S. 1164 (1994) 27

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 120 S. Ct. 1655 (2000) ..... *passim*

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 24

DeSilva v. DiLeonardi, 125 F.3d 1110 (7th Cir. 1997) 18

Doherty v. INS, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992) 31

EEOC v. Arabian-American Oil Co., 499 U.S. 244 (1991) 30

FDIC v. Meyer, 510 U.S. 471 (1994) 25

Goldberg v. Kelly, 397 U.S. 254 (1970) 13, 15

Goss v. Lopez, 419 U.S. 565 (1975) 15

Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982) 18

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341 U.S. 123 (1951) 20

Kentucky Dep't of Corrections v. Thompson,
490 U.S. 454 (1989) 13

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865 F.2d 328 (1989) 16

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92 F.3d 195 (3d Cir. 1996) 16

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424 U.S. 319 (1976) 22

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463 U.S. 29 (1983) 30

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442 U.S. 584 (1979) 3, 22

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428 U.S. 52 (1976) 23

Plyler v. Doe,
457 U.S. 202 (1982) 17, 20

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774 F.2d 731 (7th Cir. 1985) 18

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507 U.S. 292 (1993) 22

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464 U.S. 16 (1983) 26

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184 F.3d 337 (4th Cir. 1999) 3, 16

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345 U.S. 206 (1953) 2, 19

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 19

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 13, 22

United States v. Johnson,
120 S.Ct. 1114 (2000) 25

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489 U.S. 235 (1989) 24

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445 U.S. 480 (1980) 13

Yiu Sing Chen v. Sava,
708 F.2d 869 (2d Cir. 1983) 17

Statutes

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28 U.S.C. § 1254(1) 6

28 U.S.C. § 1291 6

28 U.S.C. § 1331 6

28 U.S.C. § 1361 6

28 U.S.C. § 1346 6

28 U.S.C. § 2201 6

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INTRODUCTION

This petition raises three primary legal issues that boil down to a single straightforward question: Can the INS deprive an alien child of his statutory and constitutional right to apply for asylum without conducting *any* hearing of *any* kind – or *even interviewing the child himself*? The INS contends that it is not required to conduct any hearing, or even interview an alien child seeking asylum, if the child's parent wants to return the child to his former country. The INS advances this position even though a hearing or interview, if conducted, necessarily could reveal evidence that the child faces a risk of persecution in returning to his former country.

The INS's procedural approach is dramatically inconsistent with the Due Process Clause of the Fifth Amendment (which requires a hearing before a "person," including a child, is deprived of a liberty interest) and with the Refugee Act of 1980 (which expressly provides that "any alien," which on its face includes an alien child, may "apply" for asylum and receive an asylum hearing). *See* 8 U.S.C. § 1158(a).

As the Lawyers' Committee for Human Rights explained in its amicus brief in the court of appeals, moreover, "[t]he implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus Brief of Lawyers' Committee for Human Rights, at 19. The Lawyers' Committee pointed out the example of a young Togolese girl who applied for asylum, but whose parents "demand[ed] that the Attorney General dismiss their daughter's asylum claim [so] that she be returned to Togo" – where "she would be forced" to endure severe physical abuse. *Id.* In such a case, as the Lawyers' Committee explained, the INS's position would not require an asylum hearing (or even an interview of the girl).[2]

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[2] The INS may try to discount such examples, but it cannot. Without a hearing or even an interview, the INS cannot plausibly claim

(continued...)

In this case, no one can say for sure what would happen at the asylum hearing – whether INS immigration officials would find that Elian Gonzalez has a risk of persecution if he returns to Cuba. The court of appeals frankly acknowledged that "*we expect that a reasonable adjudicator might find that [Elian's] fears were 'well founded.*'" Pet. App. 30a-31a n.26 (emphasis added). In any event, predictions and debate about the possible *substantive* outcome of the asylum hearing are speculative and misplaced, for the question here concerns the *process* that the INS must employ to make the asylum determination.

In an immigration case decided nearly a half-century ago, Justice Jackson posed the question at the heart of this case: "[D]oes it matter what the procedure is?" *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (opinion of Jackson, J., joined by Frankfurter, J.). He responded to his own question that "[o]nly the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty." *Id.*

This case is about "procedural fairness and regularity": the procedures to which alien children seeking asylum are entitled under the Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a), and under the Fifth Amendment to the United States Constitution. Our petition raises three primary questions.

First, the *constitutional* question raised by the petition is whether aliens seeking asylum have due process rights in

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[2] (...continued)
that it will discover the facts that could demonstrate a well founded fear of persecution. That is precisely why a hearing is central to the notion of procedural due process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

connection with an asylum application. Relying on its 16-year-old precedent in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit held that aliens seeking admission to this country (including aliens seeking asylum) have *no due process rights whatsoever.* In the Eleventh Circuit's view, such aliens possess neither an *inherent* liberty interest under the Due Process Clause in seeking asylum, nor an interest created by the Refugee Act of 1980. The D.C., Second, Third, Fourth, and Fifth Circuits have reached the opposite conclusion, holding that the Refugee Act of 1980 gives aliens seeking asylum an interest in petitioning for asylum that thereby triggers at least the basic due process rights. *See, e.g., Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum v. Fano*, 427 U.S. 215 (1976)] envision.").

The circuit split on the due process issue is deep, it is recognized by scholars and commentators, and it is ripe for resolution by this Court. The issue is important to the rights of aliens (including the thousands of alien children in this country) and to the Government's administration of the asylum process. And resolution of the due process question is critical to the outcome of this case: If aliens seeking asylum have due process rights, then alien children seeking asylum are, of course, also entitled to due process in seeking asylum (which, at a minimum, would entail an interview and some kind of hearing for a child asylum applicant). *See, e.g., Parham v. J.R*, 442 U.S. 584 (1979); *cf.* INS *Guidelines for Children's Asylum Claims* 19 (Dec. 10, 1998) (discussing how to interview minor children who apply for asylum and may "lack . . . maturity").

Second, apart from any requirements dictated by the Constitution, the Refugee Act of 1980 grants alien children who apply for asylum the right to an asylum hearing. The plain language of the statute requires an asylum hearing for "any alien" who has "applied" for asylum. The statutory language is clear and unambiguous. An alien child is plainly included in the

broad term "any alien," and Elian Gonzalez has in fact applied for asylum under any plausible definition of the term. The INS's Guidelines themselves recognize, moreover, that even very young children may apply for asylum. The INS's contrary interpretation adopted in this case flouts the statutory text and is therefore not entitled to *Chevron* deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987); *id.* at 453 (Scalia, J.) ("INS's interpretation is clearly inconsistent with the plain meaning" and thus entitled to no deference).

While the plain language is controlling, it bears emphasis that the plain language is fully consistent with sound policy for resolution of asylum applications submitted by minors. Indeed, before this case, the INS's *Guidelines* and the INS's most closely analogous regulation provided that alien children applying for asylum should receive an asylum hearing. *See* 8 C.F.R. § 236.3(f). In short, "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents. So, too . . . do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

Third, the petition raises an important additional question regarding the scope of *Chevron* deference. The court of appeals erroneously extended *Chevron* deference to the INS's interpretation although it was set forth in an internal INS memorandum and three opinion letters. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court squarely held that *Chevron* deference does not apply to an agency interpretation of a statute that is "contained in an opinion letter," as opposed to an interpretation "arrived at after, for example, a *formal* adjudication or notice-and-comment rulemaking." *Id.* at 1662 (emphasis added). The Court added – unequivocally – that "[i]nterpretations such as those in opinion letters, . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* The court of appeals

in this case thus erroneously accorded *Chevron* deference to precisely the kinds of *informal* agency interpretations (opinion letters in an "informal adjudication," *see* Pet. App. 147a-48a) that, under *Christensen*, are not entitled to *Chevron* deference.

Even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* may prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000). While the divergence is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring issue warrants review and clarification. That is particularly true in this case given that the court of appeals' *Chevron* error undeniably affected its resolution of this case. *See, e.g.*, Pet App. 13a-26a, 32a.

In an ordinary case, then, certiorari would be warranted based on (i) the importance of these legal issues, (ii) the deep circuit split on the due process issue, (iii) the court of appeals' clear error in failing to heed the plain language of the statute, (iv) the court's error applying *Christensen*, and (v) the confusion in the lower courts on the *Chevron/Christensen* issue.

This is no ordinary case, to be sure, and that raises the question whether this is an appropriate case for this Court to resolve those important and recurring legal issues. We think so. Indeed, even absent the important legal issues at the heart of this petition, there is plainly a national need that *this individual case* be decided *correctly* and *be decided by this Court*. The extraordinary importance of *this individual case* – to the United States (with its myriad congressional denunciations of Cuba's gross human rights abuses), to the Cuban-American community, to the American citizenry more broadly, and to the Gonzalez family – is too obvious to require extended discussion. That factor alone justifies this Court's review. Only this Court has

the constitutional stature and moral authority to render the final word that will stand the test of time in this divisive, difficult, and nationally momentous matter.

The petition should be granted. The importance of this case – particularly when coupled with the significance of the underlying constitutional and statutory issues, the circuit splits and confusion, and the court of appeals' errors – demonstrates the compelling need for this Court's review.

In order to ensure expedition in this case, we respectfully request that the Court grant certiorari during the summer. If so, counsel for petitioner will work with counsel for respondents to devise and propose an expedited briefing and argument schedule that would result in oral argument, if possible, no later than October 2000.

OPINIONS BELOW

The district court's opinion is reported at 86 F. Supp.2d 1167 and is reprinted at Pet. App. 47a-108a.

The Eleventh Circuit's opinion granting an injunction pending appeal is unreported and is reprinted at Pet. App. 33a-46a. The Eleventh Circuit's opinion on the merits, which is not yet reported, is reprinted at Pet. App. 1a-32a. The Eleventh Circuit's opinion denying the petition for rehearing is unreported and is reprinted at Pet. App. 146a-150a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361, and 2201. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set forth in an addendum at the end of this brief.

STATEMENT OF THE CASE

A. Background

Petitioner Elian Gonzalez was born in December 1993 to Elizabeth Brotons and Juan Miguel Gonzalez. In the pre-dawn hours of November 22, 1999, when Elian was nearly six years old, his mother and twelve other Cuban nationals boarded a small motorboat and attempted to reach the United States. The next day, the boat capsized in windy conditions and rough seas. Eleven of the passengers died, including Elian's mother. Elian survived by clinging to an inner tube. Pet. App. 3a.

Two days later, two fisherman rescued Elian. Elian later was taken into INS custody and brought to a hospital in Miami to recuperate from his ordeal. Elian's great uncle, Lazaro Gonzalez, contacted the INS and visited the boy in the hospital. Upon Elian's release, the INS paroled Elian into his great uncle's care, and Elian went to live with his great uncle. Pet. App. 3a-4a.

Soon thereafter, Lazaro Gonzalez filed an asylum application on Elian's behalf, which was followed by a similar application signed by Elian himself. Lazaro Gonzalez filed a third application after a Florida state court judge, in a now-dissolved order, granted Lazaro temporary custody of Elian. Each application stated that petitioner Elian Gonzalez "is afraid to return to Cuba" on account of a well-founded fear of persecution. For support, the applications stated that many members of Elian's family have been persecuted by the Castro regime by being imprisoned and harassed. The applications also stated that Elian, if returned to Cuba, would be used as a propaganda tool for the Castro government and would be involuntarily indoctrinated. Pet. App. 4a.

B. The INS's Administrative Process

Through Cuban officials, Juan Miguel Gonzalez eventually expressed his views that he wanted his son returned

to him. In December 1999, INS officials conducted interviews of Juan Miguel Gonzalez and of Lazaro Gonzalez (with Lazaro's daughter Marisleysis). *The INS never interviewed Elian Gonzalez about the asylum applications, whether he had a fear of persecution, or whether there was a possible conflict of interest between him and his father.* Pet. App. 5a.

On January 5, 2000, the Executive Associate Commissioner of the INS for Field Operations sent virtually identical letters to Lazaro Gonzalez and his attorneys. *See* Pet. App. 132a-135a, 136a-139a. The letters stated that INS Commissioner Doris Meissner had concluded that the asylum applications filed by and on behalf of Elian Gonzalez were void and required no further consideration. The letters further stated that "we have determined that Mr. [Juan Miguel] Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters." *Id.* at 133a, 137a.

One week later, on January 12, 2000, Attorney General Janet Reno sent a letter to Lazaro Gonzalez's attorneys. *See* Pet. App. 140a-145a. The Attorney General stated that she was unaware of "any basis for reversing Commissioner Meissner's decision that Juan Gonzalez – Elian's father – has the sole authority to speak for his son on immigration matters." *Id.* at 141a.

After this litigation commenced, the INS produced a copy of a legal memorandum written by the General Counsel of the INS for Commissioner Meissner (and signed "approved" by the Commissioner). Pet. App. 109a-131a. The memorandum states that "*a child's right to seek asylum independent of his parents is well established* . . . . While Section 208(a)(2) of the

INA describes certain exceptions to this right, those exceptions are not applicable to this case. *There are no age-based restrictions on applying for asylum.* Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances *even a very young child* may be considered for a grant of asylum." *Id.* at 123a-124a (emphasis added).

Despite this analysis, the memorandum concluded that "[t]he INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature." Pet. App. 131a.

C. Litigation in the District Court

On January 19, 2000, petitioner filed a complaint in the United States District Court for the Southern District of Florida for injunctive and mandamus relief to compel the INS to adjudicate his asylum application as required by the Refugee Act of 1980 and the INS's implementing regulations. The complaint contended that the INS's actions in the case had violated Elian's constitutional, statutory, and regulatory rights. Pet. App. 60a-61a.

On January 27, 2000, the INS moved to dismiss, and on March 21, 2000, the district court granted the INS's motion. Citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the district court concluded that petitioner had no due process rights in connection with the asylum process. Pet. App. 90a. The decision in *Jean* had held that, in connection with the asylum process, excludable aliens have no *inherent* due process rights, nor any procedural due process rights created as a result of the statutory entitlement to seek asylum provided by 8 U.S.C. § 1158(a)(1).

As to the statutory claim, the district court acknowledged that 8 U.S.C. § 1158(a)(1) states that "[a]ny alien . . . may apply for asylum." Pet. App. 92a-93a. Although

recognizing that Congress has carved out specific rules for children in other immigration statutes (but not here) and that Congress had created several other exceptions to the asylum application process (none covering applications by children), the court stated that the phrase "any alien" was ambiguous as to whether it covered alien children. *Id.* at 100a-105a. The district court concluded, therefore, that the INS was entitled to *Chevron* deference in refusing to process Elian Gonzalez's asylum application. *Id.* at 105a.

D. Litigation in the Eleventh Circuit

1. On April 19, 2000, the Eleventh Circuit issued an opinion granting an injunction pending appeal. The injunction prevented Elian Gonzalez from departing the United States and required the Government to take steps to prevent his departure while the appeal was pending. Pet. App. 46a.

In granting the injunction, the court of appeals stated that "Plaintiff has made a 'substantial case on the merits' of his appeal." Pet. App. 36a. The court stated:

> The statute in this case seems pretty clear. Section 1158(a)(1) provides that "[a]ny alien . . . irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of "[a]ny alien." *See* 8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." We, therefore, question the proposition that, as a matter of law, Plaintiff (unless his father consents) cannot exercise the statutory right to apply for asylum. . . . Congress's provision for "any alien" is not uncertain in meaning just because it is broad.

Id. at 39a. The court of appeals noted that "the INS cannot properly infringe on the plain language of the statute or the clear congressional purpose underlying it." *Id.* at 40a. The court also pointed out that the "[t]he existing INS regulations do

envision situations where a minor may act on his own behalf in immigration matters . . . [and] under some circumstances, may seek asylum against the express wishes of his parents. Also, the INS *Guidelines for Children's Asylum Claims* . . . envision that young children will be active and independent participants in the asylum adjudication process." *Id.* at 40a-41a (footnotes omitted).

As to Elian's case, the court stated that "[n]ot only does it appear that Plaintiff might be entitled to apply personally for asylum, it appears that he did so. . . . Plaintiff – although a young child – has expressed a wish that he not be returned to Cuba. He personally signed an application for asylum. Plaintiff's cousin, Marisleysis Gonzalez, notified the INS that Plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview Plaintiff about his own wishes." Pet. App. 43a-44a.

2. Although it granted the injunction, on June 1, 2000, addressing the appeal on the merits, the court of appeals affirmed the district court. Pet. App. 1a-32a. First, as to the due process claim, the court ruled that it was constrained by its *en banc* decision in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), to rule that Elian Gonzalez had no procedural due process rights in connection with his application for asylum, whether through an inherent liberty interest or a liberty interest created by the Refugee Act of 1980. Pet. App. 8a.

On the statutory question, the INS had contended in the court of appeals that a child cannot ordinarily "apply" for asylum over the objection of his parent, that Elian Gonzalez thus had not really "applied" for asylum, and that the asylum applications were void. The court of appeals stated that the statute provides that "any alien" may "apply" for asylum and that the INS is required to adjudicate any such application. Pet. App. 11a-12a. But the court of appeals ultimately concluded that the statutory term "apply" was ambiguous and the court

thus extended *Chevron* deference to the INS's interpretation of the statute. *Id.* at 13a-26a. The court made clear, however, that the INS's interpretation was merely "within the outside border of reasonable choices." *Id.* at 32a; *see also id.* at 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect").

3. On June 14, 2000, petitioner filed a petition for rehearing and rehearing *en banc*. On the *Chevron* issue, petitioner emphasized that the panel's decision was inconsistent with this Court's recent decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), handed down on May 1, 2000. Specifically, petitioner pointed out that the Court in *Christensen* held that *Chevron* deference does not extend to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines," 120 S. Ct. at 1662, and that the INS's interpretations in this case were contained in opinion letters and an internal memorandum – precisely the kinds of *informal* agency actions that *Christensen* said do not warrant deference.

The court of appeals denied the petition for *en banc* review, and the panel issued an opinion. The court distinguished *Christensen* on the ground that the agency decisionmaking in this case was an "*informal* adjudication." Pet. App. 147a. The panel said it would not interpret *Christensen* to apply to opinion letters in informal agency adjudications. *Id.* at 149a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER ALIENS SEEKING ASYLUM HAVE PROCEDURAL DUE PROCESS RIGHTS, AND THE ELEVENTH CIRCUIT'S DECISION DENYING SUCH RIGHTS IS ERRONEOUS.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const. amend. v. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth] Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). If a person's liberty or property interest is at stake, the "Constitution's command of due process" ordinarily requires "prior notice and a hearing" before a deprivation of that interest. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

A person's liberty or property interests stem from one of two sources. *First*, federal statutes may create liberty or property interests that cannot be deprived without procedural due process. *See Vitek v. Jones*, 445 U.S. 480, 488-91 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970). *Second*, individuals have certain "core" liberty or property interests that cannot be deprived without procedural due process. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (protected liberty interests "may arise from two sources – the Due Process Clause itself and the laws" of the federal government or States).[3]

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[3] The Court has extended "the same procedural protections to statutorily created rights as to 'core' rights." Tribe, *American Constitutional Law* 710 (2d ed. 1988).

In this case, both sources apply. First, as most courts of appeals other than the Eleventh Circuit have held, the Refugee Act of 1980 gives aliens seeking asylum a liberty or property interest in applying for asylum that cannot be deprived without due process. Second, even apart from the statute, aliens seeking asylum possess a core liberty interest in seeking asylum that cannot be deprived without due process.

Resolution of the due process issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question. Elian Gonzalez never received a hearing (the central requirement of due process); indeed, the INS never even interviewed him in connection with his asylum application.

A. The Circuits Are Divided on the Question Whether the Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Creates Procedural Due Process Rights.

The Refugee Act of 1980 established a uniform right for aliens to seek asylum:

> Any alien who is physically present in the United States or who arrives in the United States . . . , *irrespective of such alien's status*, may apply for asylum in accordance with this section . . . .

8 U.S.C. § 1158(a)(1) (emphasis added). Except in certain statutorily specified circumstances not applicable here, an alien who applies for asylum must receive a hearing. *See* 8 U.S.C. § 1158(a)(2). INS regulations extensively set forth the procedures governing asylum applications and, consistent with the statute, state that "[t]he Service shall adjudicate the claim of each asylum applicant whose application is complete." 8 C.F.R. § 208.9(a).

By its plain terms, the Refugee Act grants all aliens an entitlement to apply for asylum. This Court's precedents

establish that this entitlement qualifies as a protected interest under the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (statutory "right to use . . . adjudicatory procedures" is a "property" right triggering appropriate procedural protections under Due Process Clause); *see also Meachum v. Fano*, 427 U.S. 215, 226 (1976); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). As a result, the Government may not deprive an asylum applicant of his entitlement to seek asylum without providing certain procedural due process protections.

This Court has never directly addressed the question whether the Refugee Act of 1980 creates a liberty or property interest for purposes of the procedural protections of the Due Process Clause. Confusion reigns in the lower courts, however, and the courts of appeals are deeply divided on the issue. "The constitutional standards to be applied to exclusion cases, wherein the government has refused to admit into the country persons from other nations who have arrived at United States borders, are less than clear." 3 Rotunda and Nowak, *Treatise on Constitutional Law* 65 n.102 (1999) (citing cases on split); *see also* Jones, *The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees*, 21 Hastings Const. L.Q. 1071, 1093 (1994) ("a split has developed among lower courts as to the extent to which unadmitted foreigners have due process rights"); Miller, *Aliens' Right to Seek Asylum*, 22 Vand. L. J. Transnational Law 187, 204 (1989) ("the circuits are split as to whether aliens have due process rights").

Since 1980, the D.C., Second, Third, Fourth, and Fifth Circuits (and arguably the Seventh) have properly concluded that the entitlement to seek asylum granted by the Refugee Act triggers corresponding procedural due process rights in connection with asylum-related proceedings. We will briefly chronicle the leading circuit decisions.

In *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999), the Fourth Circuit held that the statutory right to seek asylum also created a constitutional right to due process in asylum-related proceedings. *See id.* ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum*] envision.").[4]

The Third Circuit similarly has held that the Refugee Act creates such a protected liberty interest. *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).[5] As a result, there are "minimum due process rights required by fairness to which all asylum applicants are entitled." *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) and *Meachum*, 427 U.S. 215). The court added that "[p]recisely what minimum procedures are due under a statutory right depends on the circumstances of the particular situation." *Marincas*, 92 F.3d at 203. The court explained, in addition, that other "[c]ourts have recognized that aliens seeking asylum are entitled to some due process protection." *Id.* at 203 n.8 (citing Second Circuit cases).

The D.C. Circuit likewise has squarely concluded that an alien has "a Fifth Amendment procedural due process right to petition the government for political asylum." *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (1989). That due process right requires – at a "minimum" – "some form of meaningful or fair hearing." *Id.*

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[4] The Fourth Circuit rejected any suggestion that an alien seeking asylum has an *inherent* constitutional liberty interest in connection with the asylum process, as opposed to a statutorily created interest that triggers procedural due process protections. *See* 184 F.3d at 342 ("Aliens have no *independent* constitutional rights in an asylum procedure.") (emphasis added).

[5] The Third Circuit, too, stated that aliens have no *inherent* constitutionally protected liberty interest in seeking admission, but do have a *statutorily created* entitlement that triggers procedural due process.

The Second Circuit similarly has held: "In the absence of protected interests which originate in the Constitution itself, constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit." *Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir. 1984); *see also Yiu Sing Chen v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983) ("refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned" may enjoy due process protection).[6]

The Fifth Circuit also has reached the same result: "Besides protected interests which originate in the Constitution itself, the Supreme Court has also recognized that constitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government and creating a substantive entitlement to a particular governmental benefit. In this case we conclude that Congress and the executive have created, at a minimum, *a constitutionally protected right to petition our government for*

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[6] The question of entitlement is based on the language of the statute, which grants an asylum hearing to "any alien" who is physically present in the United States. Such aliens are indisputably "persons" for purposes of the Due Process Clause. "Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). There would be no basis, therefore, for trying to draw a line between excludable and deportable aliens in determining whether *the statute* creates an entitlement that triggers procedural due process. *See generally* Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 Yale L.J. 639, 658 (1989). Even were such a line drawn, the majority of these cases concern excludable aliens (the category historically held to have fewer *inherent* constitutional rights), yet the courts granted due process rights.

political asylum." *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1036-38 (5th Cir. Unit B 1982) (emphasis added).

Finally, the Seventh Circuit has indicated that both a minor child applying for asylum and his parents have due process rights in connection with the minor's asylum hearing. *See Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). Although the case concerned the due process rights of parents to be informed of their child's asylum application, the decision was premised on and assumed the due process right of the child to seek asylum over his parent's objection and to receive procedural due process protections. *Accord DeSilva v. DiLeonardi*, 125 F.3d 1110, 1115 (7th Cir. 1997).

In contrast to those decisions, the Eleventh Circuit had previously held (and held again in this case) that the Refugee Act of 1980 does *not* create an entitlement to seek asylum that is thereby protected by the Due Process Clause. In its 8-4 *en banc* decision in *Jean v. Nelson*, the Eleventh Circuit held that the Refugee Act grants aliens no entitlement to seek asylum – and that aliens therefore possess *no due process rights* in connection with asylum proceedings. Judge Kravitch dissented for four judges, stating that "the Refugee Act of 1980 does create at a minimum a *constitutionally protected right* to petition our government for political asylum" – an entitlement that carries with it certain procedural due process rights for aliens seeking asylum. 727 F.2d at 989 (quotation omitted) (emphasis added).

This circuit split is deep, it is ripe, it is recognized by scholars and commentators, and it is obviously of critical importance to aliens who seek asylum and to the Government's immigration policies. The Government takes the view that the Eleventh Circuit's decision in *Jean v. Nelson* is correct and that excludable aliens seeking asylum have no due process rights. It is our submission, by contrast, that the D.C., Second, Third, Fourth, Fifth, and Seventh Circuits have correctly concluded

that the Refugee Act of 1980 creates an interest in seeking asylum that triggers procedural protections under the Due Process Clause. As the lopsided nature of the split would suggest, the Eleventh Circuit – the court that decided *this case* – has decided the issue erroneously. This Court should grant certiorari to resolve the split. As we will explain in Section I.C below, moreover, resolution of this issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question.

B. Even in the Absence of Any Statutorily Created Interest, Refugees in the United States Who Apply for Asylum Possess an *Inherent* Liberty Interest in Seeking Asylum That Is a Protected Interest Under the Due Process Clause.

In the 1950s, this Court ruled that aliens seeking admission to this country possess no *inherent* liberty interest in admission that would trigger procedural due process rights. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *see also Landon v. Plasencia*, 459 U.S. 21 (1982). That is a different question, of course, from whether there is a statutorily created liberty interest. For that reason, these decisions in no way affect or diminish our argument that the Refugee Act creates a liberty or property interest for purposes of procedural due process.

That said, and even assuming these 1950s-era decisions are correct (which is a dubious proposition[7]), the cases do not

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[7] These decisions have been described as "patently preposterous," Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. 1362, 1392-96 (1953), and among "the most shocking decisions the Court has ever rendered," 2 Davis, *Administrative Law*

(continued...)

speak directly to the distinct question whether that *subset* of unadmitted aliens who are *seeking asylum* have an inherent liberty interest in seeking asylum that triggers procedural protections under the Due Process Clause. Contrary to the Eleventh Circuit's *other* holding in *Jean*, we submit that aliens seeking asylum do possess such an interest.

Because the existence of the statutorily created liberty interest means that the Court need not reach this alternative ground for finding a liberty interest, we touch upon it only briefly. "Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The Court has long rejected the concept that "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.* "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

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[7] (...continued)
Treatise 358 (1979). In his separate opinion in *Jean*, Justice Marshall stated that "excludable aliens do, in fact, enjoy Fifth Amendment protections" and "the principle that unadmitted aliens have no constitutionally protected rights defies rationality." 472 U.S. at 873, 874. Indeed, any other conclusion, Justice Marshall pointed out, would mean that courts could not intervene even if the Government were to "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens." *Id.* at 874. We agree with Justice Marshall that those decisions are wrongly decided and, if necessary, should be overruled. That said, the Court need not come near reaching that question to resolve this case in our favor.

The scope of "liberty" encompassed by the Due Process Clause plainly must include the interest of a "person" in this country to *petition for asylum*. This Court has long held that aliens subject to *deportation* have due process rights. *See Landon v. Plasencia*, 459 U.S. at 32-33. There is no plausible distinction – for purposes of determining whether procedural due process *applies* – between an alien subject to *deportation* and an unadmitted alien *seeking asylum*. Indeed, the alien seeking asylum is seeking to avoid persecution, which on its face is a more weighty interest than merely avoiding deportation. What is more, Congress itself has eliminated the distinction between excludable and deportable aliens in both the Refugee Act, *see* 8 U.S.C. § 1158(a)(1), and in the relevant 1996 amendments now codified at 8 U.S.C. § 1229 *et seq.*

In short, regardless of any *statutorily created* liberty interest, we submit that the right of a "person" within the territory of the United States to seek asylum because of a well founded fear of persecution by returning to his former country is an inherent liberty interest that triggers procedural due process protections.

C. The INS's Procedures in This Case Did Not Satisfy Due Process.

We acknowledge, of course, that this Court generally does not grant certiorari to resolve a circuit split if resolution of the legal issue could not affect the outcome of the case at hand. In this case, however, a ruling that aliens seeking asylum have a liberty interest under the Due Process Clause would alter the outcome of this case – and require the INS to hold a hearing before depriving Elian Gonzalez of his right to seek asylum.

The reason is straightforward: As the Court stated in *United States v. James Daniel Good Real Property*, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. 43, 53 (1993). This core

principle of due process applies to children in matters that affect children's rights. *See Parham v. J.R.*, 442 U.S. 584 (1979).

The question here, then, is what process – what kind of hearing – is necessary to satisfy the due process rights of a child who has applied for asylum. Given the child's extraordinarily important interest in an accurate assessment, the proper rule is that a child who seeks to apply for asylum has a due process right to an asylum hearing (an asylum hearing where, to be sure, the parents are entitled to be heard as well). *Cf. Reno v. Flores*, 507 U.S. 292, 309 (1993) ("At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge.").[7]

Holding an asylum hearing protects the alien's weighty interest in obtaining asylum, but does not unduly burden any parental interest. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). After all, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason a parent would have for returning the child to such persecution. In other words, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.[8] In short, by following the

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[7] Even if a child is not *automatically* entitled to an asylum hearing when the child seeks asylum over the objection of a parent, the child clearly still possesses a due process right *to a fair hearing* to determine the parent's ability to represent the child's best interests in any asylum proceedings.

[8] If a parent somehow made a convincing case that a child facing persecution should nonetheless be returned to his former country, the (continued...)

statute, the INS not only will comply with due process requirements, it will reach the best result for the child.

The suggestion that a minor's liberty interests evaporate when a parent seeks to exercise control over the minor has been rejected time and again by this Court. To take just one example, in *Parham v. J.R.*, the Court found that a child has a due process interest in avoiding institutional commitment – notwithstanding the desires of the parent – and "that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder.'" 442 U.S. at 606. The Court added that the inquiry "*must also include an interview with the child.*" *Id.* at 607[9] (emphasis added).[9]

In this case, whatever the *minimum* elements of due process might be for alien children in asylum proceedings, the INS did not come anywhere close. It did not hold an asylum hearing. In fact, it did not hold *any hearing at all* to determine, for example, whether Elian's father represented Elian's best interests. Indeed, *the INS agents never even interviewed Elian Gonzalez* as part of the INS's supposed "assessment" of the matter. Nor did the INS ask Elian (or even Juan Miguel Gonzalez, for that matter) a single question about possible harm to Elian should he return to Cuba, or provide any opportunity for consideration of objective evidence on that subject. The INS's ad hoc and haphazard procedures fell woefully short of due process.

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[8] (...continued)
Attorney General may have authority to consider the parent's view, subject to constitutional and statutory constraints. *See* 8 U.S.C. §§ 1158(b), 1231(b)(3).

[9] *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (child's exercise of constitutional right cannot be controlled or thwarted by her parent).

The Court should grant certiorari to resolve the split on the due process issue and reverse the judgment of the court of appeals.

II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AN ASYLUM HEARING FOR "ANY ALIEN" WHO "APPLIES" FOR ASYLUM, AND ELIAN GONZALEZ IS AN ALIEN WHO HAS APPLIED FOR ASYLUM.

The Refugee Act of 1980 provides for an asylum hearing for "any alien" who has "applied" for asylum. The phrase "any alien" by its terms includes any child, and Elian Gonzalez has in fact "applied" for asylum by any plausible definition of that term. While a parent's views can and should be heard at a child's asylum hearing, the statute leaves no room for the INS simply to refuse outright to hold *a hearing*.

This Court has emphasized repeatedly that statutory analysis "begins with the language of the statute. And where the statute provides a clear answer, it ends there as well." *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 2000 WL 742912, at *9, No. 99-579 (U.S. June 12, 2000); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotation omitted).

Because the statutory text is plain, there is no basis for extending *Chevron* deference to the INS's contrary interpretation. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 766 (1999) ("[w]e have no occasion to review the call for deference here, the interpretation urged in respondent's brief

being clearly the better reading of the statute under ordinary principles of construction.").

The INS claims that the term "apply" is undefined and ambiguous. But an undefined term is interpreted in accord "with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *see also INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("assume that the legislative purpose is expressed by the ordinary meaning of the words used") (internal quotation omitted). The term "apply" is ordinarily defined to mean "[t]o request or seek assistance, employment, or admission." American Heritage Dictionary 89 (3d ed. 1996); *see also* Black's Law Dictionary 96 (7th ed. 1999) ("[t]o make a formal request or motion"). Under any remotely plausible definition of the term "apply," Elian Gonzalez has applied for asylum.

The INS's supposed statutory construction of the word "apply" is, in reality, a rather transparent plea for the courts to recognize or create an implicit exception to the statute in cases involving minors who apply for asylum (at least in cases where the parent objects). The INS seeks, in effect, to superimpose a parental consent requirement onto the statute. But the statutory text contains no such exception. The omission of such an exception is significant, particularly given that Section 1158(a)(2) of the statute – entitled "Exceptions" – sets forth three specific exceptions to the right to apply for asylum. *See* 8 U.S.C. § 1158(a)(2). The fact that Congress specified various exceptions (and did so in 1996) to the right to apply for asylum, but did not provide any exception for applications by children, strongly buttresses the natural reading of the text. *See United States v. Johnson*, 120 S.Ct. 1114, 1118 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also Andrus v. Glover*

Constr. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent.").

Nor can the INS claim that this was some kind of congressional mistake or mere oversight. As the 1998 INS *Guidelines for Children's Asylum Claims* state, "[d]uring the last 10 years, the topic of child asylum seekers has received increasing attention from the international community." INS *Guidelines* at 1.

In addition, Congress specified special rules for children in different provisions of the statute. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). Again, the fact that Congress spoke specifically to children in one portion of the statute, but not in the asylum provision, buttresses the textual interpretation that the term "any alien" includes alien children and that alien children thus may "apply" for asylum. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term 'refugee,' [in the 1980 amendments to the Immigration and Naturalization Act] certainly indicate that Congress intended the two standards to differ").

The INS's contrary argument, accepted by the court of appeals under *Chevron*, ultimately seems premised on the notion that it would somehow be "bad policy" or "absurd" to apply the plain language here. *See Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring). As to the INS's naked policy arguments, the plain language of the statute controls. *See*

Harris, 2000 WL 742912, at *9 (U.S. June 12, 2000) (party and amici "submit that the policy consequences . . . could be devastating . . . . We decline these suggestions to depart from the text of § 502(a)(3)."); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act.").

Nor can the INS squeeze this case into the rare case where the effect of implementing the ordinary meaning of the text would cause a "patent absurdity." *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring). In fact, the plain language of the text is entirely consistent with the INS *Guidelines for Children's Asylum Claims*, with the most closely analogous INS regulation, with international law principles, and with common sense.

As the court of appeals recognized, the INS *Guidelines for Children's Asylum Claims* "envision that young children will be active and independent participants in the asylum adjudication process." Pet. App. 41a. In addition, INS regulations actually "contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents." *Id.*[10] Not only do "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents, [but] [s]o, too . . . do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

In short, all relevant legal sources to which this Court might look to determine whether the plain language of the statute reflects sensible policy strongly confirm application of the plain language in this case. By contrast, the INS has not uncovered any support in the relevant body of legal materials

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[10] *See* 8 C.F.R. § 236.3(f), quoted in full in addendum.

for its decision to flat-out refuse an asylum hearing for a minor alien who has applied for asylum.

The final point in assessing whether the plain language constitutes sensible policy is perhaps the most decisive. Holding an asylum hearing as the statute dictates is plainly the best way to protect the child's rights and preserve the integrity of the Refugee Act, while not unduly burdening the parental or government interests at stake. As we stated above, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason for a parent to return the child to such persecution. To reiterate, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.

In short, the plain language and structure of the statute mandate an asylum hearing for Elian Gonzalez and demonstrate that the INS violated the statute. Because of the unique importance of this particular case, and the need that it be resolved both correctly and by this Court, this statutory issue warrants certiorari.

III. CONTRARY TO THIS COURT'S RECENT DECISION IN *CHRISTENSEN*, THE COURT OF APPEALS ERRONEOUSLY EXTENDED *CHEVRON* DEFERENCE TO THE INS's OPINION LETTERS AND MEMORANDUM.

This Court's recent decision in *Christensen v. Harris County* established a simple and unambiguous prohibition on extending *Chevron* deference to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines." 120 S. Ct. 1655, 1662 (2000). The Court observed that under *Chevron* "a court must give effect to an agency's regulation

containing a reasonable interpretation of an ambiguous statute." *Id.* But the Court emphasized that it was "confront[ing] an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.*

The court of appeals' decision in this case is in conflict with the decision in *Christensen.* The INS internal memorandum and letters are the kinds of agency statements that the *Christensen* Court held are not entitled to *Chevron* deference. And even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* would prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000); *cf. Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection*, 208 F.3d 1, 4-6 (1st Cir. 2000) (refusing to grant *Chevron* deference to an opinion letter issued by the EPA to resolve a matter referred to that agency under the doctrine of primary jurisdiction). While this divergence of interpretation is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring and important issue warrants review and clarification, particularly given that it altered the result in this case.

The court of appeals made clear that, freed from *Chevron*, it likely would have interpreted the statute differently than did the INS. *See* Pet. App. 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect."); *id.*

("The final aspect of the INS policy also worries us some."); *id.* at 32a ("The policy decision that the INS made was within the outside border of reasonable choices.").[11]

The court of appeals also stated that the level of deference it applied in this case "was strengthened" by the "foreign policy implications of the administrative decisions dealing with immigration." Pet. App. 147a. The court's reference to foreign policy implications in an asylum case was plain error. As the Second Circuit has rightly explained, "[C]ongress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum." *Doherty v. INS*, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992).

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[11] In order to preserve them for review on the merits, we also raise several other issues. First, the INS's ultimate interpretation was the product of an insufficiently explained change in interpretation. The INS's multiple and shifting interpretations – shifts that occurred without sufficient explanation – preclude the courts from granting deference to the INS's final interpretation. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Second, the INS's policy was adopted some 20 years after the statute was enacted, which also diminishes any deference owed to it. *See EEOC v. Arabian-American Oil Co.*, 499 U.S. 244 (1991). Third, the INS's ultimate interpretation is equivalent to a litigating position, and it is black-letter law that agency interpretations developed as litigating positions similarly warrant no deference under *Chevron*. *See* Pet. App. 40. Finally, the INS's application of its policy in this case – particularly its failure to interview Elian Gonzalez and to allow presentation of objective evidence about his risk of persecution – was arbitrary and capricious under the Administrative Procedure Act.

Respectfully submitted,

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Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.

Elian GONZALEZ, a minor, by and through Lazaro Gonzalez, as next friend, or, alternatively, as temporary legal custodian, Plaintiffs-Appellants,
v.
Janet RENO, Attorney General of the United States; Doris Meissner, Commissioner, United States Immigration and Naturalization Service; Robert Wallis, District Director, United States Immigration and Naturalization Service; United States Immigration and Naturalization Service; and United States Department of Justice, Defendants-Appellees, Juan Miguel Gonzalez, Intervenor.

No. 00-11424.

June 1, 2000.

Six-year-old alien, whose mother had died during their trip aboard small boat from Cuba to Florida, brought suit, by and through his great uncle as his next friend, alleging that Immigration and Naturalization Service (INS) and others denied him due process and violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file personally for asylum against wishes of his Cuban father. The United States District Court for the Southern District of Florida, No. 00-00206-CV-KMM, K. Michael Moore, J., 86 F.Supp.2d 1167, dismissed action. Alien appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) INS did not violate alien's due process rights; (2) District Court was not required to appoint guardian ad litem to represent alien's interests; (3) policies upon which INS relied in determining that alien lacked capacity to file personally for asylum were entitled to some deference; (4) INS policies under which six-year-old aliens necessarily lacked sufficient capacity to assert asylum claims on their own, and under which a six-year-old alien was required to be represented by some adult in applying for asylum, were reasonable interpretations of asylum statute; (5) policy under which ordinarily a parent, even one outside United States, and only a parent, could act for his or her six-year old child who was in this country with respect to asylum was reasonable interpretation of asylum statute; (6) INS policy under which parent's residence in communist-totalitarian state was no special circumstance, sufficient in and of itself, to justify consideration of asylum claim by parent's six-year-old child, presented by child's relative in this country, against wishes of parent, was reasonable interpretation of asylum statute; and (7) INS did not act arbitrarily or abuse its discretion in rejecting alien's applications as void.

Affirmed.

West Headnotes

[1] **Aliens** 54.3(1)
24k54.3(1) Most Cited Cases

Court of Appeals had subject-matter jurisdiction over minor alien's appeal of district court decision dismissing his action alleging that Immigration and Naturalization Service (INS) denied him due process and violated immigration statute by dismissing his asylum applications as legally void, based on its conclusion that alien lacked capacity to file personally for asylum against wishes of his father. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[2] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

[2] **Constitutional Law** 274.3
92k274.3 Most Cited Cases

Immigration and Naturalization Service (INS) did not violate due process rights of six-year-old alien in dismissing his asylum applications as legally void, based on its conclusion that alien lacked capacity to file personally for asylum against wishes of his Cuban father. U.S.C.A. Const.Amend. 5.

[3] **Infants** 78(1)
211k78(1) Most Cited Cases

District court was not required to appoint guardian ad

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litem to represent interests of six-year-old alien in his action alleging that Immigration and Naturalization Service (INS) violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file for asylum against wishes of his Cuban father, inasmuch as alien was ably represented in district court by his great uncle as next friend. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[4] Infants 82
211k82 Most Cited Cases

Court of Appeals would not remove six-year-old alien's great uncle as alien's next friend to substitute alien's father, in alien's action alleging that Immigration and Naturalization Service (INS) violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file for asylum against wishes of his Cuban father, inasmuch as great uncle, aided by seasoned lawyers, had completely and steadfastly pressed alien's claimed rights in district court and Court of Appeals. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[5] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

In considering claim that Immigration and Naturalization Service (INS) violated immigration statute by dismissing asylum claim, Court of Appeals was required to begin with examination of scope of statute itself. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[6] Statutes 219(2)
361k219(2) Most Cited Cases

In a review of an agency's construction of statute which it administers, first is the question whether Congress has spoken directly to the precise question at issue; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

[7] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Six-year-old alien was eligible to apply for asylum, inasmuch as statute providing that "[a]ny alien . . . may apply for asylum" meant exactly what it said. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[8] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

When an alien applies for asylum within the meaning of the asylum statute, the Immigration and Naturalization Service (INS), under the statute itself and INS regulations, must consider the merits of the alien's asylum claim. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1); 8 C.F.R. § 208.9(a).

[9] Statutes 188
361k188 Most Cited Cases

In reading statutes, the Court of Appeals considers not only the words Congress used, but the spaces between those words.

[10] Constitutional Law 72
92k72 Most Cited Cases

[10] Statutes 219(1)
361k219(1) Most Cited Cases

Where a statute is silent on an issue, Congress has left a gap in the statutory scheme, from which springs executive discretion, and, as a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute, to choose how to fill such gaps.

[11] Constitutional Law 60
92k60 Most Cited Cases

That Congress has left a gap in a statutory scheme does not mean that Congress has done something wrong; Congress may commit something to the discretion of other branches of government.

[12] Constitutional Law 74
92k74 Most Cited Cases

When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute; however, where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch, then the gaps should not be filled by federal judges.

[13] Constitutional Law 74

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92k74 Most Cited Cases

Where congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency rather than by federal courts.

[14] Aliens 39
24k39 Most Cited Cases

The authority of the executive branch to fill gaps in statutory schemes is especially great in the context of immigration policy.

[15] Aliens 39
24k39 Most Cited Cases

The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials, such as the Immigration and Naturalization Service (INS), in matters touching upon foreign affairs.

[16] Constitutional Law 72
92k72 Most Cited Cases

Respect for the authority of the executive branch in foreign affairs is a well- established theme in our law, and the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress.

[17] Statutes 219(1)
361k219(1) Most Cited Cases

The proper review by the Court of Appeals of the exercise by the executive branch of its discretion to fill gaps in statutory schemes must be very limited.

[18] Constitutional Law 72
92k72 Most Cited Cases

That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy.

[19] Administrative Law and Procedure 310
15Ak310 Most Cited Cases

Executive agencies must comply with the procedural requirements imposed by statute.

[20] Administrative Law and Procedure 416.1
15Ak416.1 Most Cited Cases

Agencies must respect their own procedural rules and regulations.

[21] Administrative Law and Procedure 303.1
15Ak303.1 Most Cited Cases

The policy selected by an agency must be a reasonable one in light of the statutory scheme.

[22] Administrative Law and Procedure 760
15Ak760 Most Cited Cases

Although the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness, the courts cannot properly reexamine the wisdom of an agency-promulgated policy.

[23] Aliens 44
24k44 Most Cited Cases

Because the law, particularly the asylum statute, was silent about validity of six-year-old alien's purported asylum applications, it fell to Immigration and Naturalization Service (INS) to make discretionary policy choice with respect to that issue. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[24] Aliens 44
24k44 Most Cited Cases

Policies upon which Immigration and Naturalization Service (INS) relied in determining that six-year-old alien lacked capacity to file personally for asylum against wishes of his Cuban father were entitled to some deference in alien's action alleging that INS violated immigration statute by dismissing his asylum applications as legally void, notwithstanding that such policies were developed in course of administrative proceedings, rather than during rulemaking, and that such policies might not harmonize perfectly with earlier INS interpretative guidelines, inasmuch as policies were not after-the-fact rationalization; policies were not contradicted by any statutory provision, regulatory authority, or prior agency adjudication. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

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[25] Administrative Law and Procedure 753
15Ak753 Most Cited Cases

An after-the-fact rationalization of agency action, that is, an explanation developed for the sole purpose of defending in court the agency's actions, is usually entitled to no deference from the courts.

[26] Aliens 44
24k44 Most Cited Cases

Interpretative guidelines issued by Immigration and Naturalization Service (INS) do not have the force and effect of law.

[27] Aliens 44
24k44 Most Cited Cases

That an Immigration and Naturalization Service (INS) policy has been developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does render the policy altogether unworthy of deference.

[28] Aliens 44
24k44 Most Cited Cases

That an Immigration and Naturalization Service (INS) policy may not be a longstanding one affects only the degree of deference required, and does not render the policy altogether unworthy of deference.

[29] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policies under which six-year-old aliens necessarily lacked sufficient capacity to assert asylum claims on their own, and under which a six-year-old alien was required to be represented by some adult in applying for asylum, were reasonable interpretations of asylum statute. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[30] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

The Immigration and Naturalization Service (INS) is not required, as a matter of law, to individually assess each alien minor's mental capacity to determine if they have the capacity to assert asylum claims on their own; rather, absolute line-drawing based on age is an acceptable approach. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[31] Aliens 54(1)
24k54(1) Most Cited Cases

Although the Immigration and Naturalization Service (INS) is not required to let six-year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[32] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policy under which ordinarily a parent, even one outside United States, and only a parent, could act for his or her six-year old child who was in this country with respect to asylum was reasonable interpretation of asylum statute; although policy gave paramount consideration to primary role of parents in upbringing of their children, it recognized that special circumstances might exist rendering a parent an inappropriate representative for child. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[33] Infants 81
211k81 Most Cited Cases

Although the common practice in courts seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be next friend of his or her child as a matter of right.

[34] Parent and Child 2.5
285k2.5 Most Cited Cases
(Formerly 285k2(2))

Because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children, even where the parent is not generally unfit, is not without limits.

[35] Aliens 44
24k44 Most Cited Cases

[35] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Because Congress has decided that any alien may apply for asylum, Congress has charged the

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Immigration and Naturalization Service (INS), when the INS promulgates policy and fills gaps in the statutory scheme, with facilitation, not hindrance, of that legislative goal. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[36] Aliens 54.3(1)
24k54.3(1) Most Cited Cases

Considering the principles of judicial deference to executive agencies, Court of Appeals could not disturb policy of Immigration and Naturalization Service (INS) just because it might be imperfect.

[37] Aliens 54.3(1)
24k54.3(1) Most Cited Cases

Court of Appeals could not invalidate policy of Immigration and Naturalization Service (INS) merely because Court personally might have chosen another.

[38] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policy, under which parent's residence in communist-totalitarian state was no special circumstance, sufficient in and of itself, to justify consideration of asylum claim by parent's six-year-old child, presented by child's relative in this country, against wishes of parent, was reasonable interpretation of asylum statute; policy took some account of possibility of government coercion, and policy implicated foreign affairs, requiring special deference. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[39] Constitutional Law 72
92k72 Most Cited Cases

In no context is the executive branch entitled to more deference than in the context of foreign affairs.

[40] Aliens 54.3(3)
24k54.3(3) Most Cited Cases

Appropriate standard of review of decision of Immigration and Naturalization Service (INS) to treat asylum applications filed by six-year-old alien against wishes of his father as legally void was "arbitrary, capricious, or abuse of discretion" standard, not "facially legitimate and bona fide reason" standard. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[41] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) did not act arbitrarily or abuse its discretion in rejecting as void application for asylum signed and submitted by six-year-old alien himself against his Cuban father's wishes, inasmuch as INS's per se rule prohibiting six-year-old children from personally filing asylum applications against their parents' wishes was entitled to deference. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[42] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) did not act arbitrarily or abuse its discretion in rejecting as void application for asylum submitted on behalf of six-year-old alien, against wishes of alien's Cuban father, by alien's great uncle as next friend; INS was not clearly wrong in determining that father was not operating under coercion by Cuban government or that, if he was, his interests were aligned with Cuban government, and INS's determination that asylum claim probably lacked merit was not clearly inaccurate, given lack of INS or judicial decisions where person in similar circumstances established well-founded fear of persecution. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[43] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Congress largely has left the task of defining with precision the phrase "well- founded fear of persecution," found in statute defining "refugee" for asylum purposes, to the Immigration and Naturalization Service (INS). Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[44] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Political conditions which affect the populace as a whole or in large part are generally insufficient to establish persecution of an asylum applicant. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

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[45] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

The Immigration and Naturalization Service is not required to treat education and indoctrination as synonymous with persecution in asylum proceedings. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[46] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

Not all exceptional treatment is "persecution" for purposes of an asylum claim. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[47] **Constitutional Law** 70.1(1)
92k70.1(1) Most Cited Cases

[47] **Constitutional Law** 72
92k72 Most Cited Cases

It is the duty of Congress and the executive branch, as policymakers, to exercise political will, and, although courts should not be unquestioning, they should respect the other branches' policymaking powers.

[48] **Federal Courts** 1.1
170Bk1.1 Most Cited Cases

The judicial power is a limited power, and it is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

*1343 Kendall B. Coffey, Miami, FL, Barbara Lagoa, Judd J. Goldberg, Greenberg, Traurig, PA, for Plaintiffs-Appellants.

David J. Kline, Office of Immig. Litigation, Civil Division, William J. Howard, Department of Justice/OIL, Russell J.E. Verby, Department of Immigration Litigation, Edwin S. Kneedler, Washington, DC, Anne R. Schultz, Miami, FL, for Defendants-Appellees.

Mark D. Beckett, Martin N. Flics, Jeffrey Alan Tochner, Latham & Watkins, New York City, Amicus Curiae for Lawyers Committee for Human Rights, Women's Commission for Refugee Women and Children, Florida Immigrant Advocacy Center, United States Representative from the 18th, Children and Family Justice Center.

Appeal from the United States District Court for the Southern District of Florida.

*1344 Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

EDMONDSON, Circuit Judge:

This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government: a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion.

Elian Gonzalez ("Plaintiff"), a six-year-old Cuban child, arrived in the United States alone. His father in Cuba demanded that Plaintiff be returned to Cuba. Plaintiff, however, asked to stay in the United States; and asylum applications were submitted on his behalf. The Immigration and Naturalization Service ("INS")--after, among other things, consulting with Plaintiff's father and considering Plaintiff's age--decided that Plaintiff's asylum applications were legally void and refused to consider their merit.

Plaintiff then filed this suit in federal district court, seeking on several grounds to compel the INS to consider and to determine the merit of his asylum applications. The district court dismissed Plaintiff's suit. *Gonzalez ex rel. Gonzalez v. Reno*, 86 F.Supp.2d 1167, 1194 (S.D.Fla.2000). Plaintiff appeals, [FN1] and we affirm.

FN1. Several defendant-appellees are involved in this appeal. All these defendants are part of the executive branch of our government. For the sake of simplicity, we refer to the defendants collectively as the "INS."

I.

In December 1993, Plaintiff was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. When Plaintiff was about three years old, Juan

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Miguel and Elizabeth separated. Elizabeth retained custody of Plaintiff after the separation. Juan Miguel, however, continued to have regular and significant contact with his son. Plaintiff, in fact, attended school in the district where his father lived and often stayed at Juan Miguel's home.

In November 1999, Elizabeth decided to leave Cuba and to take her son to the United States. In the pre-dawn hours of 22 November, Plaintiff and Elizabeth, along with twelve other Cuban nationals, left Cuba aboard a small boat. The next day, the boat capsized in strong winds and rough seas off the coast of Florida. Eleven of the passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

Two days later, Plaintiff was rescued at sea by Florida fishermen and was taken to a hospital in Miami for medical treatment. While Plaintiff was receiving medical treatment, the INS was contacted by Plaintiff's great-uncle: Miami resident Lazaro Gonzalez. INS officials decided, upon Plaintiff's release from the hospital, not to remove Plaintiff immediately to Cuba. Instead, the INS deferred Plaintiff's immigration inspection and paroled Plaintiff into Lazaro's custody and care.

Soon thereafter, Lazaro filed an application for asylum on Plaintiff's behalf with the INS. This application was followed shortly by a second application signed by Plaintiff himself. A third asylum application was filed by Lazaro on Plaintiff's behalf in January 2000, after a state court awarded temporary custody of Plaintiff to Lazaro. [FN2] The applications were prepared by a Miami lawyer.

> FN2. A Florida state court since has dismissed Lazaro's petition for custody of Plaintiff. *See In re the Matter of Lazaro Gonzalez,* No. 00- 00479-FC-28 (Fla. 11th Cir.Ct.2000).

The three applications were substantially identical in content. The applications stated that Plaintiff "is afraid to return to Cuba ." The applications claimed that Plaintiff had a well-founded fear of persecution because many members of Plaintiff's family had been persecuted by the Castro government in Cuba. In particular, ***1345** according to the applications, Plaintiff's stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of Plaintiff's great-uncles also had been imprisoned for their political acts. Plaintiff's mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if Plaintiff were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.

Plaintiff's father, however, apparently did not agree that Plaintiff should remain in the United States. Soon after Plaintiff was rescued at sea, Juan Miguel sent to Cuban officials a letter, asking for Plaintiff's return to Cuba. The Cuban government forwarded this letter to the INS.

Because of the conflicting requests about whether Plaintiff should remain in the United States, INS officials interviewed both Juan Miguel and Lazaro. An INS official, on 13 December, met with Juan Miguel at his home in Cuba. At that meeting, Juan Miguel made this comment:

> [Plaintiff], at the age of six, cannot make a decision on his own .... I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family .... As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Juan Miguel denied that Lazaro was authorized to seek asylum for Plaintiff; Juan Miguel also refused to consent to any lawyer representing Plaintiff. Juan Miguel assured the INS official that his desire for Plaintiff's return to Cuba was genuine and was not coerced by the Cuban government.

One week later, INS officials in Miami met with Lazaro, Marisleysis Gonzalez (Plaintiff's cousin), and several lawyers representing Plaintiff. At that meeting, the parties discussed Juan Miguel's request. Lazaro contended that Juan Miguel's request for Plaintiff's return to Cuba was coerced by the Cuban government. [FN3] INS officials also inquired about the legal basis for Plaintiff's asylum applications; Lazaro replied this way: "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there." Plaintiff's lawyers told the INS again of the persecution of Plaintiff's relatives in Cuba because of their political opposition to the Castro government.

> FN3. As proof of this contention, Lazaro told INS officials that, before Plaintiff was discovered at sea, Juan Miguel telephoned

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Lazaro and asked Lazaro to take care of Plaintiff if Plaintiff made it to the United States. Lazaro stated that, after Plaintiff's rescue, Juan Miguel's demeanor had changed noticeably and that, according to Juan Miguel's neighbors in Cuba, Juan Miguel was "[g]etting extra protection" from Cuban authorities.

On 31 December, an INS official again met with Juan Miguel in Cuba to investigate further Lazaro's claim that Juan Miguel's request had been coerced. [FN4] At that meeting, Juan Miguel repeated that he desired Plaintiff's return to Cuba. Juan Miguel also reasserted that he was under no undue influence from any individual or government. The INS official--taking Juan Miguel's demeanor into account--determined that Juan Miguel, in fact, genuinely desired his son's return to Cuba.

FN4. To reduce third parties' opportunities to eavesdrop upon the meeting, this interview was held at the residence of a United Nations official near Havana. Also, some of the interview was conducted in writing to prevent eavesdropping.

The INS Commissioner, on 5 January 2000, rejected Plaintiff's asylum applications as legally void. The Commissioner--concluding that six-year-old children lack the capacity to file personally for asylum against the wishes of their parents--determined that Plaintiff could not file his own asylum applications. Instead, according to ***1346** the Commissioner, Plaintiff needed an adult representative to file for asylum on his behalf. The Commissioner--citing the custom that parents generally speak for their children and finding that no circumstance in this case warranted a departure from that custom--concluded that the asylum applications submitted by Plaintiff and Lazaro were legally void and required no further consideration. Plaintiff asked the Attorney General to overrule the Commissioner's decision; the Attorney General declined to do so.

Plaintiff then, by and through Lazaro as his next friend, filed a complaint in federal district court seeking to compel the INS to consider the merits of his asylum applications. In his complaint, Plaintiff alleged, among other things, that the refusal to consider his applications violated 8 U.S.C. § 1158 and the Fifth Amendment Due Process Clause. The district court rejected both claims and dismissed Plaintiff's complaint. Plaintiff appeals. [FN5]

FN5. During the pendency of this appeal, the INS revoked Plaintiff's parole and removed Plaintiff from Lazaro's custody. The INS then paroled Plaintiff into the custody of Juan Miguel, who had traveled to the United States to reclaim his son. After Juan Miguel came to the United States, we permitted Juan Miguel to intervene in this case.
To ensure that Plaintiff would not be returned to Cuba, depriving Plaintiff of a day in court and depriving this Court of jurisdiction over Plaintiff's appeal, we enjoined Plaintiff's removal from the United States pending appeal. Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.

II.

[1][2][3][4] On appeal, Plaintiff argues that the district court erred (1) by dismissing Plaintiff's claim under 8 U.S.C. § 1158, (2) by dismissing Plaintiff's due process claim, and (3) by failing to appoint a guardian ad litem to represent Plaintiff's interests. [FN6] We have reviewed carefully the record and the briefs filed by all parties. We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion. *See Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir.1984) (en banc) ("Aliens seeking admission to the United States ... have no constitutional rights with regard to their applications ...."), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). Plaintiff's guardian ad litem claim, because Plaintiff was ably represented in district court by his next friend, also lacks merit and similarly does not warrant extended discussion. *See* Fed.R.Civ.P. 17(c) (providing for appointment of guardian ad litem in discretion of district court); *see also Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir.1958) (noting that guardian ad litem may be unnecessary where child already represented adequately by next friend). We, accordingly, affirm the district court's dismissal of the constitutional claim and the district court's refusal to appoint a guardian ad litem. [FN7] We now turn, however, to a more difficult question: the district court's dismissal of Plaintiff's statutory claim.

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FN6. The INS contended in district court that the district court lacked subject-matter jurisdiction over Plaintiff's suit. The district court, however, rejected this argument and concluded that subject-matter jurisdiction did exist. The INS has not renewed its jurisdictional contention on appeal.
We, however, are mindful of our own jurisdictional limits. So, we have considered our subject-matter jurisdiction over this appeal. We conclude that this Court does have subject-matter jurisdiction over Plaintiff's appeal.

FN7. Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff's next friend and to substitute Plaintiff's father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff's next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff's claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor's motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

III.

Plaintiff contends that the district court erred in rejecting his statutory claim ***1347** based on 8 U.S.C. § 1158. Section 1158 provides that "[a]ny alien ... may apply for asylum." 8 U.S.C. § 1158(a)(1). Plaintiff says that, because he is "[a]ny alien," he may apply for asylum. Plaintiff insists that, by the applications signed and submitted by himself and Lazaro, he, in fact, did apply for asylum within the meaning of section 1158. In addition, Plaintiff argues that the summary rejection by the INS of his applications as invalid violated the intent of Congress as set out in the statute.

The INS responds that section 1158 is silent about the validity of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the wishes of the child's parent. The INS argues that, because the statute does not spell out how a young child files for asylum, the INS was free to adopt a policy requiring, in these circumstances, that any asylum claim on Plaintiff's behalf be filed by Plaintiff's father. As such, the INS urges that the rejection of Plaintiff's purported asylum applications as legally void was lawful. According to the INS, because the applications had no legal effect, Plaintiff never applied at all within the meaning of the statute.

Guided by well-established principles of statutory construction, judicial restraint, and deference to executive agencies, we accept that the rejection by the INS of Plaintiff's applications as invalid did not violate section 1158.

A.

[5][6] Our consideration of Plaintiff's statutory claim must begin with an examination of the scope of the statute itself. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 119 S.Ct. 1439, 1445, 143 L.Ed.2d 590 (1999) (instructing that analysis set out in *Chevron* is applicable to immigration statutes); *Jaramillo v. INS*, 1 F.3d 1149, 1153 (11th Cir.1993) (en banc) (same). In *Chevron*, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 104 S.Ct. at 2781. We turn, therefore, to the plain language of the statute.

[7] Section 1158 provides, in pertinent part:

> *Any alien* who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, *may apply for asylum* in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: "[a]ny alien ... may apply for asylum." *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 1956, 141 L.Ed.2d 215 (1998) (observing that statute is not ambiguous just because it is broad and that statute may apply to circumstances not envisioned by Congress). That "[a]ny alien" includes Plaintiff

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seems apparent. [FN8] *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); *see also Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir.1997) (noting that word "any" has "an expansive meaning"). Section 1158, therefore, plainly would permit Plaintiff to apply for asylum.

FN8. The INS concedes that Plaintiff is eligible to apply for asylum pursuant to section 1158.

[8] When an alien does apply for asylum within the meaning of the statute, the INS--according to the statute itself and ***1348** INS regulations--must consider the merits of the alien's asylum claim. *See* 8 U.S.C. § 1158(d)(1) ("The Attorney General *shall* establish a procedure for the consideration of asylum applications filed under subsection (a) of this section.") (emphasis added); 8 C.F.R. § 208.9(a) (requiring INS to "adjudicate the claim of each asylum applicant whose application is complete"). The important legal question in this case, therefore, is not whether Plaintiff *may* apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six- year-old child *has* applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent.

[9] About this question, more important than what Congress said in section 1158 is what Congress left unsaid. In reading statutes, we consider not only the words Congress used, but the spaces between those words. Section 1158 is silent on the precise question at issue in this case. Although section 1158 gives "[a]ny alien" the right to "apply for asylum," the statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. *See* 8 U.S.C. § 1158.

B.

[10][11][12][13][14][15][16][17] Because the statute is silent on the issue, Congress has left a gap in the statutory scheme. [FN9] From that gap springs executive discretion. [FN10] As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to ***1349** fill such gaps. [FN11] *See Chevron*, 104 S.Ct. at 2793. Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy. [FN12] *See Aguirre-Aguirre*, 119 S.Ct. at 1445. Our proper review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991).

FN9. That Congress left a gap in the statutory scheme does not mean that Congress has done something wrong. Whether Congress could or should legislate with sufficient detail to address every conceivable set of circumstances that might arise is highly debatable. *See generally Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737, 1744, 135 L.Ed.2d 36 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). Congress may properly commit something to the discretion of the other branches of government.

FN10. This case is about the *discretion* of the executive branch to make policy, not about ministerial enforcement of the "law" by executive officials. It has been suggested that the precise policy adopted by the INS in this case was required by "law." That characterization of this case, however, is inaccurate. As we have explained, when the INS made its pertinent policy, the preexisting law said nothing about the validity of Plaintiff's asylum applications. Instead, Congress just provided that "[a]ny alien" may apply for asylum and left the details of the application process to the discretion of the INS. *See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1140 (9th Cir.1988) (en banc) (Hug, J., dissenting) (explaining that sometimes "Congress enacts quite general provisions, with the specifics to be filled in by the agency"). The INS, in

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its discretion, decided to require six-year-old children--who arrive unaccompanied in the United States from Cuba--to act in immigration matters only through (absent special circumstances) their parents in Cuba. The INS could have shaped its policy in a different fashion, perhaps allowing relatives (for example, those within the fourth degree of relationship) in the United States to act for such children. But it did not, and we cannot. That choice was the sole prerogative of the executive branch. According to the principles set out in *Chevron*, we can only disturb that choice if it is unreasonable. *See* *Chevron*, 104 S.Ct. at 2793; *see also* *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 678, 102 L.Ed.2d 714 (1989) (Scalia, J., dissenting) (explaining discretionary authority of executive branch in administering statutory scheme).

FN11. When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). But the ordinary rule does not always apply: where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch (a political branch accountable to the people and fit for making policy judgments), then the gaps should not be filled in by federal judges. Where Congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency. And the Supreme Court has directed that, for such statutes, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute .... Rather, if the statute is silent ... the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 104 S.Ct. at 2782.

FN12. The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. *See* *Aguirre-Aguirre*, 119 S.Ct. at 1445. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law. *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). And the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); *see also* *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir.1983) (same).

[18][19][20][21][22] That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute. *See* *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 1073, 39 L.Ed.2d 270 (1974). Agencies must respect their own procedural rules and regulations. *See* *id.* at 1074; *see also* *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir.1981). And the policy selected by the agency must be a reasonable one in the light of the statutory scheme. *Chevron*, 104 S.Ct. at 2782. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-promulgated policy . [FN13] *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 1582, 91 L.Ed. 1995 (1947) ("The wisdom of the principle adopted is none of our concern.").

FN13. The Supreme Court has instructed us with these words:
[F]ederal judges--who have no constituency-

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> -have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."
> *Chevron*, 104 S.Ct. at 2793 (citation omitted).

[23] In this case, because the law--particularly section 1158--is silent about the validity of Plaintiff's purported asylum applications, it fell to the INS to make a discretionary policy choice. The INS, exercising its gap-filling discretion, determined these things: (1) six-year-old children lack the capacity to sign and to ***1350** submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist- totalitarian state (such as Cuba), [FN14] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme. *See Chevron*, 104 S.Ct. at 2782.

> FN14. *See* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (noting that "Cuba is a totalitarian state," where Communist Party "exercises control over all aspects of Cuban life").

[24][25] But we first address Plaintiff's contention that the "policy" relied on by the INS in this case is really no policy at all but is, in reality, just a litigating position. An after-the-fact rationalization of agency action--an explanation developed for the sole purpose of defending in court the agency's acts--is usually entitled to no deference from the courts. *Bradberry v. Director, Office of Workers' Comp. Programs*, 117 F.3d 1361, 1366 (11th Cir.1997). But we are unable to say that the position of the INS here is just an after-the-fact rationalization.

[26][27][28] The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced. [FN15] *Cf. IAL Aircraft Holding, Inc. v. FAA*, 206 F.3d 1042, 1046 & n. 5 (11th Cir.2000). While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law), [FN16] the parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that "flatly contradicts" the policy. *Cf. General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (noting that agencies have latitude to "adapt their rules and policies to the demands of changing circumstances"). That the INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. *See Chenery*, 67 S.Ct. at 1580; *see also Cook v. Wiley*, 208 F.3d 1314, 1319-20 (11th Cir.2000) (explaining that executive policies not "subjected to the heightened scrutiny of [formal] rulemaking" are nonetheless entitled to "some deference"); *Bigby v. INS*, 21 F.3d 1059, 1063-64 (11th Cir.1994) (finding *Chevron* deference appropriate even though agency policy had not been adopted as regulation); *U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1255 n. 6 (11th Cir.1991) ("Although the agency action in *Chevron* involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications ...."). And that the INS policy may not be a longstanding one likewise affects only the degree of deference required. [FN17] ***1351** *See Chenery*, 67 S.Ct. at 1580. The INS policy, therefore, is entitled to, at least, some deference under *Chevron;* and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.

> FN15. The INS policy on unaccompanied six-year-old children purporting to file for asylum against their parents' wishes was set out in these writings: (1) a memorandum, dated 3 January 2000, from the INS General Counsel to the INS Commissioner; (2) two letters, dated 5 January, from an INS district director to Plaintiff's lawyers and Lazaro, letters explaining the decision of the INS Commissioner; and (3) a letter, dated 12 January, from the Attorney General to

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Plaintiff's lawyers and Lazaro.

FN16. The INS Guidelines "do not have the force and effect of law." *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1511 (11th Cir.1992).

FN17. The INS claims that the approach taken in Plaintiff's case is the INS's longstanding position on young, unaccompanied aliens. The INS, however, points to no evidence in the record showing that the INS, in the past, has taken this approach. But, even assuming that Plaintiff's case triggered the making of this policy to fit cases like Plaintiff's peculiar circumstances, deference to the INS policy would still be due if the policy is a reasonable one. *See Chenery*, 67 S.Ct. at 1580 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

[29][30][31] We accept that the INS policy at issue here comes within the range of reasonable choices. First, we cannot say that the foundation of the policy--the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim-- is unreasonable. [FN18] *See Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir.1985) (presuming that twelve-year-old child was "near the lower end of an age range in which a minor may be mature enough to assert" an asylum claim against the wishes of his parents). Because six-year-old children must have some means of applying for asylum, *see* 8 U.S.C. § 1158(a)(1), and because the INS has decided that the children cannot apply personally, the next element of the INS policy--that a six-year-old child must be represented by some adult in applying for asylum--necessarily is reasonable.

FN18. In other words, we do not think that the INS, as a matter of law, must individually assess each child's mental capacity; we cannot say that looking at capacity instead of age for young children is required. Instead, we recognize that absolute line drawing--although necessarily sacrificing accuracy and flexibility for certainty and efficiency--is an acceptable approach. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 2567-68, 49 L.Ed.2d 520 (1976). And, as long as the approach taken by the INS is a reasonable one, we need not decide what the best approach would be.

We, however, do not mean to suggest that the course taken by the INS is the only permissible approach. Although the INS is not required to let six- year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Even young children can be capable of having an accurate impression of the facts about which they might speak. To obtain asylum, we doubt that it is essential for a child to be able to debate the merits of Marxism-Leninism against the merits of Western-style democracy. Some reasonable people could conclude that it should be sufficient for a child to be able to speak about his fears and to recount the facts that support his fears about returning to another country. Not infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect. *See, e.g., Pocatello v. United States*, 394 F.2d 115, 116-17 (9th Cir.1968) (affirming district court's admission of five-year-old's testimony); *Miller v. State*, 391 So.2d 1102, 1106 (Ala.Crim.App.1980) (affirming decision of trial court to permit four-year- old to testify); *Baker v. State*, 674 So.2d 199, 200 (Fla.Dist.Ct.App.1996) (affirming trial court decision admitting testimony and statements of six-year-old victim).

[32][33][34] The INS determination that ordinarily a parent (even one outside of this country) [FN19]--and, more important, *only* a parent--can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting ***1352** a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of the public in the prompt but fair disposition of asylum claims. The INS policy--by presuming that the parent is the sole, appropriate representative for a child--gives

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paramount consideration to the primary role of parents in the upbringing of their children. But we cannot conclude that the policy's stress on the parent-child relationship is unreasonable. [FN20] *See Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

FN19. We conclude that the approach taken by the INS about out-of- the-country representatives was a reasonable one. Other approaches might have been available. The INS might have selected a policy giving more weight to the fact that the parent of a child in the United States remained outside of this country's jurisdiction. For example, maybe the INS could have required that the adult representative--purporting to act in immigration matters (either by applying for asylum on behalf of the child or in effect vetoing an application for asylum) for a child in this country--be present in this country himself at the pertinent time. *See, e.g., Cozine v. Bonnick*, 245 S.W.2d 935, 937 (Ky.1952) (requiring that next friend, purporting to represent child in court, be resident of state). But what else might have been done is not decisive for us.

FN20. We do not suggest that recognizing the parent-child relationship to the exclusion of other familial relationships is the only reasonable approach. The parent-child relationship is obviously an important one. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); *see also In re Custody of Smith*, 137 Wash.2d 1, 969 P.2d 21, 27-28 (Wash.1998), *cert. granted sub nom. Troxel v. Granville*, 527 U.S. 1069, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999). Still, although the common practice in the courts of this country seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be the next friend of his child as a matter of absolute right. *See Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir.1955) ("[No] parent [ ] may claim to be a guardian ad litem of his minor child as a matter of right."). Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children--even where the parent is not generally "unfit"--is not without limits in this country. *See, e.g., In the Matter of Sampson*, 37 A.D.2d 668, 323 N.Y.S.2d 253, 255 (N.Y.App.Div.1971) (affirming order requiring disfigured child to undergo risky cosmetic surgery against genuine wishes of child's only parent: the state contended surgery would have "a beneficial effect" upon child); *Crommelin-Monnier v. Monnier*, 638 So.2d 912, 916 (Ala.Civ.App.1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country). In addition, the law in the United States frequently treats more distant familial relationships as important. *See, e.g.*, Kan. Stat. Ann. § 38-1541 (permitting any person related within the fourth degree to child to move to intervene in "child in need of care" proceedings); Ala.Code § 12-16- 150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15-12-135(a) (disqualifying persons related within the sixth degree to interested parties from jury service).

Critically important, the INS policy does not neglect completely the independent and separate interest that a child may have, apart from his parents, in applying for asylum. *See Polovchak*, 774 F.2d at 736-37. Instead, according to the INS policy, special circumstances may exist that render a parent an inappropriate representative for the child. [FN21] Where such circumstances do exist, the INS policy appears to permit other persons, besides a parent, to speak for the child in immigration matters. So, to some extent, the policy does protect a child's own right to apply for asylum under section 1158 despite the contrary wishes of his parents.

FN21. Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an

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> exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

[35][36][37] We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction. Because Congress has decided that "[a]ny alien" (including six-year-old children) may apply for asylum, 8 U.S.C. § 1158(a)(1), Congress has charged the INS--when it promulgates policy and fills gaps in the statutory scheme--with facilitation, not hindrance, of that legislative goal. *See Shoemaker v. Bowen*, 853 F.2d 858, 861 (11th Cir.1988) (noting that *Chevron* does not provide agency with license to "frustrate[ ] the underlying congressional policy"). We recognize***1353** that, in some instances, the INS policy of deferring to parents--especially those residing outside of this country--might hinder some six-year-olds with non-frivolous asylum claims and prevent them from invoking their statutory right to seek asylum. But, considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 100 S.Ct. 2844, 2875, 65 L.Ed.2d 1010 (1980) (Burger, C.J., concurring) (noting that agency policy may be valid although policy does not perfectly accomplish legislative goals). And we cannot invalidate the policy--one with international-relations implications--selected by the INS merely because we personally might have chosen another. *See Chevron*, 104 S.Ct. at 2793; *see also Jaramillo*, 1 F.3d at 1152-53. Because we cannot say that this element of the INS policy-- that, ordinarily, a parent, and only a parent, can act for a six-year-old child in immigration matters--is unreasonable, we defer to the INS policy.

[38] The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba. [FN22] *See generally* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) ("[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens."). Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent--even when he is not coerced--demands that the child leave this country to return to a country with little respect for human rights and basic freedoms.

> FN22. According to the United States Department of State, the human rights record of the Cuban government is "poor." Cuban citizens who oppose or criticize the government routinely are "harass[ed], threaten[ed], arbitrarily arrest[ed], detain[ed], imprison[ed], and defame[d]." Cuba regularly denies citizens "the freedoms of speech, press, assembly, and association," and restricts the free exercise of religion. The Cuban constitution provides that "legally recognized civil liberties can be denied to anyone who actively opposes the 'decision of the Cuban people to build socialism.' " *See* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000); *see also* UNHCHR Res.2000/25, U.N. Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about "the continued violation of human rights and fundamental freedoms in Cuba").

[39] Nonetheless, we cannot properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion: where special circumstances--such as definite coercion directed at an individual parent--exist, a non-parental representative may be necessary to speak for the child. In addition and more important, in no context is the executive branch entitled to more deference than in the context of foreign affairs. *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936). This aspect of the INS policy seems to implicate the conduct of foreign affairs more than any other. Something even close to a per se rule-- that, for

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immigration purposes, no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United ***1354** States--likely would have significant consequences for the President's conduct of our Nation's international affairs: such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent's country. As we understand the legal precedents, they, in effect, direct that a court of law defer especially to this international-relations aspect of the INS policy.

We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158; although section 1158 does not require the approach that the INS has chosen to take.

C.

[40] We now examine the INS's application of its facially reasonable policy to Plaintiff in this case. Although based on a policy permissible under *Chevron,* if the ultimate decision of the INS--to treat Plaintiff's asylum applications as invalid--was "arbitrary, capricious, [or] an abuse of discretion," the decision is unlawful. [FN23] *See* 5 U.S.C. § 706(2)(A); *see also INS v. Yueh-Shaio-Yang,* 519 U.S. 26, 117 S.Ct. 350, 353, 136 L.Ed.2d 288 (1996); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971). But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.

> FN23. The INS asks us to apply the "facially legitimate and bona fide reason" standard of review set out in *Kleindienst v. Mandel,* 408 U.S. 753, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972), instead of the more stringent "arbitrary, capricious, or an abuse of discretion" standard. We think that the *Kleindienst* standard is not the correct standard to apply in this case. But we do note that, even if the *Kleindienst* standard were applied, the result in this case would remain the same.

[41] The application signed and submitted by Plaintiff himself, insofar as the INS has decided that six-year-old children cannot file for asylum themselves, necessarily was a nullity under the INS policy. As we have explained, the INS's per se rule--prohibiting six-year-old children from personally filing asylum applications against their parents' wishes--is entitled to deference under the law. The INS, therefore, did not act arbitrarily or abuse its discretion in rejecting Plaintiff's own purported asylum application as void.

[42] Plaintiff contends that, even if the INS policy is facially reasonable under *Chevron,* the INS decision to reject the applications submitted by Lazaro was arbitrary. Plaintiff asserts that two special circumstances--the alleged coercion of Juan Miguel by the Cuban government and the objective basis of Plaintiff's asylum claim--bear negatively upon Juan Miguel's fitness to represent Plaintiff in immigration matters. The INS, according to Plaintiff, was therefore required to recognize some other adult representative--namely, Lazaro--to act on Plaintiff's behalf. We, however, conclude that the INS adequately considered these circumstances in reaching its ultimate decision.

The INS first determined that Juan Miguel, in fact, was not operating under coercion from the Cuban government or that, even if he was, his honest and sincere desires were aligned with those of the Cuban government. That determination was not clearly wrong and was no abuse of discretion. An INS official, on two occasions, interviewed Juan Miguel in person in Cuba. Aware of the possibility that Juan Miguel might be under some kind of coercion, the INS official took steps to ensure that Juan Miguel could express freely his genuine wishes about Plaintiff's asylum claim. The INS official, after meeting with Juan Miguel face-to-face, concluded--based upon her observations of his demeanor--that Juan Miguel's statement was not the result of duress or coercion. We, therefore, cannot say that the INS's rejection of Plaintiff's contention about coercion was arbitrary.

***1355** The INS also preliminarily assessed the objective basis of Plaintiff's asylum claim and concluded that his claim for asylum probably lacked merit. [FN24] Again, we cannot conclude that the INS's determination was arbitrary or an abuse of discretion. In making this assessment, the INS considered the information contained in the asylum applications and information provided to the INS by Plaintiff's lawyers. In addition, the INS interviewed Lazaro and inquired about the basis for Plaintiff's asylum claim. [FN25]

> FN24. We do not decide, as the INS

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advocates, that this summary and preliminary assessment of the merits of Plaintiff's asylum claim was a "consideration" of Plaintiff's purported asylum application within the meaning of the statute. But we do accept that this rough look at the potential merits was a legitimate part of deciding whether Plaintiff's father had a substantial conflict of interest with Plaintiff about asylum that would disqualify the father from representing Plaintiff.

FN25. That the INS, in making a preliminary assessment of the strength of Plaintiff's asylum claim, never interviewed Plaintiff has worried us. But the INS did speak with persons representing Plaintiff--Lazaro, Marisleysis, and Plaintiff's lawyers--on more than one occasion about the nature of his asylum claim.

The essence of Plaintiff's asylum claim was that, if he is returned to Cuba: (1) he will not enjoy the freedom that he has in the United States; (2) he might be forced to undergo "re-education" and indoctrination in communist theory; and (3) he might be used by the Cuban government for propaganda purposes. No one should doubt that, if Plaintiff returns to Cuba, he will be without the degree of liberty that people enjoy in the United States. Also, we admit that re-education, communist indoctrination, and political manipulation of Plaintiff for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility.

[43] Nonetheless, we cannot say that the INS's assessment of Plaintiff's asylum claim--that it probably lacked merit--was arbitrary. To make a meritorious asylum claim, an asylum applicant must show that he has a "well-founded fear of persecution" in his native land. *See* 8 U.S.C. § 1101(a)(42). Congress largely has left the task of defining with precision the phrase "well-founded fear of persecution" to the INS. *See Perlera- Escobar v. Executive Office for Immigration,* 894 F.2d 1292, 1296 (11th Cir.1990) (stating that, where statutory term is ambiguous, agency properly defined term through adjudications); *see also Singh v. INS,* 134 F.3d 962, 967 (9th Cir.1998) (noting that statutes do not define "persecution" or specify acts constituting "persecution").

[44][45][46] Plaintiff points to no earlier INS adjudications or judicial decisions where a person, in circumstances similar to Plaintiff's, was found to have established a "well-founded fear of persecution." Political conditions "which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." *See Mitev v. INS,* 67 F.3d 1325, 1330 (7th Cir.1995). We cannot say that the INS had to treat education and indoctrination as synonymous with "persecution." *See Ghaly v. INS,* 58 F.3d 1425, 1431 (9th Cir.1995) (explaining that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive"); *see also Mikhailevitch v. INS,* 146 F.3d 384, 390 (6th Cir.1998) (stating that "persecution" "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"); *Bradvica v. INS,* 128 F.3d 1009, 1012 (7th Cir.1997) ("[M]ere harassment does not amount to persecution."); Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook,* 254-61 (6th ed.1998) (citing cases discussing meaning of "persecution"). Not all exceptional treatment is persecution. The INS's estimate of the purported applications--as applications ***1356** that were not strong on their merits--is not clearly inaccurate. [FN26]

FN26. We do not know for certain that, if Plaintiff's asylum applications were accepted and fully adjudicated, Plaintiff necessarily would fail to establish his eligibility for asylum. Depending on how the record was developed, we expect that a reasonable adjudicator might find that Plaintiff's fears were "well-founded." We also think that some reasonable adjudicator might regard things like involuntary and forcible "re-education" as persecution. But these issues are not questions that we, in the first instance, are to answer. The ultimate merits of an asylum petition are not before this Court at all. Instead, they are matters that would be committed to the discretion of the INS. The INS (and the courts) never have suggested that an asylum applicant in like circumstances was eligible for asylum. We cannot say that the INS's assessment of the likelihood of success of the applications in this case was arbitrary.

We have not the slightest illusion about the INS's

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choices: the choices-- about policy and about application of the policy--that the INS made in this case are choices about which reasonable people can disagree. Still, the choices were not unreasonable, not capricious and not arbitrary, but were reasoned and reasonable. The INS's considerable discretion was not abused.

CONCLUSION

[47][48] As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

When the INS was confronted with Plaintiff's purported asylum applications, the immigration law of the United States provided the INS with no clear answer. The INS accordingly developed a policy to deal with the extraordinary circumstances of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the express wishes of the child's parents (or sole parent). The INS then applied this new policy to Plaintiff's purported asylum applications and rejected them as nullities.

Because the preexisting law compelled no particular policy, the INS was entitled to make a policy decision. The policy decision that the INS made was within the outside border of reasonable choices. And the INS did not abuse its discretion or act arbitrarily in applying the policy and rejecting Plaintiff's purported asylum applications. The Court neither approves nor disapproves the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict 8 U.S.C. § 1158.

The judgment of the district court is AFFIRMED [FN27].

FN27. NOTICE OF SHORTENED TIME: We order that, if petitions for rehearing or suggestions for rehearing en banc are to be filed, they must be filed within 14 days of this date. Expect no extensions.

212 F.3d 1338, 2000 Daily Journal D.A.R. 5737, 13 Fla. L. Weekly Fed. C 713

Briefs and Other Related Documents (Back to top)

- 2000 WL 33978813 (Appellate Brief) Brief of the Lawyers Committee for Human Rights, the Women's Commission for Refugee Women and Children, and the Florida Immigrant Advocacy Center as Amici Curiae, in Support of Neither Party (May. 04, 2000)
- 2000 WL 33978814 (Appellate Brief) Amicus Curae Brief on behalf of Appellant (May. 04, 2000)
- 2000 WL 33978812 (Appellate Brief) Reply Brief of Plaintiff-Appellant Elian Gonzalez (May. 01, 2000)
- 2000 WL 33980154 (Appellate Brief) Brief of Intervenor Juan Miguel Gonzalez (May. 01, 2000)
- 2000 WL 33978811 (Appellate Brief) Initial Brief of Plaintiff-Appellant Elian Gonzalez (Apr. 10, 2000)

END OF DOCUMENT

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IV. Separation of Church & State

Brett Kavanaugh – *Good News Club v. Milford Central School*

Allegation: In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Facts:

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations.** It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

For opinion see 121 S.Ct. 2093, 121 S.Ct. 296

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL, Respondent.
No. 99-2036.
October Term, 2000.
November 30, 2000.
On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE SALLY CAMPBELL IN SUPPORT OF PETITIONERS

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*i QUESTIONS PRESENTED

1. Whether the Establishment Clause requires the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

2. Whether the Free Speech, Free Exercise, and Equal Protection Clauses permit the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

*iii TABLE OF CONTENTS

QUESTIONS PRESENTED ... i

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... v

INTEREST OF AMICUS CURIAE ... 1

SCHOOL POLICY INVOLVED ... 2

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INTRODUCTION AND SUMMARY OF ARGUMENT ... 2

ARGUMENT ... 5

I. THE CONSTITUTION DOES NOT REQUIRE THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY ... 5

II. THE CONSTITUTION DOES NOT PERMIT THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY ... 9

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS ... 21

CONCLUSION ... 23

***iv** TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) ... 6

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) ... 22

Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) ... passim

Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) ... passim

Campbell v. St. Tammany School Bd., 206 F.3d 482 (5th Cir. 2000) ... passim

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) ... passim

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ... 20

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) ... 10, 14, 19

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Employment Division v. Smith, 494 U.S. 872 (1990) ... 20-21

Engel v. Vitale, 370 U.S. 421 (1962) ... 5

Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991) ... 14

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3rd Cir. 1990) ... 14, 15

Hague v. CIO, 307 U.S. 496 (1939) ... 12

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) ... 12

*v Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) ... 9

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) ... passim

Lee v. Weisman, 505 U.S. 577 (1992) ... 5, 22

McDaniel v. Paty, 435 U.S. 618, 639 (1978) ... 20

Mitchell v. Helms, 120 S. Ct. 2530 (2000) ... 6

Mueller v. Allen, 463 U.S. 388 (1983) ... 6

National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc) ... 14

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) ... passim

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) ... passim

Santa Fe Ind. School District v. Doe, 120 S. Ct. 2266 (2000) ... 5

Widmar v. Vincent, 454 U.S. 263 (1981) ... passim

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Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) ... 6

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) ... 6

ARTICLE

Douglas Laycock, Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers, 81 Nw. L. Rev. 1 (1987) ... 8

***vi** RULES

S. Ct. R. 37.3 ... 1

S. Ct. R. 37.6 ... 1

***1** INTEREST OF AMICUS CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amicus curiae and counsel for amicus curiae made a monetary contribution to the preparation or submission of this brief. See id.

Amicus Curiae Sally Campbell has challenged a local policy in St. Tammany Parish, Louisiana, that is similar to the Milford policy at issue in this case. The school board of St. Tammany Parish allows after-hours use of its buildings for civic, recreational, and entertainment uses, and for other uses that pertain to the "welfare of the public." Campbell v. St. Tammany School Bd., 206 F.3d 482, 484 (5th Cir. 2000). The St. Tammany policy expressly excludes partisan political activity, for-profit fundraising, and "religious services or religious instruction." Id. Ms. Campbell asked to use school facilities in St. Tammany School District for religious purposes. Relying on its policy, the School Board denied her request.

Ms. Campbell brought suit, alleging a violation of her First and Fourteenth Amendment rights. A panel of the United States Court of Appeals for the Fifth Circuit ruled that the Constitution does not require St. Tammany to allow religious speech in its facilities. Id. On October 26, 2000, over the dissent of Judges Jones, Smith, Barksdale, Garza, and DeMoss, the Court denied rehearing en banc. 2000 WL 1597749 (5th Cir.). Ms. Campbell intends soon to file a petition for writ of certiorari in this Court.

In their dissent from denial of rehearing en banc, Judges Jones, Smith, Barksdale, Garza, and DeMoss correctly contended that St. Tammany has created a public forum and that the content-based exclusion of religious speech from that forum is unconstitutional. For a forum to be considered a public forum, "[a]ll that is required is that the forum be 'generally open' to the public." Id. at *6 (Jones,

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J.). The St. Tammany facilities are "open 'indifferently' for use by private *2 groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple." Id. at *8.

These five Judges also correctly explained that St. Tammany's exclusion of religious speech is, in any event, unconstitutional even under the test applicable to limited public fora. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). Exclusions of speech from such fora must be both reasonable and viewpoint-neutral. The St. Tammany policy is unreasonable because it bears no relationship to the purposes of the forum: "To describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9 (Jones, J.). In addition, the St. Tammany policy discriminates on the basis of viewpoint, as is inherent in the exclusion of religious speech: "The crux of the issue is this: when measured against the 'welfare of the public standard,' how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" Id.

In summary, these five Judges stated: "It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the 'welfare of the public.' Once it did so, however, it could not arbitrarily discriminate against religious speakers." Id. at *10.

As this description reveals, the Milford case currently before the Court is not unique, but rather exemplifies a broader national problem of unjustified discrimination against religious speech in public facilities (as in St. Tammany). For that reason, and because the Court's resolution of this case is likely to affect the resolution of Ms. Campbell's case, Ms. Campbell respectfully submits this amicus curiae brief.

*3 SCHOOL POLICY INVOLVED

The relevant portions of the Milford Community Use of School Facilities policy are as follows:

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes;
>
> 1. For the purpose of instruction in any branch of education, learning or the arts.
>
> ***
>
> 3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public. ***
>
> Use for Nonreligious Purposes. School premises shall not be used by any individual or organization for religious purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Community Use policy for the Milford Central School District, members of the public may use public school facilities for (i) "instruction in any branch of education, learning or the arts," (ii) "holding social, civic and recreational meetings and entertainment events," or (iii) "other uses pertaining to the welfare of the community." Milford's expansive public access policy contains one -- and only one -- express exception: "School premises shall not be used by any individual or organization for religious purposes." Pursuant to this policy, the Milford Board

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of Education denied the request of the Good News Club (a community-based youth organization that provides moral instruction from a Christian perspective) to use its facilities. See 202 F.3d 502 (2d Cir. 2000).

*4 The discriminatory policy enacted by Milford Central School District targets religious speech for a distinctive burden. Milford's discrimination against private religious speech in general, and against the Good News Club in particular, is unconstitutional. As the Court has concluded in several virtually identical cases, the Constitution demands that private religious speech, religious people, and religious organizations receive at least the same treatment as their secular counterparts in gaining access to public facilities and public property. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, with respect to the precise issue of access to public school facilities that is raised in this case, the Court has repeatedly (and often unanimously) held that "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." Rosenberger, 515 U.S. at 846 (O'Connor, J., concurring). In so ruling, the Court has emphasized time and again that the Free Speech and Free Exercise Clauses protect "private speech endorsing religion." Id. at 841 (majority opinion).

Because the Court has already ruled decisively on the two central issues raised here, this case requires the Court to break no new ground, but merely to reaffirm its prior holdings. First, the Establishment Clause does not require the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility. Second, the Free Speech, Free Exercise, and Equal Protection Clauses do not permit the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility.

*5 ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

One fundamental question in this case is whether the Establishment Clause requires the government to exclude private religious groups such as the Good News Club from open and neutrally available public facilities. The answer is plainly no. The government may open public facilities on a neutral basis -- for use by religious and secular groups alike -- without violating the Establishment Clause.

To be sure, the Court has held that the Establishment Clause prohibits government-led or government-encouraged prayer to student audiences at certain public school events. See, e.g., Santa Fe Indep. School District v. Doe, 120 S. Ct. 2266 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962). But the Court has flatly rejected the broader and more extreme proposition that the Establishment Clause requires the government to eradicate all religious expression, public and private, from public schools and other public facilities. The Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.); see also id. at 775 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) (Establishment Clause not contravened "where truly private speech is allowed on equal terms in a vigorous public forum" so long as there is no "government manipulation of the forum"). The Court thus has

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emphasized time and again the critical distinction "between government speech endorsing religion, which the Establishment *6 Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quotation omitted).

Therefore, it is by now clear that the government does not violate the Establishment Clause when it allows religious individuals or groups to use public facilities or take public assistance that is available on a neutral basis to secular and religious alike. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); see also Mitchell v. Helms, 120 S. Ct. 2530 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). When the government provides facilities or aid on a neutral basis to religious and secular alike, there is no danger that the government has favored (and thereby endorsed) the religious over the secular -- and thus no Establishment Clause violation. Lamb's Chapel, 508 U.S. at 395 ("Under these circumstances ..., there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed .... "). A public facility open for use by private groups is "in a sense, surplus land" such that the government "conveys no message of endorsement" when it permits "privately organized and privately led groups of students (or others)" to use the facility. Laurence Tribe, American Constitutional Law § 14-5, at 1175 (2d ed. 1988).

If the rule were otherwise -- that is, if the Establishment Clause barred the neutral extension of general facilities or benefits to religious groups -- "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *7Widmar, 454 U.S. at 274-75 (quotation omitted). The Constitution requires no such discrimination against religious people and groups.

In assessing neutrality for purposes of the Establishment Clause, moreover, a government forum or benefit readily qualifies as neutral when (as here) the government makes the forum or benefit available to "a wide variety of private organizations." Lamb's Chapel, 508 U.S. at 395. See also Rosenberger, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."); Mergens, 496 U.S. at 252 (neutrality requirement met given that "broad spectrum" of secular groups could use the facilities); Widmar, 454 U.S. at 277 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect"). In other words, the fact that numerous secular groups enjoy the same rights as religious groups more than suffices to demonstrate that the government has not impermissibly favored religion.

The fact that younger (and at least potentially more impressionable) children may attend school or play at a particular public building or park does not alter the Establishment Clause analysis, or the significance of neutrality as the government's essential safe harbor in complying with the Establishment Clause. On the contrary, with younger and more impressionable children, it is doubly important for the government to be scrupulously neutral so as not to convey a message that religion is disfavored. Otherwise, "[w]ithholding access" to religious groups, because they are religious, "would leave an impermissible perception that religious activities are disfavored." Rosenberger, 515 U.S. at 846 (O'Connor, J.,

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concurring). Justice O'Connor's assessment applies to young as well as old. After all, if a young student cannot "understand toleration of [private] religion in the schools" -- which is the necessary premise of the impressionability argument -- he or she *8 would be just as "incapable of understanding exclusion of [private] religion from the schools." Douglas Laycock, Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 19 (1987). [FN2]

FN2. If the Court were to accept the mistaken- attribution/impressionability argument, the appropriate remedy, as Justice Marshall stated in Mergens, would not be an outright ban on private religious speech, but merely a disclaimer making clear that the school does not endorse the groups or clubs that use its facilities. See Mergens, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold access program at issue in Mergens because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary); see also Pinette, 515 U.S. at 794 n.2 (Souter, J., concurring) (if there is a danger of confusion, "no reason to presume that an adequate disclaimer could not have been drafted"); id. at 769 (plurality) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.").
As to any possibility of student peer pressure, as was stated in Mergens, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." Mergens, 496 U.S. at 251. Again the appropriate remedy for the possibility of such pressure would not be an overbroad ban on religious speech, but a neutral mechanism for ensuring, for example, that only students with parental permission were allowed into meetings of private groups occurring in public school facilities. Of course, parental permission is already necessary to attend meetings of the Good News Club, which eliminates any such issue in this case.

In this case, the Establishment Clause does not require the exclusion of religious speech in general -- or the Good News Club in particular -- from Milford's open and neutrally available public facility. It is undisputed that the Good News Club is a private group, not a government organization, and it is undisputed that the Milford school is available to a broad class of secular educational events, "social, civic and recreational meetings and entertainment events," and other uses pertaining to the welfare of the community. The School District therefore would not be favoring (and thereby endorsing) religion over *9 non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter. When, as here, the government ensures neutrality by making its facilities available to religious and secular groups alike, "the message is one of neutrality rather than endorsement" and the Establishment Clause is not violated. Mergens, 496 U.S. at 248.

II. THE CONSTITUTION DOES NOT PERMIT THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

Because the Establishment Clause raises no barrier to religious speech in an open and neutrally available public facility, the remaining question is whether the Constitution permits the Milford School District to exclude religious groups such as the Good News Club from school facilities. Stated more directly, can the government unapologetically and unabashedly discriminate against private religious

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speech in a public facility? The answer to that question as well is no.

The basic principles that guide the free speech analysis are settled. "[P]rivate religious speech ... is as fully protected under the Free Speech Clause as secular private expression." Pinette, 515 U.S. at 760. A "free- speech clause without religion" would be, in the words of the Court, "Hamlet without the prince." Id. (opinion of Court for 7 Justices). The Constitution's protection for religious speech applies not just to speech from a religious perspective, but also to religious "proselytizing," Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981), and religious "worship," Pinette, 515 U.S. at 760; Widmar, 454 U.S. at 269 n.6.

It is "axiomatic" that the government "may not regulate speech based on its substantive content or the message it conveys." Rosenberger, 515 U.S. at 828. When the ***10** government targets not just subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." Id. (internal citation omitted).

It is true that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." Pinette, 515 U.S. at 761. But when the government maintains a forum open to at least some speakers and subject matters, the government's "right to limit protected expressive activity is sharply circumscribed." Id.

In a public forum (whether a traditional public forum such as a park or a public forum designated by the government such as an open bandstand), the government may impose reasonable content-neutral time, place, and manner restrictions. But content-based exclusions from a traditional or designated public forum are subject to strict scrutiny and presumptively unconstitutional. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). When the government operates not a traditional or designated public forum, but what is referred to as a "limited public forum" or a "non-public forum," the government's ability to impose content-based exclusions may be more expansive. But the government still "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." Rosenberger, 515 U.S. at 829 (internal quotations omitted); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); Perry, 460 U.S. at 46. [FN3]

FN3. There is substantial confusion regarding the appropriate terms to describe these three categories. Some cases use the term "non-public forum" to describe what we refer to as a "limited public forum." See, e.g., Cornelius, 473 U.S. at 800. That, of course, creates no real confusion, but reveals that there are two terms that may describe the same kind of forum. Some cases (including many in the Second Circuit) use the term "limited public forum" to describe what we refer to as a "designated public forum." See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 211 (2d Cir. 1997) ("designated public forum, sometimes called the 'limited public forum' "); see also Good News Club, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). That can generate substantial confusion because the standards governing those two kinds of forums otherwise would be different. In any event, the terminology we use in this case -- traditional public forum, designated public forum, and limited public forum -- is consistent with Rosenberger, but we nonetheless caution that the use of terminology is not entirely consistent among courts, advocates, and commentators.

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*11 In this case, Milford's exclusion of Good News Club from its facilities is unconstitutional for any of four independent reasons.

• First, Milford has created a designated public forum, and Milford's exclusion of religious speech (the Good News Club) from that forum is content- based and viewpoint-based, is not justified by a compelling state interest, and thus is unconstitutional under the Free Speech Clause.

• Second, even if Milford has not created a designated public forum, it maintains a limited or non-public forum, and the exclusion of religious speech in general (and instruction about morals from a religious perspective in particular) is viewpoint-based and thus unconstitutional under the Free Speech Clause.

• Third, in order to exclude speech from a limited or non-public forum, the government's exclusion must also be reasonable in light of the purpose of the forum. The blanket exclusion of religious speech, because it is religious, from a forum is facially unreasonable where, as here, it bears no relationship to the purpose for which the forum was created. Milford's policy is thus unconstitutional under the Free Speech Clause for that reason as well.

*12 • Fourth, putting aside the intricacies of free speech doctrine (whether a forum is a designated public forum or merely a limited public forum, whether an exclusion is viewpoint-based or merely content-based), the Milford policy contains a more basic constitutional flaw. The government's exclusion of religious speech, because it is religious, from a public facility violates the Free Exercise and Equal Protection Clauses, both of which bar governmental discrimination against religious people, religious organizations, and religious speech.

1. The policy adopted by the Milford Central School District has created a designated public forum with respect to Milford's school facilities. As a result, the content-based exclusion of religious speech (including the Good News Club) from those facilities is unconstitutional.

A government entity's traditional public fora are those places such as streets and parks that have "immemorially been held in trust for the use of the public." Hague v. CIO, 307 U.S. 496, 515 (1939). In addition, the government can create a public forum for free speech (create the legal equivalent of, for example, a park) by opening public facilities to general use. Perry, 460 U.S. at 45. Public school facilities, in particular, become public fora when school authorities "by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (internal quotations omitted).

The Court's decision in Widmar is instructive on the forum definition issue. There, the University of Missouri at Kansas City made its facilities "generally available for the activities of registered student groups." 454 U.S. at 264-65. The school policy also stated: "No University buildings or grounds ... may be used for purposes of religious worship or religious teaching." Id. at 265 n.3. Because the university had created a public forum, the Court subjected the content-based exclusion of religious speech from the forum to strict scrutiny: "[T]he *13 UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. ... In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions" -- namely, strict

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scrutiny. Id. at 269-70 (emphasis added).

In Lamb's Chapel, the Court similarly considered whether the government policy at issue there -- providing that school facilities were available to the public for educational, social, civic, and recreational purposes, and for other uses pertaining to the welfare of the community -- created a public forum, or rather a limited public forum. The Court stated that the argument that the school district had created a public forum carried "considerable force," but the Court ultimately decided not to "rule on this issue" because the exclusion of religious groups was plainly viewpoint-based and unconstitutional regardless of the nature of the forum. 508 U.S. at 392-93.

The Court's "strong suggestion" in Lamb's Chapel that open school facilities may well be a public forum is a useful starting point, however, for considering the nature of the forum in this case. See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring). The Milford policy, in our view, plainly creates "a forum generally open to the public." Perry, 460 U.S. at 45. Indeed, it is hard to conjure up a more expansive access policy than one in which a public facility is open for any "social, civic, or recreational use," for uses pertaining to the welfare of the community, and for "instruction in any branch of education." [FN4] For that reason, numerous courts ***14** of appeals analyzing similarly expansive policies where school facilities were open for social, civic, and recreational use by outside groups have held that the schools created public fora. See, e.g., Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5, 941 F.2d 45, 48 (1st Cir. 1991); Gregoire v. Centennial School Dist., 907 F.2d 1366, 1378 (3rd Cir. 1990); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc).

FN4. To be sure, Milford requires that groups using its facilities also make its events "open to the general public." That is a "manner" restriction imposed on groups seeking to use the school facilities. That is not a content-based restriction and thus does not in any way call into question the conclusion that Milford operates a public forum. Indeed, if anything, the non-exclusivity requirement buttresses the notion that this is a designated public forum.

For example, in the Grace Bible case, the First Circuit panel (including then-Chief Judge Breyer) assessed a policy that, as the Court characterized it, provided access for groups that were "good for the community unless, in the judgment of the school board, it is injurious to the school." 941 F.2d at 48. The school district excluded a group that wished to engage in religious speech. The First Circuit stressed that a school district opening its facilities for public use under such a policy "has no greater right to pick and choose among users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public use." Id. The Court concluded: "The bare fact is, [the school district] has volunteered expressive opportunity to the community at large, excluding some because of the content of their speech. This is elementary violation." Id.

This Court has looked not just to the policy, but also to the "practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Cornelius, 473 U.S. at 802. In this case, the factual record buttresses what the plain terms of the policy reveal. In particular, Milford has granted access to numerous groups such as the Boy Scouts, Girl Scouts, and 4-H Club. ***15** This practice is persuasive evidence regarding the

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open nature of the forum. [FN5]

FN5. The government cannot rely on a vague definition of the forum to escape the conclusion that it has created a public forum. "If the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." Gregoire, 907 F.2d at 1375. Were the rule contrary, "[a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal." Mergens, 496 U.S. at 244.

In sum, the policy and the record show that Milford Central School has created a public forum. Thus, Milford's indisputably content-based exclusion of religious speech in general (and the Good News Club in particular) from that forum is unconstitutional. See Widmar, 454 U.S. at 269; see also Campbell, 2000 WL 1597749 at *8 (Jones, J.) ("The St. Tammany facilities are "open 'indifferently' for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple."). [FN6]

FN6. The court of appeals suggested that the parties had agreed that Milford created only a limited public forum. 202 F.3d at 509. But as explained above, Second Circuit precedent conflates the categories of designated public fora and limited public fora by suggesting that the categories are governed by the same rules. See Bronx Household of Faith, 127 F.3d at 211 ("designated public forum, sometimes called the 'limited public forum' "); see also Good News Club, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). Any concession that a "limited public forum" was involved in this case is, therefore, not a concession at all given Second Circuit precedent that equates a designated public forum and a limited public forum. For that reason, the Court should independently assess the nature of the forum in this case, unconstrained by the parties' prior Second-Circuit-induced characterizations.

2. If Milford's forum is not a designated public forum, it is a limited public forum from which viewpoint-based exclusions are unconstitutional. The decisions in Lamb's Chapel and *16 Rosenberger demonstrate, moreover, that Milford's exclusion of religious speech in general (and of the Good News Club in particular) from its school facilities is viewpoint-based and thus unconstitutional.

In Lamb's Chapel, the Court considered a school policy like the one at issue in this case that provided: "[S]chool premises shall not be used by any group for religious purposes." 508 U.S. at 387. Pursuant to that policy, the school denied a church's request to use school premises "to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today." Id. The record did not indicate "that the application to exhibit the particular film series ... was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." Id. at 393-94. The Court held that this exclusion of religious perspectives was viewpoint- based and "plainly invalid." Id. at 394. The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious viewpoint."

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Id. at 393.

The Court reached the same result in Rosenberger. The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious student group. The Court held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Relying on Lamb's Chapel, the Court stressed that "discriminating against religious speech [is] discriminating on the basis of viewpoint." Id. at 832 (emphasis added). In particular, "[r]eligion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 831. As that language demonstrates, the Rosenberger Court concluded that the exclusion of religious speech, ideas, ***17** thought, and uses from a forum is inherently and by definition viewpoint-based.

In this case, Lamb's Chapel and Rosenberger make clear that Milford's policy and exclusion of the Good News Club is patently unconstitutional. The Milford School District allows instruction about morals provided from a secular perspective, but disallows instruction about morals from a religious perspective. As Judge Cabranes observed in a factually similar case, "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination." Bronx Household of Faith, 127 F.3d at 220 (concurring and dissenting). Similarly, in Campbell, Judge Jones correctly analyzed a vague "welfare" standard similar to that in Milford: "when measured against the 'welfare of the public' standard, how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" St. Tammany, 2000 WL 1597749 at *9. [FN7]

FN7. Bound by Second Circuit precedent, Judge Cabranes' opinion in that case did not take issue with the circuit's distinction between religious speech and religious worship. Such a distinction is, however, flawed for the reasons discussed below.

Of course, under Rosenberger, the express exclusion of religious uses is, in any event, inherently viewpoint-based, and thus unconstitutional regardless of the nature of the forum. As the Court said, "[r]eligion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 831. [FN8]

FN8. The four dissenters in Rosenberger likewise recognized that discrimination against religious speech was unacceptable. "The common factual thread running through Widmar, Mergens, and Lamb's Chapel, is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in Widmar and Mergens) or to suppress a particular religious viewpoint (as in Lamb's Chapel). ... Each case ... drew ultimately on the unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum." 515 U.S. at 888 (Souter, J., dissenting) (internal citations omitted).

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***18** Milford's exclusion of certain religious speech cannot be saved or cabined by positing a distinction between (i) speech from a religious perspective and (ii) religious prayer or worship. The court of appeals attempted to split the atom and to draw such a line, but that is impossible: Religious worship is religious speech and religious thought. As Judge Jacobs persuasively explained, moreover, "[d]iscussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially -- quintessentially -- religious." 202 F.3d at 515 (dissent).

So, too, the Court in Widmar flatly dismissed the idea that religious worship could be segregated from religious speech for purposes of free speech doctrine. The Court said that it is impossible to draw the line where singing, reading, and teaching transforms into "worship." 454 U.S. at 269 n.6 The Widmar analysis is surely correct, as there is no basis in precedent or logic for placing religious speech in one First Amendment category and religious worship in another First Amendment category.

In sum, even assuming that the Milford policy does not create a designated public forum, but only a limited or nonpublic forum, the exclusion of the Good News Club is viewpoint-based and thus unconstitutional.

3. A third independent reason why the exclusion of Good News Club violates the Free Speech Clause is the utter unreasonableness of the exclusion in light of the forum's ***19** purposes. In a limited public forum, the government's exclusion of particular speech not only must be viewpoint-neutral, but also must be "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806; see also Rosenberger, 515 U.S. at 829 (same); Perry, 460 U.S. at 49 (same; government may limit activities in forum, but cannot exclude "activities compatible with the intended purpose of the property"). In this case, Milford's express exclusion of religious speech does not serve any legitimate purpose of the forum.

In Lamb's Chapel, having found that the exclusion was viewpoint-based and thus unconstitutional, the Court did not reach the additional question whether the exclusion was "unreasonable in light of the purposes of the forum." But the Court did pointedly note that the Second Circuit had "uttered not a word in support of its reasonableness holding" and that if the rule were unreasonable, "it could be held facially invalid." 508 U.S. at 393 n.6. As suggested by the Court in Lamb's Chapel, therefore, the reasonableness analysis is a separate and vitally important aspect of the inquiry in limited public forum cases. And it provides an independent basis for striking down Milford's action in this case.

The "reasonableness" inquiry necessarily focuses, first, on the purpose of the Community Use policy and, second, on how that purpose is allegedly thwarted by allowing the forum to be used for religious purposes. The Milford policy allows the forum to be used for instruction in any branch of education, for uses pertaining to the welfare of the community, and for holding social, civic, and recreational meetings and entertainment events. The clear purpose of the Milford policy on its face is to provide the community with a place to meet and to speak as individuals and groups -- a public service provided by the government in the same way that parks are a public service to the people. It is inconceivable, however, that allowing religious speech in that public building would somehow undermine or thwart those purposes. That is especially so given that the policy allows uses pertaining to the "welfare of the community." ***20** As Judge Jones said in analyzing a similar policy in Campbell, "[t]o describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL

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1597749 at *9.

Indeed, the only possible bases for excluding religious speech would be (i) a blatant desire to disfavor religious speech or (ii) a claim that the Establishment Clause required exclusion. The former argument is unreasonable as a matter of law (and unconstitutional, as discussed below), and the latter is unavailing under this Court's precedents. In short, then, the Community Use policy's exclusion of use for "religious purposes" is unreasonable in light of the purposes served by the forum. See St. Tammany, 2000 WL 1597749, at *8 (Jones, J.) (policy excluding religious speech is "unreasonable" and "doomed"); see also Br. of Amicus Curiae American Center for Law and Justice at 17-29.

4. Aside from the intricacies of free speech doctrine, a more fundamental point demonstrates that Milford's exclusion of the Good News Club is unconstitutional. Under the Free Exercise and Equal Protection Clauses (as well as the Establishment Clause), the government may not discriminate against religion, just as the government may not discriminate on the basis of race. The government thus may not impose a burden or deny a benefit because of the religious nature of a group, person, writing, speech, or idea. To use the words of Justice Brennan, the government "may not use religion as a basis of classification for the imposition of duties [and] penalties ..." McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Of course, the non- discrimination principle articulated by Justice Brennan is by now firmly entrenched in this Court's jurisprudence. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 532 (1993) (government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit [] conduct because it is undertaken for religious reasons"); Employment Division v. Smith, 494 U.S. 872, 877 (1990) ("The government "may not ***21** impose special disabilities on the basis of religious views or religious status.").

Except in the context of a permissible accommodation of religion, the government must act on a religion-neutral basis, based on objective and discernible criteria that do not refer to or target religion. For example, if the government bars certain categories of speech or activities from a public facility (say, events with more than 50 people in attendance) and defines the limitation without reference to religion, the Constitution is not violated even though a religious meeting with more than 50 people in attendance would be excluded from the facility. In such a case, the government has not discriminated against religion (putting aside, of course, any issue of required accommodation under the Free Exercise Clause).

On the other hand, where the government excludes religious speech -- because it is religious -- from a public facility, the government has plainly discriminated against religion and just as plainly violated the Constitution. And that is precisely what Milford has done in this case by targeting religion for a distinctive burden.

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS.

In closing, it bears mention that the Milford policy poses two additional and important threats to religious liberty and freedom -- threats that this Court has emphasized before and that should inform the analysis in this case.

First, Milford's policy creates grave dangers of excessive entanglement -- namely, of the government seeking to monitor and inquire into the content of speech to determine whether it is sufficiently "religious" to require exclusion. This Court

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on many occasions has emphasized the constitutional dangers implicated when the government intrudes in this way into the *22 nature of speech. See Mergens, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); cf. Lee v. Weisman, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

The Court in Rosenberger elaborated on the problem, stating that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. The Court continued: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion...."Id. at 845-46 (emphasis added).

Second, the School District's policy necessarily induces people seeking to use public facilities to water down their speech and to hide the religiosity of their message in order to satisfy a government administrator that a proposed meeting is not really for "religious purposes." That demeaning and disturbing exercise is neither mandated nor permitted by the Constitution. The Constitution is not "some sort of homogenizing solvent" that forces religious groups "to choose between assimilating to mainstream American culture or losing their political rights." Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring). The Constitution in no way licenses the government to operate a checkpoint where religious people who hide their beliefs and intentions are allowed through, but those who express their true beliefs and intentions are turned away.

*23 In short, these two factors underscore the sound prudential and historical reasons why the Constitution neither requires nor permits discrimination against religious people and religious speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,2000.
Good News Club v. Milford Central School
2000 WL 1784193

Briefs and Other Related Documents (Back to top)

- 2001 WL 196997, 69 USLW 3416 (Oral Argument) Oral Argument (Feb. 28, 2001)
- 2001 WL 173531 (Appellate Brief) Reply Brief for Petitioners (Feb. 15, 2001)
- 2001 WL 43335 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT (Jan. 12, 2001)
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CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NEW YORK CIVIL LIBERTIES UNION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF THE RESPONDENT (Jan. 12, 2001)

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• 2000 WL 1803627 (Appellate Brief) BRIEF AMICUS CURIAE FOR 20 THEOLOGIANS AND SCHOLARS OF RELIGION IN SUPPORT OF PETITIONERS (Dec. 05, 2000)

• 2000 WL 1784135 (Appellate Brief) BRIEF OF AMICI CURIAE THE AMERICAN CENTER FOR LAW & JUSTICE, FOCUS ON THE FAMILY, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784136 (Appellate Brief) BRIEF AMICUS CURIAE OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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• 2000 WL 1784144 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784146 (Appellate Brief) BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784148 (Appellate Brief) BRIEF OF DOUGLAS LAYCOCK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784159 (Appellate Brief) BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE AMERICAN MUSLIM COUNCIL, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL BOARD OF CHURCH & SOCIETY OF THE UNITED METHODIST CHURCH, AND THE A.M.E. ZION CHURCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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• 2000 WL 1784206 (Appellate Brief) BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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Briefs and Other Related Documents

Supreme Court of the United States

GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL.

No. 99-2036.

Argued Feb. 28, 2001.
Decided June 11, 2001.

Christian club for children, a sponsor, and a member brought § 1983 action against public school, alleging that school's refusal to allow club to use school facilities violated, inter alia, their free speech rights. The United States District Court for the Northern District of New York, McAvoy, Chief Judge, 21 F.Supp.2d 147, granted school summary judgment, and club appealed. The United States Court of Appeals for the Second Circuit, 202 F.3d 502, affirmed, and certiorari was granted. The Supreme Court, Justice Thomas, J., held that: (1) school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, and (2) school's viewpoint discrimination was not required to avoid violating the Establishment Clause.

Reversed and remanded.

Justice Scalia filed a concurring opinion.

Justice Breyer filed an opinion concurring in part.

Justice Stevens filed a dissenting opinion.

Justice Souter filed a dissenting opinion, in which Justice Ginsburg joined.

West Headnotes

[1] Constitutional Law ⚿90.1(4)
92k90.1(4)

If a forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law ⚿90.1(4)
92k90.1(4)

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech, and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint, and must be reasonable in light of the purpose served by the forum. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚿90.1(1.4)
92k90.1(1.4)

[3] Schools ⚿72
345k72

Public school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, where school had opened its limited public forum to activities that served a variety of purposes, including events "pertaining to the welfare of the community," and had interpreted its policy to permit discussions of subjects such as "the development of character and morals from a religious perspective," but excluded club on ground that its activities, which included learning Bible verses, relation of Bible stories to members' lives, and prayer, were "the equivalent of religious instruction itself;" fact that club's activities were "decidedly religious in nature" did not mean that they could not also be characterized properly as the teaching of morals and character development from a particular viewpoint; abrogating *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law ⚿90.1(1.4)
92k90.1(1.4)

[4] Schools ⚿72
345k72

Because the exclusion of Christian club from use of public school premises on the basis of its religious perspective constituted unconstitutional viewpoint discrimination, it was no defense for school that purely religious purposes could be excluded under state law enumerating several purposes for which

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local boards may open their schools to public use. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Education Law § 414.

[5] Constitutional Law ⚿90.1(4)
92k90.1(4)

Speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ⚿84.5(3)
92k84.5(3)

[6] Schools ⚿72
345k72

Public school's viewpoint discrimination, in exclusion of Christian children's club from meeting at school based on its religious nature, was not required to avoid violating the Establishment Clause, where the club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, and the school made its forum available to other organizations, despite contention that elementary school children would perceive that the school was endorsing the club and would feel coercive pressure to participate, because the club's activities took place on school grounds. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law ⚿84.1
92k84.1

A significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion, and the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law ⚿84.5(3)
92k84.5(3)

[8] Schools ⚿72
345k72

To the extent Supreme Court considered whether the community would feel coercive pressure to engage in the activities of Christian children's club, conducted after hours on public school premises, the relevant community would be the parents, not the elementary school children, where it was the parents who chose whether their children would attend the club meetings and the children could not attend without their parents' permission, and an argument that the parents would be confused about whether the school was endorsing religion could not be reasonably advanced. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚿84.5(3)
92k84.5(3)

Whatever significance Supreme Court may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, it has never extended its Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚿84.5(3)
92k84.5(3)

[10] Schools ⚿72
345k72

Even if Supreme Court were to consider the possible misperceptions by schoolchildren in deciding whether public school's permitting Christian children's club's after hours activities on school premises would violate the Establishment Clause, the facts of the case did not support school's conclusion, where there was no evidence that young children were permitted to loiter outside classrooms after the school day had ended, parents had to sign permission forms for attendance at club meetings, the meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom, the instructors were not schoolteachers, and the children in the group were not all the same age as in the normal classroom setting. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚿84.5(3)
92k84.5(3)

[11] Schools ⚿72
345k72

Even if Supreme Court were to inquire into the minds of schoolchildren with respect to the Establishment

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Clause implications of permitting Christian children's club to hold meetings after hours on school premises, the danger that children would misperceive the endorsement of religion was no greater than the danger that they would perceive a hostility toward the religious viewpoint if the club were excluded from the public forum. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚿84.5(3)
92k84.5(3)

[12] Schools ⚿72
345k72

Any risk that small children would perceive endorsement of religion did not counsel in favor of excluding a Christian children's club's religious activity after hours on school premises, as there were countervailing constitutional concerns related to rights of other individuals in the community, consisting of the free speech rights of the club and its members. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law ⚿84.5(11)
92k84.5(11)

When a limited public forum is available for use by groups presenting any viewpoint, Supreme Court would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time. U.S.C.A. Const.Amend. 1.

****2095** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***98** Under New York law, respondent Milford Central School (Milford) enacted a policy authorizing district residents to use its building after school for, among other things, (1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare. Stephen and Darleen Fournier, district residents eligible to use the school's facilities upon approval of their proposed use, are sponsors of the **Good News Club**, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, they submitted a request to hold the Club's weekly afterschool meetings in the school. Milford denied the request on the ground that the proposed use--to sing songs, hear Bible lessons, memorize scripture, and pray--was the equivalent of religious worship prohibited by the community use policy. Petitioners (collectively, the Club), filed suit under 42 U.S.C. § 1983, alleging, *inter alia,* that the denial of the Club's application violated its free speech rights under the First and Fourteenth Amendments. The District Court ultimately granted Milford summary judgment, finding the Club's subject matter to be religious in nature, not merely a discussion of secular matters from a religious perspective that Milford otherwise permits. Because the school had not allowed other groups providing religious instruction to use its limited public forum, the court held that it could deny the Club access without engaging in unconstitutional viewpoint discrimination. In affirming, the Second Circuit rejected the Club's contention that Milford's restriction was unreasonable, and held that, because the Club's subject matter was quintessentially religious and its activities fell outside the bounds of pure moral and character development, Milford's policy was constitutional subject discrimination, not unconstitutional viewpoint discrimination.

Held:

****2096** 1. Milford violated the Club's free speech rights when it excluded the Club from meeting after hours at the school. Pp. 2099-2102.

(a) Because the parties so agree, this Court assumes that Milford operates a limited public forum. A State establishing such a forum is not required to and does not allow persons to engage in every type of ***99** speech. It may be justified in reserving its forum for certain groups or the discussion of certain topics. *E.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700. The power to so restrict speech, however, is not without limits. The restriction must not discriminate against speech based on viewpoint, *ibid.*, and must be reasonable in light of the forum's purpose, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567. Pp. 2099-2100.

(b) By denying the Club access to the school's limited public forum on the ground that the Club was religious in nature, Milford discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause. That exclusion is indistinguishable from the exclusions held violative of the Clause in *Lamb's Chapel v. Center Moriches*

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Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352, where a school district precluded a private group from presenting films at the school based solely on the religious perspective of the films, and in *Rosenberger,* where a university refused to fund a student publication because it addressed issues from a religious perspective. The only apparent difference between the activities of Lamb's Chapel and the Club is the inconsequential distinction that the Club teaches moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. *Rosenberger* also is dispositive: Given the obvious religious content of the publication there at issue, it cannot be said that the Club's activities are any more "religious" or deserve any less Free Speech Clause protection. This Court disagrees with the Second Circuit's view that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for Free Speech Clause purposes is that there is no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. Because Milford's restriction is viewpoint discriminatory, the Court need not decide whether it is unreasonable in light of the forum's purposes. Pp. 2100-2102.

2. Permitting the Club to meet on the school's premises would not have violated the Establishment Clause. Establishment Clause defenses similar to Milford's were rejected in *Lamb's Chapel, supra,* at 395, 113 S.Ct. 2141-- where the Court found that, because the films would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members, there was no realistic danger that the community would think that the district was endorsing religion--and in *Widmar v. Vincent,* 454 U.S. 263, 272-273, and n. 13, 102 S.Ct. 269, 70 L.Ed.2d 440--where a university's forum was ***100** already available to other groups. Because the Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar,* Milford's reliance on the Establishment Clause is unavailing. As in *Lamb's Chapel,* the Club's meetings were to be held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Court rejects Milford's attempt to distinguish those cases by emphasizing that its policy involves elementary school children ****2097** who will perceive that the school is endorsing the Club and will feel coerced to participate because the Club's activities take place on school grounds, even though they occur during nonschool hours. That argument is unpersuasive for a number of reasons. (1) Allowing the Club to speak on school grounds would ensure, not threaten, neutrality toward religion. Accordingly, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Club. See, *e.g., Rosenberger, supra,* at 839, 115 S.Ct. 2510. (2) To the extent the Court considers whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman,* 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467, the relevant community is the parents who choose whether their children will attend Club meetings, not the children themselves. (3) Whatever significance it may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g., id.,* at 592, 112 S.Ct. 2649, the Court has never foreclosed private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. *Lee, supra,* at 592, 112 S.Ct. 2649, and *Edwards v. Aguillard,* 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510, distinguished. (4) Even if the Court were to consider the possible misperceptions by schoolchildren in deciding whether there is an Establishment Clause violation, the facts of this case simply do not support Milford's conclusion. Finally, it cannot be said that the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. Because it is not convinced that there is any significance to the possibility that elementary school children may witness the Club's activities on school premises, the Court can find no reason to depart from *Lamb's Chapel* and *Widmar.* Pp. 2103-2107.

3. Because Milford has not raised a valid Establishment Clause claim, this Court does not address whether such a claim could excuse Milford's viewpoint discrimination. Pp. 2103, 2107.

202 F.3d 502, reversed and remanded.

***101** THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined,

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and in which BREYER, JJ., joined in part. SCALIA, J., filed a concurring opinion, *post,* p. 2107. BREYER, J., filed an opinion concurring in part, *post,* p. 2111. STEVENS, J., filed a dissenting opinion, *post,* p. 2112. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 2115.

Thomas Marcelle, Slingerlands, NY, for petitioners.

Frank W. Miller, East Syracuse, NY, for Respondents.

***102** Justice THOMAS delivered the opinion of the Court.

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the **Good News Club** when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.

I

The State of New York authorizes local school boards to adopt regulations governing **2098 the use of their school facilities. In particular, N.Y. Educ. Law § 414 (McKinney 2000) enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School (Milford) enacted a community use policy adopting seven of § 414's purposes for which its building could be used after school. App. to Pet. for Cert. D1-D3. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." *Id.,* at D1. Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Ibid.*

***103** Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local **Good News Club,** a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly afterschool meetings in the school cafeteria. App. in No. 98-9494(CA2), p. A-81. The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use--to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture," *ibid.*--was "the equivalent of religious worship." App. H1-H2. According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities. App. to Pet. for Cert. D2.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

> "The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia,* learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization." App. in No. 98-9494(CA2), at A30.

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed to be ***104** engaged in by the **Good News Club** were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id.,* at A25. In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study." *Id.,* at A56.

In March 1997, petitioners, the **Good News Club,** Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action under Rev.Stat. § 1979, 42 U.S.C. § 1983, against Milford in the United States District Court for the Northern District of New York. The Club alleged that Milford's denial of its application violated its free speech rights under the First and Fourteenth Amendments, its right

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to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* [FN1]

FN1. The District Court dismissed the Club's claim under the Religious Freedom Restoration Act because we held the Act to be unconstitutional in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). See 21 F.Supp.2d 147, 150, n. 4 (N.D.N.Y.1998).

**2099 The Club moved for a preliminary injunction to prevent the school from enforcing its religious exclusion policy against the Club and thereby to permit the Club's use of the school facilities. On April 14, 1997, the District Court granted the injunction. The Club then held its weekly afterschool meetings from April 1997 until June 1998 in a high school resource and middle school special education room. App. N12.

In August 1998, the District Court vacated the preliminary injunction and granted Milford's motion for summary judgment. 21 F.Supp.2d 147 (N.D.N.Y.1998). The court found that the Club's "subject matter is decidedly religious in nature, and not merely a discussion of secular matters *105 from a religious perspective that is otherwise permitted under [Milford's] use policies." *Id.,* at 154. Because the school had not permitted other groups that provided religious instruction to use its limited public forum, the court held that the school could deny access to the Club without engaging in unconstitutional viewpoint discrimination. The court also rejected the Club's equal protection claim.

The Club appealed, and a divided panel of the United States Court of Appeals for the Second Circuit affirmed. 202 F.3d 502 (2000). First, the court rejected the Club's contention that Milford's restriction against allowing religious instruction in its facilities is unreasonable. Second, it held that, because the subject matter of the Club's activities is "quintessentially religious," *id.,* at 510, and the activities "fall outside the bounds of pure 'moral and character development,' " *id.,* at 511, Milford's policy of excluding the Club's meetings was constitutional subject discrimination, not unconstitutional viewpoint discrimination. Judge Jacobs filed a dissenting opinion in which he concluded that the school's restriction did constitute viewpoint discrimination under *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare *Gentala v. Tucson,* 244 F.3d 1065 (C.A.9 2001) (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services); *Campbell v. St. Tammany's School Bd.,* 206 F.3d 482 (C.A.5 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), cert. pending, No. 00-1194; [FN*] *Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207 (C.A.2 1997) (concluding that a ban on religious services and *106 instruction in the limited public forum was constitutional), with *Church on the Rock v. Albuquerque,* 84 F.3d 1273 (C.A.10 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination); and *Good News/Good Sports Club v. School Dist. of Ladue,* 28 F.3d 1501 (C.A.8 1994) (holding unconstitutional a school use policy that prohibited **Good News Club** from meeting during times when the Boy Scouts could meet). We granted certiorari to resolve this conflict. 531 U.S. 923, 121 S.Ct. 296, 148 L.Ed.2d 238 (2000)

FN* [Reporter's Note: See *post,* 533 U.S. 913, 121 S.Ct. 2518.]

II

[1] The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum. See *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). **2100 If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. *Id.,* at 45-46, 103 S.Ct. 948. We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. See *Lamb's Chapel, supra,* at 391-392, 113 S.Ct. 2141. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, see Brief for Petitioners 15-17; Brief for Respondent 26, we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited

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public forum.

[2] When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Lamb's Chapel, supra,* at 392-393, 113 S.Ct. 2141. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, ***107** *Rosenberger, supra,* at 829, 115 S.Ct. 2510, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

III

[3][4] Applying this test, we first address whether the exclusion constituted viewpoint discrimination. We are guided in our analysis by two of our prior opinions, *Lamb's Chapel* and *Rosenberger*. In *Lamb's Chapel,* we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger,* we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the **Good News Club** based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum. [FN2]

FN2. Although Milford argued below that, under § 414, it could not permit its property to be used for the purpose of religious activity, see Brief for Appellee in No. 98-9494(CA2), p. 12, here it merely asserts in one sentence that it has, "in accordance with state law, closed [its] limited open forum to purely religious instruction and services," Brief for Respondent 27. Because Milford does not elaborate, it is difficult to discern whether it is arguing that it is required by state law to exclude the Club's activities.
Before the Court of Appeals, Milford cited *Trietley v. Board of Ed. of Buffalo,* 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), in which a New York court held that a local school district could not permit a student Bible club to meet on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414 of the Education Law." *Id.,* at 5-6, 409 N.Y.S.2d, at 915. Although the court conceded that the Bible clubs might provide incidental secular benefits, it nonetheless concluded that the school would have violated the Establishment Clause had it permitted the club's activities on campus. Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law.

***108** Milford has opened its limited public forum to activities that serve a variety of purposes, including events "pertaining to the welfare of the community." App. to Pet. for Cert. D1. Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development **2101 of character and morals from a religious perspective." Brief for Appellee in No. 98-9494(CA2), p. 6. For example, this policy would allow someone to use Aesop's Fables to teach children moral values. App. N11. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools, *id.,* at N6, and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth," *id.,* at N10-N11. In short, any group that "promote[s] the moral and character development of children" is eligible to use the school building. Brief for Appellee in No. 98-9494(CA2), at 9.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature--"the equivalent of religious instruction itself," 202 F.3d, at 507--it excluded the Club from use of its facilities.

***109** Applying Lamb's Chapel, [FN3] we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum. In *Lamb's Chapel,* the local New

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York school district similarly had adopted § 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes." 508 U.S., at 387, 113 S.Ct. 2141. Citing this prohibition, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, because the films "no doubt dealt with a subject otherwise permissible" under the rule, the teaching of family values, the district's exclusion of the church was unconstitutional viewpoint discrimination. *Id.,* at 394, 113 S.Ct. 2141.

> FN3. We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel,* despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn. See, *e.g.,* 202 F.3d 502, 513 (C.A.2 2000) (Jacobs, J., dissenting) ("I cannot square the majority's analysis in this case with *Lamb's Chapel* "); 21 F.Supp.2d, at 150; App. O9-O11 (District Court stating "that *Lamb's Chapel* and *Rosenberger* pinpoint the critical issue in this case"); Brief for Appellee in No. 98-9494(CA2), at 36-39; Brief for Appellants in No. 98-9494(CA2), pp. 15, 36.

Like the church in *Lamb's Chapel,* the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint. Certainly, one could have characterized the film presentations in *Lamb's Chapel* as a religious use, as the Court of Appeals did, *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 959 F.2d 381, 388-389 (C.A.2 1992). And one easily could conclude that the films' purpose to instruct that " 'society's slide toward humanism ... can only be counterbalanced by a loving home where Christian values are instilled from an early age,' " *id.,* at 384, was "quintessentially religious," 202 F.3d, at 510. The only apparent difference ***110** between the activity of Lamb's Chapel and the activities of the **Good News Club** is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the **Good News Club's** activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. In *Rosenberger,* a student organization ****2102** at the University of Virginia was denied funding for printing expenses because its publication, Wide Awake, offered a Christian viewpoint. Just as the Club emphasizes the role of Christianity in students' morals and character, Wide Awake " 'challenge[d] Christians to live, in word and deed, according to the faith they proclaim and ... encourage[d] students to consider what a personal relationship with Jesus Christ means.' " 515 U.S., at 826, 115 S.Ct. 2510. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. *Id.,* at 831, 115 S.Ct. 2510. Although in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor. Instead, we concluded simply that the university's denial of funding to print Wide Awake was viewpoint discrimination, just as the school district's refusal to allow Lamb's Chapel to show its films was viewpoint discrimination. *Ibid.* Given the obvious religious content of Wide Awake, we cannot say that the Club's activities are any more "religious" or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger.*

Despite our holdings in *Lamb's Chapel* and *Rosenberger,* the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature ***111** warranted treating the Club's activities as different in kind from the other activities permitted by the school. See 202 F.3d, at 510 (the Club "is doing something other than simply teaching moral values"). The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. *Id.,* at 509. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." *Id.,* at 510. With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,' " the exclusion did not constitute viewpoint discrimination. *Id.,* at 511.

[5] We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. See 202 F.3d, at 512 (Jacobs, J., dissenting) ("[W]hen the subject matter is morals

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and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* ***112** *that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination. [FN4]*

FN4. Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,' " *id.*, at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.
Justice SOUTER's recitation of the Club's activities is accurate. See *post,* at 2116-2117 (dissenting opinion). But in our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger:* Religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to Justice SOUTER, the Club's activities constitute "an evangelical service of worship." *Post,* at 2117. Regardless of the label Justice SOUTER wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger.*

****2103** IV

[6] Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. In other words, according to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree.

We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination. ***113** *Widmar v. Vincent,* 454 U.S. 263, 271, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. See *Lamb's Chapel,* 508 U.S., at 394-395, 113 S.Ct. 2141 (noting the suggestion in *Widmar* but ultimately not finding an Establishment Clause problem). We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar.* In particular, in *Lamb's Chapel,* we explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." 508 U.S., at 395, 113 S.Ct. 2141. Accordingly, we found that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Ibid.* Likewise, in *Widmar,* where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. 454 U.S., at 272-273, and n. 13, 102 S.Ct. 269.

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel,* the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar.* Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and

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Widmar by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities ***114** take place on school grounds, even though they occur during nonschool hours. [FN5] This argument is unpersuasive.

> FN5. It is worth noting that, although Milford repeatedly has argued that the Club's meeting time directly after the schoolday is relevant to its Establishment Clause concerns, the record does not reflect any offer by the school district to permit the Club to use the facilities at a different time of day. The superintendent's stated reason for denying the applications was simply that the Club's activities were "religious instruction." 202 F.3d, at 507. In any event, consistent with *Lamb's Chapel* and *Widmar,* the school could not deny equal access to the Club for any time that is generally available for public use.

****2104** [7] First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Rosenberger,* 515 U.S., at 839, 115 S.Ct. 2510 (emphasis added). See also *Mitchell v. Helms,* 530 U.S. 793, 809, 120 S.Ct. 2530, 147 L.Ed.2d 660, (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality,* upholding aid that is offered to a broad range of groups or persons without regard to their religion" (emphasis added)); *id.,* at 838, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges"). Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger, supra,* at 839, 115 S.Ct. 2510. The **Good News Club** seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the **Good News Club**.

[8] ***115** Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman,* 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the **Good News Club** meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the **Good News Club's** religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

[9] Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g., id.,* at 592, 112 S.Ct. 2649; *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (stating that "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice"), we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

None of the cases discussed by Milford persuades us that our Establishment Clause jurisprudence has gone this far. For example, Milford cites *Lee v. Weisman* for the proposition that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," 505 U.S., at 592, 112 S.Ct. 2649. In *Lee,* however, we concluded that attendance at the graduation exercise was obligatory. *Id.,* at 586, 112 S.Ct. 2649. See also *Santa Fe Independent School* *****2105*** *Dist. v. Doe,* 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (holding the school's policy of permitting prayer at ***116** football games unconstitutional where the activity took place during a school-sponsored event and not in a public forum). We did not place independent significance on the fact that the graduation exercise might take place on school premises, *Lee, supra,* at 583, 112 S.Ct. 2649. Here, where the school facilities are being used for a

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nonschool function and there is no government sponsorship of the Club's activities, *Lee* is inapposite.

Equally unsupportive is *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), in which we held that a Louisiana law that proscribed the teaching of evolution as part of the public school curriculum, unless accompanied by a lesson on creationism, violated the Establishment Clause. In *Edwards,* we mentioned that students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models. See *id.,* at 584, 107 S.Ct. 2573. But we did not discuss this concern in our application of the law to the facts. Moreover, we did note that mandatory attendance requirements meant that state advancement of religion in a school would be particularly harshly felt by impressionable students. [FN6] But we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue. Even if *Edwards* had articulated the principle Milford believes it did, the facts in *Edwards* are simply too remote from those here ***117** to give the principle any weight. *Edwards* involved the content of the curriculum taught by state teachers *during the schoolday* to children required to attend. Obviously, when individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns expressed in *Edwards* are not present. [FN7]

FN6. Milford also cites *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), for its position that the Club's religious element would be advanced by the State through compulsory attendance laws. In *McCollum,* the school district excused students from their normal classroom study during the regular schoolday to attend classes taught by sectarian religious teachers, who were subject to approval by the school superintendent. Under these circumstances, this Court found it relevant that "[t]he operation of the State's compulsory education system ... assist [ed] and [wa]s integrated with the program of religious instruction carried on by separate religious sects." *Id.,* at 209, 68 S.Ct. 461. In the present case, there is simply no integration and cooperation between the school district and the Club. The Club's activities take place *after* the time when the children are compelled by state law to be at the school.

FN7. Milford also refers to *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), to support its view that "assumptions about the ability of students to make ... subtle distinctions [between schoolteachers during the schoolday and Reverend Fournier after school] are less valid for elementary age children who tend to be less informed, more impressionable, and more subject to peer pressure than average adults." Brief for Respondent 19. Four Justices in *Mergens* believed that high school students likely are capable of distinguishing between government and private endorsement of religion. See 496 U.S., at 250-251, 110 S.Ct. 2356 (opinion of O'CONNOR, J.). The opinion, however, made no statement about how capable of discerning endorsement elementary school children would have been in the context of *Mergens,* where the activity at issue was *after school.* In any event, even to the extent elementary school children are more prone to peer pressure than are older children, it simply is not clear what, in this case, they could be pressured to do.

In further support of the argument that the impressionability of elementary school children even after school is significant, Milford points to several cases in which we have found Establishment Clause violations in public schools. For example, Milford relies heavily on *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), in which we found unconstitutional Pennsylvania's practice of permitting public schools to read Bible verses at the opening of each schoolday. *Schempp,* however, is inapposite because this case does not involve activity by the school during the schoolday.

****2106** [10] Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford's permitting the Club's activities would violate the Establishment Clause, the facts of this case simply do not support Milford's conclusion. There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended. Surely even young children are aware of events for which their parents must sign permission ***118** forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12. [FN8] In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

FN8. Milford also relies on the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, as evidence that Congress has recognized the vulnerability of elementary school children to misperceiving endorsement of religion. The Act, however, makes

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no express recognition of the impressionability of elementary school children. It applies only to public secondary schools and makes no mention of elementary schools. § 4071(a). We can derive no meaning from the choice by Congress not to address elementary schools. .

[11] Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours. For that matter, members of the public writ large are permitted in the school after hours pursuant to the community use policy. Any bystander could conceivably be aware of the school's use policy and its exclusion of the **Good News Club**, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement. Cf. *Rosenberger,* 515 U.S., at 835-836, 115 S.Ct. 2510 (expressing the concern that viewpoint discrimination can chill individual thought and expression).

[12] ***119** We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. Cf. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 779-780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from ... discomfort .... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]" (emphasis added)). There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. Cf. *Rosenberger, supra,* at 835, 115 S.Ct. 2510 ("Vital First Amendment speech principles are at stake here"). **2107 And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

[13] We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the **Good News Club's** activities on school premises, and therefore we can find no reason to depart from our holdings in *Lamb's Chapel* and *Widmar.* Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause. [FN9]

FN9. Both parties have briefed the Establishment Clause issue extensively, and neither suggests that a remand would be of assistance on this issue. Although Justice SOUTER would prefer that a record be developed on several facts, see *post,* at 2118, and Justice BREYER believes that development of those facts could yet be dispositive in this case, see *post,* at 2111 (opinion concurring in part), none of these facts is relevant to the Establishment Clause inquiry. For example, Justice SOUTER suggests that we cannot determine whether there would be an Establishment Clause violation unless we know when, and to what extent, other groups use the facilities. When a limited public forum is available for use by groups presenting any viewpoint, however, we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.

***120** V

When Milford denied the **Good News Club** access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion but write separately to explain further my views on two issues.

I

First, I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure, see *ante,* at 2104, and perceptions of endorsement, see *ante,* at 2104, 2106, "to the extent" that the law makes such factors relevant, ***121** is consistent with the belief (which I hold) that in this case that extent is zero. As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected, see, *e.g., Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). What is at play here is not coercion, but the compulsion of ideas--and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, see, *e.g., Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Murdock v. Pennsylvania,* 319 U.S. 105, 108-109, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Cantwell v. Connecticut,* 310 U.S. 296, 307-310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

As to endorsement, I have previously written that "[r]eligious expression cannot **2108 violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count." *Id.,* at 765, 115 S.Ct. 2440. See also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 401, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in judgment) ("I would hold, simply and clearly, that giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect").

*122 II

Second, since we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included it (the forum was opened to any "us[e] pertaining to the welfare of the community," App. to Pet. for Cert. D1), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum--"because it's religious" will not do, see, *e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532-533, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 877-878, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)--respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject-matter limits must at least be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). [FN1] But I agree, in any event, that respondent did discriminate on the basis of viewpoint.

FN1. In this regard, I should note the inaccuracy of Justice SOUTER'S claim that the reasonableness of the forum limitation is not properly before us, see *post,* at 2115-2116, and n. 1 (dissenting opinion). Petitioners argued, both in their papers filed in the District Court, Memorandum of Law in Support of Cross-Motion for Summary Judgment in No. 97-CV-0302 (NDNY), pp. 20-22, and in their brief filed on appeal, Brief for Appellants in No. 98-9494(CA2), pp. 33-35, that respondent's exclusion of them from the forum was unreasonable in light of the purposes served by the forum. Although the District Court did say in passing that the reasonableness of respondent's general restriction on use of its facilities for religious purposes was not challenged, see 21 F.Supp.2d 147, 154 (N.D.N.Y.1998), the Court of Appeals apparently decided that the particular reasonableness challenge brought by petitioners had been preserved, because it addressed the argument on the merits, see 202 F.3d 502, 509 (C.A.2 2000) ("Taking first the reasonableness criterion, the Club argues that the

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> restriction is unreasonable .... This argument is foreclosed by precedent").

As I understand it, the point of disagreement between the Court and the dissenters (and the Court of Appeals) ***123** with regard to petitioner's Free Speech Clause claim is not whether the **Good News Club** must be permitted to present religious viewpoints on morals and character in respondent's forum, which has been opened to secular discussions of that subject, see *ante,* at 2100-2101. [FN2] The answer to that is established by our decision in *Lamb's Chapel, supra.* The point of disagreement is not even whether *some* of the Club's religious speech fell within the protection ****2109** of *Lamb's Chapel.* It certainly did. See *ante,* at 2101; 202 F.3d 502, 509 (C.A.2 2000) (the Club's "teachings may involve secular values such as obedience or resisting jealousy").

> FN2. Neither does the disagreement center on the mode of the Club's speech--the fact that it sings songs and plays games. Although a forum could perhaps be opened to lectures but not plays, debates but not concerts, respondent has placed no such restrictions on the use of its facilities. See App. N8, N14, N19 (allowing seminars, concerts, and plays).

The disagreement, rather, regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. The Club, for example, urges children "who already believe in the Lord Jesus as their Savior" to "[s]top and ask God for the strength and the 'want' ... to obey Him," 21 F.Supp.2d 147, 156 (N.D.N.Y.1998) (internal quotation marks omitted), and it invites children who "don't know Jesus as Savior" to "trust the Lord Jesus to be [their] Savior from sin," *ibid.* The dissenters and the Second Circuit say that the presence of such additional speech, because it is purely religious, transforms the Club's meetings into something different in kind from other, nonreligious activities that teach moral and character development. See *post,* at 2113-2114 (STEVENS, J., dissenting); *post,* at 2116-2117 (SOUTER, J., dissenting); 202 F.3d, at 509-511. Therefore, the argument goes, excluding the Club is not viewpoint discrimination. I disagree.

Respondent has opened its facilities to any "us[e] pertaining to the welfare of the community, provided that such us[e] shall be nonexclusive and shall be opened to the general ***124** public." App. to Pet. for Cert. D1. Shaping the moral and character development of children certainly "pertain[s] to the welfare of the community." Thus, respondent has agreed that groups engaged in the endeavor of developing character may use its forum. The Boy Scouts, for example, may seek "to influence a boy's character, development and spiritual growth," App. N10-N11; cf. *Boy Scouts of America v. Dale,* 530 U.S. 640, 649, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) ("[T]he general mission of the Boy Scouts is clear: '[t]o instill values in young people' " (quoting the Scouts' mission statement)), and a group may use Aesop's Fables to teach moral values, App. N11. When the Club attempted to teach Biblical-based moral values, however, it was excluded because its activities "d[id] not involve merely a religious perspective on the secular subject of morality" and because "it [was] clear from the conduct of the meetings that the **Good News Club** goes far beyond merely stating its viewpoint." 202 F.3d, at 510.

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives, see *Boy Scouts of America v. Dale, supra,* at 649, 120 S.Ct. 2446, by giving *reasons* why that is a good idea--because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered--because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based--that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination. ***125** Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise--and in respondent's facilities every premise but a religious one may be defended.

****2110** In *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), we struck down a similar

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viewpoint restriction. There, a private student newspaper sought funding from a student-activity fund on the same basis as its secular counterparts. And though the paper printed such directly religious material as exhortations to belief, see *id.,* at 826, 115 S.Ct. 2510 (quoting the paper's self-described mission " 'to encourage students to consider what a personal relationship with Jesus Christ means' "); *id.,* at 865, 115 S.Ct. 2510 (SOUTER, J., dissenting) (" 'The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation' " (quoting the paper)); see also *id.,* at 865-867, 115 S.Ct. 2510 (quoting other examples), we held that refusing to provide the funds discriminated on the basis of viewpoint, because the religious speech had been used to "provid[e] ... a specific premise ... from which a variety of subjects may be discussed and considered," *id.,* at 831, 115 S.Ct. 2510 (opinion of the Court). The right to present a viewpoint based on a religion premise carried with it the right to defend the premise.

The dissenters emphasize that the religious speech used by the Club as the foundation for its views on morals and character is not just any type of religious speech--although they cannot agree exactly what type of religious speech it is. In Justice STEVENS's view, it is speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," *post,* at 2112; see also *post,* at 2114, n. 3. This does not, to begin with, distinguish *Rosenberger,* which ***126** also involved proselytizing speech, as the above quotations show. See also *Rosenberger, supra,* at 844, 115 S.Ct. 2510 (referring approvingly to the dissent's description of the paper as a "wor[k] characterized by ... evangelism"). But in addition, it does not distinguish the Club's activities from those of the other groups using respondent's forum--which have not, as Justice STEVENS suggests, see *post,* at 2113, been restricted to roundtable "discussions" of moral issues. Those groups may seek to inculcate children with their beliefs, and they may furthermore "recruit others to join their respective groups," *post,* at 2113. The Club must therefore have liberty to do the same, even if, as Justice STEVENS fears without support in the record, see *ibid.,* its actions may prove (shudder!) divisive. See *Lamb's Chapel,* 508 U.S., at 395, 113 S.Ct. 2141 (remarking that worries about "public unrest" caused by "proselytizing" are "difficult to defend as a reason to deny the presentation of a religious point of view"); cf. *Lynch v. Donnelly,* 465 U.S. 668, 684-685, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (holding that "political divisiveness" could not invalidate inclusion of creche in municipal Christmas display); *Cantwell v. Connecticut,* 310 U.S., at 310-311, 60 S.Ct. 900.

Justice SOUTER, while agreeing that the Club's religious speech "may be characterized as proselytizing," *post,* at 2117, n. 3, thinks that it is even more clearly excludable from respondent's forum because it is essentially "an evangelical service of worship," *post,* at 2117. But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no "*relevance* " to the constitutional issue. *Widmar v. Vincent,* 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); see also *Murdock v. Pennsylvania,* 319 U.S., at 109, 63 S.Ct. 870 (refusing to distinguish evangelism from worship). [FN3] Those holdings ***127** are ****2111** surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. *Widmar v. Vincent, supra,* at 269, n. 6, 102 S.Ct. 269; cf. *Lee v. Weisman,* 505 U.S. 577, 616-617, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology"). And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. See, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va., supra,* at 844-845, 115 S.Ct. 2510; *Widmar v. Vincent, supra,* at 269, n. 6, 102 S.Ct. 269. I will not endorse an approach that suffers such a wondrous diversity of flaws.

FN3. We *have* drawn a different distinction--between religious speech generally and speech about religion--but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic. See *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (State schools in their official capacity may not teach religion but may teach about religion). Whatever the rule there, licensing and monitoring private religious speech is an entirely different matter, see, *e.g., Kunz v. New York,* 340 U.S. 290, 293-294, 71 S.Ct. 312, 95 L.Ed. 280 (1951), even in a limited public forum where the State has some authority to draw subject-matter distinctions.

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* * *

With these words of explanation, I join the opinion of the Court.

Justice BREYER, concurring in part.

I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. See, *e.g., Mitchell v. Helms,* 530 U.S. 793, 839, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (O'CONNOR, J., concurring in judgment); ***128** *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 774, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). As this Court previously has indicated, a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important. See *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 389-390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); see also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 592-594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). Today's opinion does not purport to change that legal principle.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the **Good News Club's** activities, could reasonably perceive the school's permission for the Club to use its facilities as an endorsement of religion. See *Ball, supra,* at 390, 105 S.Ct. 3216 ("[A]n important concern of the effects test is whether ... the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"). The time of day, the age of the children, the nature of the meetings, and other specific circumstances are relevant in helping to determine whether, in fact, the Club "so dominate [s]" the "forum" that, in the children's minds, "a formal policy of equal access is transformed into a demonstration of approval." *Capitol Square Review and Advisory Bd., supra,* at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment).

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. The specific legal action that brought this case **2112 to the Court of Appeals was the District Court's decision to grant Milford Central School's motion for summary judgment. The Court of Appeals affirmed the grant of summary judgment. We now hold that the school was not entitled to *129 summary judgment, either in respect to the Free Speech or the Establishment Clause issue. Our holding must mean that, *viewing the disputed facts* (including facts about the children's perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed "genuine issue[s]" of "material fact," Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school's role, cf. *post,* at 2118 (SOUTER, J., dissenting). Indeed, the Court itself points to facts not in evidence, *ante,* at 2106 ("There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended"), *ante,* at 2106 ("There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours"), identifies facts in evidence which may, depending on other facts not in evidence, be of legal significance, *ibid.* (discussing the type of room in which the meetings were held and noting that the Club's participants "are not all the same age as in the normal classroom setting"), and makes assumptions about other facts, *ibid.* ("Surely even young children are aware of events for which their parents must sign permission forms"), *ibid.* ("Any bystander could conceivably be aware of the school's use policy and its exclusion of the **Good News Club**, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"). The Court's invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today's opinion. Cf. Fed. Rules Civ. Proc. 56(c) (summary judgment appropriate only where there is "no genuine issue as to any material fact" and movant "is entitled to a judgment as a *130 matter of law"), 56(f) (permitting supplementation of record for summary judgment purposes where appropriate).

Justice STEVENS, dissenting.

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The Milford Central School has invited the public to use its facilities for educational and recreational purposes, but not for "religious purposes." Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. The film in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), illustrates this category. See *id.*, at 388, 113 S.Ct. 2141 (observing that the film series at issue in that case "would discuss Dr. [James] Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage"). Second, there is religious speech that amounts to worship, or its equivalent. Our decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), concerned such speech. See *id.*, at 264-265, 102 S.Ct. 269 (describing the speech in question as involving "religious worship"). Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.

A public entity may not generally exclude even religious worship from an open public forum. *Id.*, at 276, 102 S.Ct. 269. Similarly, a public entity that creates a limited public forum for the discussion of certain specified topics may not exclude a speaker simply because she approaches **2113 those topics from a religious point of view. Thus, in *Lamb's Chapel* we held that a public school that permitted its facilities to be used for the discussion of family issues and child rearing could not deny access to speakers presenting a religious point of view on those issues. See 508 U.S., at 393-394, 113 S.Ct. 2141.

But, while a public entity may not censor speech about an authorized topic based on the point of view expressed *131 by the speaker, it has broad discretion to "preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); see also *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 275, n. 6, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (STEVENS, J., dissenting) "A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make 'decisions concerning the content of those activities' " (quoting *Widmar*, 454 U.S., at 278, 102 S.Ct. 269 (STEVENS, J., concurring in judgment)). Accordingly, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The novel question that this case presents concerns the constitutionality of a public school's attempt to limit the scope of a public forum it has created. More specifically, the question is whether a school can, consistently with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.

Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize afterschool discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups--for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan--to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and *132 tend to separate young children into cliques that undermine the school's educational mission. Cf. *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding a city's refusal to allow "political advertising" on public transportation).

School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship. See, *e.g.*, *Campbell v. St. Tammany Parish School Board*, 231 F.3d 937, 942 (C.A.5 2000) ("Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by the First Amendment, without

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inviting political or religious activities presented in a form that would disserve its efforts to maintain neutrality"). Moreover, any doubt on a question such as this should be resolved in a way that minimizes "intrusion by the Federal Government into the operation of our public schools," *Mergens,* 496 U.S., at 290, 110 S.Ct. 2356 (STEVENS, J., dissenting); see also *Epperson v. Arkansas,* **2114 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint .... By and large, public education in our Nation is committed to the control of state and local authorities").

The particular limitation of the forum at issue in this case is one that prohibits the use of the school's facilities for "religious purposes." It is clear that, by "religious purposes," the school district did not intend to exclude all speech from a religious point of view. See App. N13-N15 (testimony of the superintendent for Milford schools indicating that the policy would permit people to teach "that man was created by God as described in the Book of Genesis" and that crime *133 was caused by society's "lack of faith in God"). Instead, it sought only to exclude religious speech whose principal goal is to "promote the gospel." *Id.,* at N18. In other words, the school sought to allow the first type of religious speech while excluding the second and third types. As long as this is done in an evenhanded manner, I see no constitutional violation in such an effort. [FN1] The line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school, particularly an elementary school, must be permitted to draw them. [FN2] Cf. *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 231, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring) ("In no activity of the State is it more vital to keep out divisive forces than in its schools ...").

FN1. The school district, for example, could not, consistently with its present policy, allow school facilities to be used by a group that affirmatively attempted to inculcate nonbelief in God or in the view that morality is wholly unrelated to belief in God. Nothing in the record, however, indicates that any such group was allowed to use school facilities.

FN2. "A perceptive observer sees a material difference between the light of day and the dark of night, and knows that difference to be a reality even though the two are separated not by a bright line but by a zone of twilight." *Buirkle v. Hanover Ins. Cos.,* 832 F.Supp. 469, 483 (D.Mass.1993).

This case is undoubtedly close. Nonetheless, regardless of whether the **Good News Club's** activities amount to "worship," it does seem clear, based on the facts in the record, that the school district correctly classified those activities as falling within the third category of religious speech and therefore beyond the scope of the school's limited public forum. [FN3] In short, I am persuaded that the school district *134 could (and did) permissibly exclude from its limited public forum proselytizing religious speech that does not rise to the level of actual worship. I would therefore affirm the judgment of the Court of Appeals.

FN3. The majority elides the distinction between religious speech on a particular topic and religious speech that seeks primarily to inculcate belief. Thus, it relies on *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), as if that case involved precisely the same type of speech that is at issue here. But, while both Wide Awake, the organization in *Rosenberger,* and the **Good News Club** engage in a mixture of different types of religious speech, the *Rosenberger* Court clearly believed that the first type of religious speech predominated in Wide Awake. It described that group's publications as follows:
"The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors." *Id.,* at 826, 115 S.Ct. 2510.
In contrast to Wide Awake's emphasis on providing Christian commentary on such a diverse array of topics, **Good News Club** meetings are dominated by religious exhortation, see *post,* at 2116 (SOUTER, J., dissenting). My position is therefore consistent with the Court's decision in *Rosenberger.*

Even if I agreed with Part II of the majority opinion, however, I would not **2115 reach out, as it does in Part IV, to decide a constitutional question that was not addressed by either the District Court or the Court of Appeals.

Accordingly, I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

The majority rules on two issues. First, it decides that the Court of Appeals failed to apply the rule in

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Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), which held that the government may not discriminate on the basis of viewpoint in operating a limited public forum. The majority applies that rule and concludes that Milford violated *Lamb's Chapel* in denying Good News the use of the school. The majority then goes on to determine that it would not violate the Establishment Clause of the First Amendment for the Milford School District to allow the **Good News Club** to hold its intended gatherings of public school children in Milford's elementary school. ***135** The majority is mistaken on both points. The Court of Appeals unmistakably distinguished this case from *Lamb's Chapel,* though not by name, and accordingly affirmed the application of a policy, unchallenged in the District Court, that Milford's public schools may not be used for religious purposes. As for the applicability of the Establishment Clause to the **Good News Club's** intended use of Milford's school, the majority commits error even in reaching the issue, which was addressed neither by the Court of Appeals nor by the District Court. I respectfully dissent.

I

Lamb's Chapel, a case that arose (as this one does) from application of N.Y. Educ. Law § 414 (McKinney 2000) and local policy implementing it, built on the accepted rule that a government body may designate a public forum subject to a reasonable limitation on the scope of permitted subject matter and activity, so long as the government does not use the forum-defining restrictions to deny expression to a particular viewpoint on subjects open to discussion. Specifically, *Lamb's Chapel* held that the government could not "permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." 508 U.S., at 393-394, 113 S.Ct. 2141.

This case, like *Lamb's Chapel,* properly raises no issue about the reasonableness of Milford's criteria for restricting the scope of its designated public forum. Milford has opened school property for, among other things, "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." App. to Pet. for Cert. D1-D3. But Milford has done this subject to the restriction that "[s]chool premises shall not be used ... for ***136** religious purposes." *Id.,* at D2. As the District Court stated, Good News did "not object to the reasonableness of [Milford]'s policy that prohibits the use of [its] facilities for religious purposes." *Id.,* at C14.

The sole question before the District Court was, therefore, whether, in refusing to allow Good News's intended use, Milford was misapplying its unchallenged restriction in a way that amounted to imposing a viewpoint-based restriction on what could be said or done by a group entitled to use the forum for an educational, civic, or other permitted purpose. The question was whether Good News was being disqualified when it merely sought to use the school property the same way that the Milford Boy and Girl Scouts and the 4-H Club did. The District Court held on the basis of undisputed facts that Good News's activity was essentially unlike the presentation of views on secular issues from a ****2116** religious standpoint held to be protected in *Lamb's Chapel,* see App. to Pet. for Cert. C29-C31, and was instead activity precluded by Milford's unchallenged policy against religious use, even under the narrowest definition of that term.

The Court of Appeals understood the issue the same way. See 202 F.3d 502, 508 (C.A.2 2000) (Good News argues that "to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination"); *id.,* at 509 ("The crux of the **Good News Club's** argument is that the Milford school's application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral"). [FN1] The Court of Appeals ***137** also realized that the *Lamb's Chapel* criterion was the appropriate measure: "The activities of the **Good News Club** do not involve merely a religious perspective on the secular subject of morality." 202 F.3d, at 510. Cf. *Lamb's Chapel, supra,* at 393, 113 S.Ct. 2141 (district could not exclude "religious standpoint" in discussion on child rearing and family values, an undisputed "use for social or civic purposes otherwise permitted" under the use policy). [FN2] The appeals court agreed with the District Court that the undisputed facts in this case differ from those in *Lamb's Chapel,* as night from day. A sampling of those facts shows why both courts were correct.

FN1. The Court of Appeals held that any challenge to the policy's reasonableness was foreclosed by its own precedent, 202 F.3d, at 502, 509, a holding the majority leaves untouched, see *ante,* at 2100 ("[W]e need not decide whether it is unreasonable in light of

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the purposes served by the forum"); cf. *ante,* at 2100, n. 2 ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law"). In any event, the reasonableness of the forum limitation was beyond the scope of the appeal from summary judgment since the District Court had said explicitly that the religious use limitation was not challenged.

FN2. It is true, as the majority notes, *ante,* at 2101, n. 3, that the Court of Appeals did not cite *Lamb's Chapel* by name. But it followed it in substance, and it did cite an earlier opinion written by the author of the panel opinion here, *Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207 (C.A.2 1997), which discussed *Lamb's Chapel* at length.

Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him.... If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group--His family." App. to Pet. for Cert. C17-C18 (ellipsis in original). The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word," and is "important--and true--because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility." *Id.,* at C20.

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson. ***138** During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to " 'stop and ask God for the strength and the "want" ... to obey Him.' " *Ibid.* They are instructed that

"[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will--we will pray with you separately, individually .... And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him." *Ibid.*

****2117** During the invitation, the teacher "invites" the "unsaved" children " 'to trust the Lord Jesus to be your Savior from sin,' " and " 'receiv[e][him] as your Savior from sin.' " *Id.,* at C21. The children are then instructed that

"[i]f you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life." *Ibid.*

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. [FN3] The majority ***139** avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." *Ante,* at 2101. If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

FN3. The majority rejects Milford's contention that Good News's activities fall outside the purview of the limited forum because they constitute "religious worship" on the ground that the Court of Appeals made no such determination regarding the character of the club's program, see *ante,* at 2102-2103, n. 4. This distinction is merely semantic, in light of the Court of Appeals's conclusion that "[i]t is difficult to see how the Club's activities differ materially from the 'religious worship' described" in other case law, 202 F.3d 502, 510 (C.A.2 2000), and the record below.

Justice STEVENS distinguishes between proselytizing and worship, *ante,* at 2112 (dissenting opinion), and distinguishes each from discussion reflecting a religious point of view. I agree with Justice STEVENS that Good News's activities may be characterized as proselytizing and therefore as outside the purpose of Milford's limited forum, *ante,* at 2114. Like the Court of Appeals, I also believe Good News's meetings have elements of worship that put the club's activities further afield of Milford's limited forum policy, the legitimacy of which was unchallenged in the summary judgment proceeding.

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II

I also respectfully dissent from the majority's refusal to remand on all other issues, insisting instead on acting as a court of first instance in reviewing Milford's claim that it would violate the Establishment Clause to grant Good News's application. Milford raised this claim to demonstrate a compelling interest for saying no to Good News, even on the erroneous assumption that *Lamb's Chapel's* public forum analysis would otherwise require Milford to say yes. Whereas the District Court and Court of Appeals resolved this case entirely on the ground that Milford's actions did not offend the First Amendment's Speech Clause, the majority now sees fit to rule on the application of the Establishment Clause, in derogation of this Court's proper role as a court of review. *E.g., National Collegiate Athletic* ***140** *Assn. v. Smith,* 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999) ("[W]e do not decide in the first instance issues not decided below").

The Court's usual insistence on resisting temptations to convert itself into a trial court and on remaining a court of review is not any mere procedural nicety, and my objection to turning us into a district court here does not hinge on a preference for immutable procedural rules. Respect for our role as a reviewing court rests, rather, on recognizing that this Court can often learn a good deal from considering how a **2118 district court and a court of appeals have worked their way through a difficult issue. It rests on recognizing that an issue as first conceived may come to be seen differently as a case moves through trial and appeal; we are most likely to contribute something of value if we act with the benefit of whatever refinement may come in the course of litigation. And our customary refusal to become a trial court reflects the simple fact that this Court cannot develop a record as well as a trial court can. If I were a trial judge, for example, I would balk at deciding on summary judgment whether an Establishment Clause violation would occur here without having statements of undisputed facts or uncontradicted affidavits showing, for example, whether Good News conducts its instruction at the same time as school-sponsored extracurricular and athletic activities conducted by school staff and volunteers, see Brief for Respondent 6; whether any other community groups use school facilities immediately after classes end and how many students participate in those groups; and the extent to which Good News, with 28 students in its membership, may "dominate the forum" in a way that heightens the perception of official endorsement, *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 851, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (O'CONNOR, J., concurring); see also *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). We will never know these facts.

Of course, I am in no better position than the majority to perform an Establishment Clause analysis in the first *141 instance. Like the majority, I lack the benefit that development in the District Court and Court of Appeals might provide, and like the majority I cannot say for sure how complete the record may be. I can, however, speak to the doubtful underpinnings of the majority's conclusion.

This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment. See *id.,* at 271, 102 S.Ct. 269 ("[T]he interest of the [government] in complying with its constitutional obligations may be characterized as compelling"); *Lamb's Chapel,* 508 U.S., at 394, 113 S.Ct. 2141. Milford's actions would offend the Establishment Clause if they carried the message of endorsing religion under the circumstances, as viewed by a reasonable observer. See *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring). The majority concludes that such an endorsement effect is out of the question in Milford's case, because the context here is "materially indistinguishable" from the facts in *Lamb's Chapel* and *Widmar. Ante,* at 2103. In fact, the majority is in no position to say that, for the principal grounds on which we based our Establishment Clause holdings in those cases are clearly absent here.

In *Widmar,* we held that the Establishment Clause did not bar a religious student group from using a public university's meeting space for worship as well as discussion. As for the reasonable observers who might perceive government endorsement of religion, we pointed out that the forum was used by university students, who "are, of course, young adults," and, as such, "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U.S., at 274, n. 14, 102 S.Ct. 269. To the same effect, we remarked that the "large number of groups meeting on campus" negated "any reasonable inference of

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University support from the mere fact of a campus meeting place." *Ibid.* Not only was the forum "available to a broad class of nonreligious as ***142** well as religious speakers," but there were, in fact, over 100 recognized student groups at the University, and an "absence of empirical evidence that religious groups [would] dominate [the University's] open forum." *Id.,* at 274- ****2119** 275, 102 S.Ct. 269; see also *id.,* at 274, 102 S.Ct. 269 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"). And if all that had not been enough to show that the university-student use would probably create no impression of religious endorsement, we pointed out that the university in that case had issued a student handbook with the explicit disclaimer that "the University's name will not be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members.' " *Id.,* at 274, n. 14, 102 S.Ct. 269.

Lamb's Chapel involved an evening film series on child rearing open to the general public (and, given the subject matter, directed at an adult audience). See 508 U.S., at 387, 395, 113 S.Ct. 2141. There, school property "had repeatedly been used by a wide variety of private organizations," and we could say with some assurance that "[u]nder these circumstances ... there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed ...." *Id.,* at 395, 113 S.Ct. 2141.

What we know about this case looks very little like *Widmar* or *Lamb's Chapel.* The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six. [FN4] The Establishment Clause cases have ***143** consistently recognized the particular impressionability of schoolchildren, see *Edwards v. Aguillard,* 482 U.S. 578, 583-584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) , and the special protection required for those in the elementary grades in the school forum, see *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 620, n. 69, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). We have held the difference between college students and grade school pupils to be a "distinction [that] warrants a difference in constitutional results," *Edwards v. Aguillard, supra,* at 584, n. 5, 107 S.Ct. 2573 (internal quotation marks and citation omitted).

FN4. It is certainly correct that parents are required to give permission for their children to attend Good News's classes, see *ante,* at 2104 (as parents are often required to do for a host of official school extracurricular activities), and correct that those parents would likely not be confused as to the sponsorship of Good News's classes. But the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, Lodging, Exh. X2, who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the "challenge" and "invitation."
The fact that there may be no evidence in the record that individual students were confused during the time the **Good News Club** met on school premises pursuant to the District Court's preliminary injunction is immaterial, cf. Brief for Petitioners 38. As Justice O'CONNOR explained in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), the endorsement test does not focus "on the actual perception of individual observers, who naturally have differing degrees of knowledge," but on "the perspective of a hypothetical observer." *Id.,* at 779-780, 115 S.Ct. 2440 (opinion concurring in part and concurring in judgment).

Nor is Milford's limited forum anything like the sites for wide-ranging intellectual exchange that were home to the challenged activities in *Widmar* and *Lamb's Chapel.* See also *Rosenberger,* 515 U.S., at 850, 836-837, 115 S.Ct. 2510. In *Widmar,* the nature of the university campus and the sheer number of activities offered precluded the reasonable college observer from seeing government endorsement in any one of them, and so did the time and variety of community use in the *Lamb's Chapel* case. See also *Rosenberger,* 515 U.S., at 850, 115 S.Ct. 2510 ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical"); *id.,* at 836-837, 850, 115 S.Ct. 2510 (emphasizing the array of university-funded magazines containing "widely divergent ****2120** viewpoints" and the fact that believers in Christian evangelism competed on equal footing in the University forum with aficionados of "Plato, Spinoza, and Descartes," as well as "Karl Marx, Bertrand Russell, and Jean-Paul Sartre"); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 ***144** U.S. 226, 252, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion").

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The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children. The club is open solely to elementary students (not the entire community, as in *Lamb's Chapel*), only four outside groups have been identified as meeting in the school, and Good News is, seemingly, the only one whose instruction follows immediately on the conclusion of the official schoolday. See Brief for National School Boards Association et al. as *Amici Curiae* 6. Although school is out at 2:56 p.m., Good News apparently requested use of the school beginning at 2:30 on Tuesdays "during the school year," so that instruction could begin promptly at 3:00, see Lodging, Exh. W-1, at which time children who are compelled by law to attend school surely remain in the building. Good News's religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until "the room is clear," and "people are out of the room," App. P29, before starting proceedings in the classroom located next to the regular third- and fourth-grade rooms, *id.*, at N12. In fact, the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a community church, 8 or 10 children attended; after the school became the site, the number went up three-fold. *Id.*, at P12; Lodging, Exh. AA2.

Even on the summary judgment record, then, a record lacking whatever supplementation the trial process might have led to, and devoid of such insight as the trial and appellate judges might have contributed in addressing the Establishment Clause, we can say this: there is a good case that Good News's exercises blur the line between public ***145** classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority's conclusion, and while the consolation may be that nothing really gets resolved when the judicial process is so truncated, that is not much to recommend today's result.

121 S.Ct. 2093, 533 U.S. 98, 150 L.Ed.2d 151, 154 Ed. Law Rep. 45, 1 Cal. Daily Op. Serv. 4737, 2001 Daily Journal D.A.R. 5858, 14 Fla. L. Weekly Fed. S 337, 2001 DJCAR 2934

Briefs and Other Related Documents (Back to top)

. 2001 WL 196997, 69 USLW 3416 (Oral Argument) Oral Argument (Feb. 28, 2001)

. 2001 WL 173531 (Appellate Brief) Reply Brief for Petitioners (Feb. 15, 2001)

. 2001 WL 43335 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT (Jan. 12, 2001)

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. 2000 WL 1784144 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784146 (Appellate Brief) BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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. 2000 WL 1784206 (Appellate Brief) BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

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. 2000 WL 1784212 (Appellate Brief) BRIEF AMICUS CURIAE OF WALLBUILDERS, INC. in support of the Petitioner (Nov. 30, 2000)

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END OF DOCUMENT

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Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
  - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

For opinion see 120 S.Ct. 2266, 120 S.Ct. 494

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
SANTA FE INDEPENDENT SCHOOL DISTRICT, Petitioner,
v.
Jane DOE, et al., Respondents.
No. 99-62.
December 30, 1999.
On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

*iii TABLE OF CONTENTS

QUESTION PRESENTED ... i

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... v

INTEREST OF AMICI CURIAE ... 1

SCHOOL POLICY INVOLVED ... 1

SUMMARY OF ARGUMENT ... 2

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ARGUMENT ... 5

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT -- INDEED, CONSTITUTIONALLY CANNOT -- BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT ... 5

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy ... 5

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge ... 15

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis ... 18

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games ... 19

II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS." ... 20

*iv III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES ... 22

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE ... 25

V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE ... 27

CONCLUSION ... 30

*v TABLE OF AUTHORITIES

CASES

Adler v. Duval County School Bd., 174 F.3d 1236 (11th Cir. 1999) ... 22

Agostini v. Felton, 521 U.S. 203 (1997) ... 14, 26

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) ... 27, 29

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) ... passim

Bowen v. Kendrick, 487 U.S. 589 (1988) ... 25, 27

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) ... passim

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ... 14

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ... passim

Engel v. Vitale, 370 U.S. 421 (1962) ... passim

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) ... passim

Lee v. Weisman, 505 U.S. 577 (1992) ... passim

Lynch v. Donnelly, 465 U.S. 668 (1984) ... 6, 19, 22, 27

Marsh v. Chambers, 463 U.S. 783 (1983) ... 6, 27

Mueller v. Allen, 463 U.S. 388 (1983) ... 13, 14, 26

*vi Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) ... passim

Tilton v. Richardson, 403 U.S. 672 (1973) ... 9

United States v. Salerno, 481 U.S. 739 (1987) ... 25

Wallace v. Jaffree, 472 U.S. 38 (1985) ... 23, 24

Widmar v. Vincent, 454 U.S. 263 (1981) ... passim

Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) ... passim

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Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) ... 13, 14

RULES

S. Ct. R. 37.3 ... 1

S. Ct. R. 37.6 ... 1

MISCELLANEOUS

Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/religion.html (May 1998) ... 25

Nadine Strossen, How Much God in the Schools? A Discussion of Religion's Role in the Classroom, 4 Wm. & Mary Bill Rts. J. 607 (1995) ... 15

Eugene Volokh, Equal Treatment is Not Establishment, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999) ... 29

*1 INTEREST OF AMICI CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. See id.

Congressman Steve Largent represents the First District of Oklahoma in the United States House of Representatives. Congressman J.C. Watts represents the Fourth District of Oklahoma in the United States House of Representatives. Both Mr. Largent and Mr. Watts played professional football; Mr. Largent is a member of the Hall of Fame.

Congress has substantial authority to enact legislation and vote on constitutional amendments regarding student religious speech, particularly in the Nation's public schools. See generally Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990). As citizens and Members of Congress, Mr. Largent and Mr. Watts have a deep interest in ensuring appropriate protection for student religious speech in our public schools and in preventing discrimination against religious organizations, religious persons, and religious speech. Mr. Largent and Mr. Watts thus have a strong interest in this case and submit that Santa Fe High School's religion-neutral policy for a brief student statement before varsity football games is entirely appropriate and consistent with the Constitution.

SCHOOL POLICY INVOLVED

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The Santa Fe Independent School District in Galveston County, Texas, maintains the following policy for Santa Fe High School:

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and *2 student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Pet. App. F1 (emphases added).

SUMMARY OF ARGUMENT

Santa Fe High School allows a student to make a brief statement to the crowd before home varsity football games "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Santa Fe High School's policy does not require or even encourage the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind. Nor, on the other hand, does the school policy prevent the student from doing so. The policy is thus entirely neutral toward religion and religious speech.

Respondents nonetheless claim that the school policy on its face violates the Establishment Clause because an individual student (not a school or government official) might invoke God's name, utter religious words, or say a prayer in his or her pre-game statement. Respondents' Establishment Clause theory directly conflicts with this Court's settled jurisprudence. The Court has held that the Establishment Clause permits a neutral school speech policy in which individuals may engage in religious or other speech as they see fit in a school forum. See *3Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981). In these cases, the Court has stressed the critical distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quoting Mergens, 496 U.S. at 250).

Similarly, in Lee v. Weisman, 505 U.S. 577 (1992), a case striking down government-led and government-composed prayer at school graduations, the Court repeatedly distinguished government religious speech from private religious speech. Indeed, in concurrence, Justice Souter, joined by Justices Stevens and O'Connor, foreshadowed and effectively answered in advance the question presented in this case: "If the State had chosen its ... speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." Id. at 630 n.8 (Souter, J., concurring) (emphasis added) (citing Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986)).

The Court's cases show, moreover, that respondents' theory of the Constitution is exactly backwards. If Santa Fe High School took steps to prevent the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school would violate the Constitution --

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the Free Speech and Free Exercise Clauses of the First Amendment. The Constitution protects the Santa Fe student speaker who chooses to mention God just as much as it protects the Santa Fe student speaker who chooses not to mention God. The school cannot force the student to "say a prayer," nor can the school prohibit the student from "saying a prayer." By adhering scrupulously to this principle *4 of neutrality, the Santa Fe High School policy for pre-game student statements satisfies the Constitution.

As seven Justices indicated in Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), the school need not issue any sort of "disclaimer" because this case involves an individual's verbal speech (in contrast to a case such as Pinette involving a fixed visual display in a public area). That said, we understand that a disclaimer is currently read over the public address system at Santa Fe High School football games. Given that fact and, in any event, given that this case involves a facial challenge, the Court can uphold the Santa Fe policy without considering whether and/or under what circumstances a school disclaimer ever might be necessary.

The forum's scarcity (namely, the fact that only one student per game speaks) does not alter the constitutional analysis. The Court explained in Rosenberger that "nothing" in the Court's decisions suggests that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835.

Finally, respondents' theory would cause severe practical harm. Schools would have to monitor and censor religious words by all non-governmental speakers (a high school football player in a pre-game pep rally, a student newspaper writer, the guest speaker at a school speakers' series, the valedictorian at graduation). This Court, however, has never forced or even allowed the public schools of this country to censor students and speakers who happen to be religious or wish to speak religious words at a school event. On the contrary, as the Court has said, the absolutist legal theory of those who seek to cleanse public school events of all private religious expression evinces a pervasive "hostility to religion" that is neither required nor permitted under the Religion Clauses. Rosenberger, 515 U.S. at 846.

*5 ARGUMENT

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT -- INDEED, CONSTITUTIONALLY CANNOT -- BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT.

Respondents do not dispute that a public high school may set aside a moment before a football game for a student to deliver a public message solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. The sole question is whether, as respondents submit, the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer.

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy.

Three mutually reinforcing strands of this Court's jurisprudence demonstrate that a public high school such as Santa Fe constitutionally need not (indeed, constitutionally cannot) prohibit the student from religious speech in his or her pre-game statement to the crowd.

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First, the Court's cases striking down government school prayer have carefully distinguished governmental religious speech from protected private religious speech. Second, in a series of related cases, the Court has held that student religious speech in a school forum is not attributable to the State and therefore does not violate the Establishment Clause. Indeed, it is constitutionally impermissible for the government to discriminate against religion and prevent a student from engaging in religious speech at a school event. Third, the Court has similarly held that decisions by private individuals to use neutrally available government aid for religious purposes are not attributable to the State for purposes of the Establishment ***6** Clause, a principle akin to the theory of neutrality employed in the student speech cases.

1. The Court has held that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayer in classes or at graduation ceremonies. [FN2]

> FN2. The Establishment Clause generally does not prohibit governmental religious speech at non-school events so long as no one is compelled to speak or indicate agreement with the religious message. See Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); see also County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting). The examples of such governmental religious speech are pervasive and long-standing. The President issues Thanksgiving Day proclamations; this Court starts its sessions with a plea that "God save the United States and this Honorable Court"; both Houses of Congress begin the day with official prayer; the phrase "In God We Trust" adorns our currency; the list goes on.

The facts in the leading case, Engel v. Vitale, 370 U.S. 421 (1962), are well-known. A school board in New York had directed that teachers and students begin each school day with an official prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Id. at 422. The Court struck down the policy, stating that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." Id. at 425.

In concurrence, Justice Douglas emphasized a critical theme that would recur in the Court's decisions in subsequent years: "Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." Id. at 442-43 (Douglas, J., concurring) (quotation omitted; emphasis added). ***7** "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." Id. at 443.

In Lee v. Weisman, 505 U.S. 577 (1992), the Court held that Engel applied to public school graduation ceremonies. The Court pointed to the following "dominant facts": The school had "decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." Id. at 586-87; see also id. at 588 (State made "decision to include a prayer"). Moreover, the school principal selected the clergy member and "directed and controlled the content of the prayers." Id. at 588. The degree of school involvement "made it clear that the graduation prayers bore the imprint of the State." Id. at 590. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated the critical facts: The "government composes official

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prayers, selects the member of the clergy to deliver the prayer, [and] has the prayer delivered at a public school event." Id. at 603 (Blackmun, J., concurring) (quotation omitted).

But the Lee Court cabined its holding in a way important to this case by stressing the critical distinction between (i) individual religious speech in schools, which is protected by the Constitution, and (ii) government-required religious speech in schools, which the Court held to be prohibited by the Constitution. The Court stated, for example, that "the First Amendment does not allow the government to stifle prayers." Id. at 589 (emphasis added). The Court explained that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Id.

The problem the Court identified in Lee, therefore, was not that students were exposed to religious speech, but that they were exposed to governmental religious speech. "In religious debate or expression the government is not a prime participant .... A state-created orthodoxy puts at grave risk *8 that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." Id. at 591-92 (emphasis added). The First Amendment thus is not concerned with actions that do not "so directly or substantially involve the state in religious exercises or in the favoring of religion." Id. at 598 (quotation omitted; emphasis added).

Given that private individuals can engage in religious speech in school settings, the Court recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." Id. at 598-99. But that is hardly some constitutional vice; to the contrary, it is a constitutional virtue. Indeed, the Court expressly warned that "[a] relentless and all- pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Id. at 598.

In a concurring opinion, Justice Souter, joined by Justices Stevens and O'Connor, elaborated by distinguishing the situation in Lee from a hypothetical policy that presumably would satisfy the Constitution (a policy that happens to be precisely akin to that employed by Santa Fe High School for football games): "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." Id. at 630 n.8 (Souter, J., concurring) (emphasis added) (citing Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986)).

The opinions and analyses of the Engel and Lee Courts foreshadowed -- and effectively approved in advance -- the Santa Fe High School policy at issue here. The Establishment Clause permits a student speaker to deliver a religious message in a neutrally available school forum, so long as the school *9 itself does not select, compose, deliver, or require a religious message.

2. We need not rely solely on statements in Lee and Engel, however, to support our argument. In a series of cases over the last two decades, the Court has held that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. Indeed, the Court has held that the Constitution prohibits the government from excluding private religious speech, because it is religious, from a school event.

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These cases arose after certain schools and plaintiffs read Engel and other decisions as license (or judicial compulsion) to eradicate all traces of religion, government and private, from the public schools. The Court has rejected these homogenizing efforts to cleanse public schools of private religious expression, emphasizing time and again the critical distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quoting Mergens, 496 U.S. at 250).

The cases affirming this dispositive principle are by now familiar: Widmar, Mergens, Lamb's Chapel, Rosenberger, and Pinette. Because of their importance to this case, we briefly review each.

In Widmar v. Vincent, the Court held that the Constitution "forbids a State to enforce certain exclusions [of religious speakers] from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. 263, 267-68 (1981). A public university had justified its exclusion of religious speakers by citing the Establishment Clause as interpreted in Tilton v. Richardson, 403 U.S. 672 (1973), but the Court in Widmar reaffirmed "the right of religious speakers to use public forums on equal terms with *10 others." 454 U.S. at 273 n.12. As the Court stated, "by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there." Id. at 272 n.10.

In Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), the Court extended the principle of Widmar to the high school context -- in a case where Congress through the Equal Access Act had mandated equal treatment of religious speech in public schools. A high school religious group sought permission to meet at the high school, as other groups did. The school denied the request, arguing that "official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students." Id. at 247-48. The Court, without dissent on the constitutional issue, rejected that Establishment Clause argument. The Court relied on the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 250 (plurality). The Court added that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." Id. (emphasis added). And if a state "refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Id. at 248 (plurality).

The Court reached the same conclusion in Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). The Court struck down a school board rule that allowed schools to open their facilities except to religious uses. The Court unanimously concluded that the policy violated the Free Speech Clause and stated that "there would have been no realistic danger that the community would think that the *11 District was endorsing religion or any particular creed" by allowing religious uses in the school. Id. at 395.

The Court again relied on the neutrality principle in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious group on the ground that the group's student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." Id. at 823.

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The Court first held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." Id. at 831. As to the Establishment Clause analysis, the Court began with the "central lesson": A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Id. at 839. In the speech context, the Court stated: "[M]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." Id.

The Court found that a program including payments for expenses of the religious magazine as well as other student publications would be "neutral toward religion." Id. at 840. Such a program would respect the "critical difference between governmentspeech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 841 (quotation omitted); see also id. at 834 (speech of "private persons" and "University's own speech" controlled "by different principles"); id. (referring to "distinction between the University's own favored message and the private speech of students").

***12** The Court applied those same principles of neutrality outside the educational context in Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). The State there had excluded a private religious display (a cross) from a public square generally open to private displays.

The Court stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Id. at 760. A plurality stated that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." Id. at 767 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

In a concurring opinion, Justice Souter, joined by Justices O'Connor and Breyer, largely agreed with those principles, albeit finding that a state disclaimer might be necessary in cases of fixed visual displays. Id. at 784 (Souter, J., concurring). As to the need for a disclaimer, the concurring Justices distinguished a fixed visual display from an individual's verbal speech: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." Id. at 786.

In sum, as this series of cases makes clear, state action prohibiting a student speaker from engaging in religious speech, because it is religious, is a First Amendment violation. But even if it were not a First Amendment free speech/free exercise violation to exclude religious speech, these cases show that it is surely not a First Amendment Establishment Clause violation for a school to permit religious speech on a neutral basis at a school event. As Justice Kennedy has explained, "in some circumstances the First Amendment may require that ***13** government property be available for use by religious groups, and even where not required, such use has long been permitted." County of Allegheny v. ACLU, 492 U.S. 573, 667 (1989) (Kennedy, J., concurring and dissenting) (citations omitted; emphasis added).

3. The principle that the government does not violate the Establishment Clause

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when it enacts a neutral program available to religious and non-religious alike finds additional doctrinal support in a separate strand of this Court's Establishment Clause jurisprudence. The Court has rejected challenges to government programs through which a "religious" individual or religious organization may take advantage of a neutrally available government benefit (the analytic equivalent of the neutrally available school speech forum). Four cases illustrate this principle.

In Mueller v. Allen, 463 U.S. 388 (1983), the Court considered a tax deduction program that allowed deductions for school expenses, including for parents who sent their children to religious schools. Citing Widmar, the Court held that where religion is advanced only "as a result of decisions of individual parents 'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." Id. at 399 (quoting Widmar, 454 U.S. at 274).

The Court applied the same principle in Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986). The government provided financial assistance to blind students, one of whom used the assistance to attend a seminary. The Court, through Justice Marshall, stated: "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." Id. at 488-89.

Mueller and Witters laid the constitutional foundation for the Court's decision in Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). There, the school district provided ***14** sign-language interpreters to students, but refused to provide them to students attending religious schools on the ground that the assistance would violate the Establishment Clause. The Court rejected that defense: "[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." Id. at 10.

Finally, in Agostini v. Felton, 521 U.S. 203 (1997), the Court relied on Mueller, Witters, and Zobrest in concluding that Title I's aid program did not violate the Establishment Clause. The Court held that the Constitution permits government aid to students on "a neutral basis" -- aid available regardless whether the student attends a sectarian or non-sectarian school. Id. at 234-35. Such a program "cannot reasonably be viewed as an endorsement of religion." Id. at 235.

4. The decisions in Widmar, Mergens, Lamb's Chapel, Rosenberger, and Pinette -- when read together with Lee v. Weisman and cases such as Mueller, Witters, Zobrest, and Agostini -- establish two critical principles that speak directly to the issue in this case. First, the Establishment Clause permits a citizen or student or religious group to utilize a neutrally available school forum to speak religious words or invoke God's name or say a prayer. Second, if the government were to prevent citizens or students at a school event from religious speech, because it is religious, the government would violate the free speech and free exercise [FN3] rights of the speakers.

> FN3. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs").

These principles, which validate the policy at issue in this case, should not be controversial. The President of the ACLU, for example, has correctly analyzed the issue presented here: ***15** [T]he First Amendment would protect the right of a

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student speaker to voluntarily make religious statements even at a school-sponsored event. ... [I]f the student were truly expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in Weisman. ... "If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."
Nadine Strossen, How Much God in the Schools? A Discussion of Religion's Role in the Classroom, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (quoting Lee, 505 U.S. at 630 n.8 (Souter, J., concurring)).

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge.

This case involves a student's verbal speech at a school event, as opposed to a fixed visual display in a public square. As a result, the school need not issue a disclaimer to eliminate any claimed audience misperception of government endorsement of a student's private speech.

Seven Justices suggested as much in Pinette, with Justice Souter, joined by Justices O'Connor and Breyer, explaining the rationale in concurrence: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." 515 U.S. at 786 (Souter, J., concurring). A four-Justice plurality added that the Court's "Religion Clause jurisprudence is complex enough without the addition of th[e] highly litigable feature" of sometimes-mandatory government disclaimers. *16Id. at 769 n.4 (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.).

That said, the Court in this case need not consider whether and/or under what circumstances a disclaimer ever might be necessary, for two reasons.

First, this is a facial challenge to the Santa Fe High School football game policy. The Court thus could uphold the school's policy against the facial attack and simply leave for another day the question whether and/or under what circumstances a disclaimer ever might be necessary. See Pinette, 515 U.S. at 784, 794 n.2 (Souter, J., concurring) (even a fixed display in the public square would not violate the Establishment Clause "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it"; "there is no reason to presume that an adequate disclaimer could not have been drafted"); Mergens, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold program at issue in Mergens because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary).

Second, and buttressing the first point, we understand that Santa Fe High School in fact issued the following oral disclaimer over the public address system at games after October 15 of this past season:
Marian Ward, a Santa Fe High School Student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of Ms. Ward's choice of a pre-game message. The purpose of the message is to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. [FN4]

FN4. This statement is recited in an October 15, 1999, letter agreement

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between counsel in a separate case involving student pre-game speech at Santa Fe High School football games. See Ward v. Santa Fe Independent School District, No. G-99-556 (S.D. Tex., Houston Division). We have been informed that the letter agreement reciting that statement is part of the record in that case.

***17** As the Court concluded in Pinette and Mergens, this kind of disclaimer, while not constitutionally necessary, would leave the audience (even the "unreasonable" listeners) with absolutely no doubt that the student's speech is not approved or endorsed by the government. See Pinette, 515 U.S. at 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); id. at 769 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such."); id. at 784 (Souter, J., joined by O'Connor and Breyer, JJ., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); Mergens, 496 U.S. at 251 (plurality opinion of O'Connor, J.) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, ... students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."). [FN5]

FN5. In this case, moreover, any chance of widespread audience confusion is all but nonexistent given that the students themselves elect the speaker and are thus necessarily aware of the school policy.

In short, a disclaimer is not constitutionally required here. But given that this is a facial challenge and given the current practice at Santa Fe High School, the Court could leave for ***18** another day the question whether and/or under what circumstances a disclaimer ever might be necessary.

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis.

The forum in this case is scarce, in the sense that only one student uses it at each home varsity football game, and there are only three to six home games a year. But the fact of scarcity does not alter the neutrality analysis.

First, as the Court in Rosenberger explained, the government's provision of a neutral forum does not suddenly become problematic if only a few speakers can utilize the forum. In such circumstances, it is "incumbent on the State ... to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in Lamb's Chapel] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835. The Court thus flatly rejected the suggestion that scarcity provided a rationale for discrimination against religious speech: "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in Lamb's Chapel been scarce, had the demand been greater than the supply, our decision would have been no different." Id.

Justices Marshall and Brennan also helpfully analyzed the possible effects of scarcity in their separate opinion in Mergens. Considering the possibility of a

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forum that did not "include the participation of more than one advocacy- oriented group," 496 U.S. at 268 (Marshall, J., concurring), those two Justices still did not suggest that such a development would be unconstitutional. Rather, that fact would simply make the school responsible, they said, to "affirmatively disclaim any endorsement" of the private speech. Id.

Second, and this is important, the school here does not decide whether the speaker will utter religious words, nor does ***19** the school premise availability of the forum on whether the speaker will utter religious words. The forum is neutral, and the choice whether to invoke God' s name or speak religious words is within the sole discretion of the student.

Compare, by contrast, a situation where the government could allow only a single school group to meet on school grounds. Suppose that a number of clubs applied for the facility. Suppose further that the school chose a religious club -- because it was religious -- rather than allocating the scarce facility on a religion-neutral basis. In that case, an Establishment Clause issue would arise. In this case, however, the school has done nothing to favor or promote a speaker who may choose to speak religious words over a speaker who may choose not to speak religious words.

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games.

The Court has stated that Establishment Clause jurisprudence is "delicate and fact-sensitive," Lee, 505 U.S. at 597, and that "[e]very government practice must be judged in its unique circumstances," Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). In this case, that principle suggests particular attention to the following points.

First and most importantly, as we have already explained, this case involves a facial challenge to a student speech policy where the student is free to speak a religious message -- or not -- as he or she sees fit.

Second, as we have said, the Court could uphold the student speech policy without reaching the question whether and/or under what circumstances a disclaimer ever might be necessary.

***20** Third this case involves a high school. The Court need not consider whether the same principles would apply to elementary school events.

Fourth, the speech policy before the Court applies only to football games. A football game is extracurricular and more in the nature of a student event than are curricular, school-dominated events such as graduations and daily classes. While graduations and classes unmistakably bear "the imprint of the State," Lee, 505 U.S. at 590, extracurricular activities generally provide an opportunity for students to participate without the same degree of school control. To be sure, faculty advisors or coaches are important, but the football team, the debate team, the cheerleading squad, the newspaper, the yearbook, the school play are activities designed to give students an extra degree of freedom to grow and learn and err in a less autocratic, less structured environment. In short, the coercive, state-dominated atmosphere described in Lee simply does not translate to extracurricular events such as football games. Cf. Mergens, 496 U.S. at 267 (Marshall, J., concurring) ("To the extent that a school emphasizes the autonomy of its students, ... there is a corresponding decrease in the likelihood that student speech will be regarded as school speech.").

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II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS."

By allowing the student speaker to say what he or she chooses (so long as the message is within the very broad bounds of the school policy), the Santa Fe school district avoids entangling itself in the difficult task of determining what is religious speech and what is not. Respondents' position, by contrast, would generate enormous practical problems that only highlight the flaws in their argument.

If the student speaker must avoid "prayer," as respondents demand, does that mean all references to God? What about ***21** references to the "Father"? The "Father above"? Must the student avoid a reference to "our Creator"? Can the student ask the crowd to observe a moment of silence for the crowd members "to pray" as they wish? Can the student refer to the afterlife? Can the student, without invoking God, use phrases that originated in the Bible? Is the word "bless" ok?

Who knows. What we do know is that the public schools -- and then the courts -- would have to monitor the private speech of individuals to make these and hundreds of other nuanced judgments and try to draw a line between religious and non-religious speech. But just as this Court is "ill-equipped to sit as a national theology board," County of Allegheny, 492 U.S. at 678 (Kennedy, J., concurring and dissenting), so too Santa Fe High School is ill- equipped to sit as a local Religion Censor, ordered by this Court to painstakingly eliminate all traces of private religious expression from its school. See Mergens, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); cf. Lee, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.").

And the school would need to play the role of Religion Censor not just at football games, but at all school events and gatherings. What to do about: A student running for student council who wants to say at an pre-election debate that the philosopher most influential to her was Jesus Christ and to explain why? A student at an awards banquet who wants to give thanks to God? A football captain who speaks to the team before the game and wishes to say a prayer and to ask God to bless the team? A student newspaper writer who wishes to write why his religion is important to him?

***22** Logically at least, all are prohibited in respondents' Orwellian world. The schools throughout the country would have to review statements and messages at all school events to ferret out religious content. Schools would necessarily engage in "government censorship, to ensure that all student [speech] meet some baseline standard of secular orthodoxy." Rosenberger, 515 U.S. at 844. As the Court stated in Rosenberger, however, the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." Id. at 835.

There should be no mistake, then, about what's at stake here. If the theory advanced by respondents is to become enshrined in this Court's case law, the full extermination of private religious speech from the public schools would be well on its way. See Adler v. Duval County School Bd., 174 F.3d 1236, 1256- 57 (11th Cir. 1999) (Marcus, J., dissenting) ("[T]he majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony ....").

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The Court should adhere to the principle of neutrality, avoid entangling schools in the review of student speech for religious words and influences, and uphold the Santa Fe policy.

III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES.

The express purpose of the Santa Fe policy for football games is "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. Those are "legitimate secular purposes." Lynch, 465 U.S. at 693 (O'Connor, J., concurring) ("solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" are legitimate secular purposes).

***23** The policy also provides an opportunity for the individual student speakers to express themselves publicly, thereby improving their own confidence and skills. And it allows the student speakers to seek unity within and reflection among the student body, thereby helping to heal some of the schisms and frustrations that inevitably develop in high schools. One need not reflect long on some of the horrific events in this country's public high schools in the past year to appreciate the desirability and validity of such goals.

The court of appeals did cast negative aspersions on the fact that the school policy states that the student may give an "message and/or invocation." But that language is neutral toward religious speech -- and thus is entirely permissible. As Justice O'Connor explained in Wallace v. Jaffree, even if a "statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). Thus, Justice O'Connor noted that a neutral moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others," would pass muster. Id. at 76.

Chief Justice Burger and Justice White both concurred with Justice O'Connor's analysis on this point. Chief Justice Burger explained: "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." Id. at 85 (Burger, C.J., dissenting). The Chief Justice agreed with Justice O'Connor that it "makes no sense to say" that a state "endorse[s] prayer" by specifying that "voluntary prayer is one of the authorized activities." Id. And Justice White noted that the student who asked whether he can pray during a moment of silence must be told "yes," and "[i]f that is the case, I would not invalidate a statute that at the outset ***24** provided the legislative answer to the question, 'May I pray?"' Id. at 91 (White, J., dissenting).

As Justice O'Connor suggested in Wallace, it would be a bizarre rule, to put it charitably, that condemned a school policy where a student could give a "message and/or invocation," but allowed a policy where a student could give a "message" -- when in fact the student was free under both policies to speak religious words. If the Constitution turned on such a strange distinction, the school here surely would re-adopt its policy without the word "invocation" and then school officials would spend their time answering "yes" to students asking whether they could utter religious words. That makes no sense, as the three Justices who addressed the issue concluded in Wallace.

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In that regard, we note that the five-Justice majority opinion in Wallace never said that inclusion of the word "prayer" as a mere alternative rendered the Alabama statute unconstitutional. Rather, there was "unrebutted evidence of legislative intent," id. at 58 -- evidence that "ma[de] it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words 'or voluntary prayer' to the statute." Id. at 61.

Santa Fe's policy carefully follows the path charted by Justice O'Connor in Wallace. The policy's neutral phrase "message and/or invocation" makes clear that the student may -- but need not -- choose to invoke God's name or speak religious words.

But "the neutral language is itself skewed," respondents no doubt will argue. To begin with, such a suggestion borders on the incoherent, particularly in the context of a facial challenge. More to the point, a fundamental problem to which student speech policies such as Santa Fe's must respond is that many people have misread Engel and Lee v. Weisman to require the wholesale elimination of religious speech -- even private religious speech -- from the public schools. Indeed, the Court ***25** can take judicial notice of the fact that those cases led to such widespread misinterpretation by public school officials that the President in 1995 ordered the Secretary of Education to distribute guidelines nationwide explaining that student religious speech is not only permitted, but protected, in public schools. See Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/ religion.html (May 1998) ("The purpose of promulgating these presidential guidelines [in 1995] was to end much of the confusion regarding religious expression in our nation's public schools .... Schools may not discriminate against private religious expression by students ....").

The Santa Fe policy also combats that widespread misinterpretation by clarifying in a neutral way that religious speech is simply an alternative that is permitted, but not required, from student speakers at football games -- akin to what the presidential guidelines stated and this Court held in Widmar, Mergens, Lamb's Chapel, and Rosenberger.

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE.

Respondents may suggest that most speakers at football games ultimately will choose to say religious words. But in this facial challenge to the policy, with no record to analyze, there is no basis to assume that the forum in fact will be used primarily by speakers employing religious words. See United States v. Salerno, 481 U.S. 739, 745 (1987). The Court here has only to determine "whether it is possible for the [policy] to be implemented in a constitutional manner." Mergens, 496 U.S. at 260 (Kennedy, J., concurring); see also Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

In any event, if most speakers express religious words, that development could raise (at most) claims of audience confusion over whether the government had somehow encouraged or ***26** endorsed religion. Of course, a disclaimer making clear that the private speech is not approved or endorsed by the state, while not constitutionally necessary with respect to an individual's verbal speech, see Pinette, 515 U.S. at 786 (Souter, J., concurring), would eliminate any conceivable problem, see Mergens, 496 U.S. at 266-70 (Marshall, J., concurring).

There is a more direct and persuasive answer, however, to this kind of argument. The fact that some percentage (even 100%) of the speakers at a public school event

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may choose to engage in religious speech in a neutrally available forum cannot be a constitutional problem any more than if 100% of government workers donate a portion of their salaries to religious organizations. Cf. Witters, 474 U.S. at 486; see also Agostini, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); Mueller, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of citizens claimed benefits under the law.").

Consider the following practical example of the problems with this kind of approach: If High School A has events where 10% of the students utter religious words, High School B holds events where 50% of the students utter religious words, and High School C has events where 95% of the students utter religious words, what result? Do the percentages matter? Do the relative percentages matter? How? Does High School C have to tell some students to stop speaking religious words? Which ones? (And what exactly are sufficiently "religious words" to use in making this calculation, in any event?) [FN6]

FN6. Respondents may also raise the specter that school officials will in fact coerce students into providing religious messages. If so, that will provide occasion for an as-applied challenge to the school's implementation of its policy. See Bowen, 487 U.S. at 618-21; Pinette, 515 U.S. at 766 (plurality opinion of Scalia, J.) (discussing hypothetical applications where a "governmental entity manipulates its administration of a public forum").

***27** V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

In Establishment Clause cases, the search for an overarching test is not always necessary, see Lee, 505 U.S. at 586, and can sometimes be counterproductive or even harmful, see Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("Any test that must deal with widely disparate situations risks being so vague as to be useless. ... Lemon has, with some justification, been criticized on this score.").

The Court, of course, has been closely and deeply divided regarding the appropriate test and way to analyze government practices (i) that favor or promote religion over non-religion and (ii) that are deeply rooted in our history and tradition. See Lee, 505 U.S. at 632 (Scalia, J., dissenting) (decision "lays waste a tradition that is as old as public-school graduation ceremonies themselves"); County of Allegheny, 492 U.S. at 657 (Kennedy, J., concurring and dissenting) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); Lynch, 465 U.S. at 674 (upholding government's nativity display: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); Marsh, 463 U.S. at 792 (legislative prayer constitutional because it has become "part of the fabric of our society"); Engel, 370 U.S. at 446 (Stewart, J., ***28** dissenting) ("What is relevant to the issue here is ... the history of the religious traditions of our people ...").

But those deep juridical divisions about the proper Establishment Clause "test" and analysis have by and large disappeared -- or been muted as irrelevant -- when the Court has analyzed laws neutral toward religion in cases such as Widmar,

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Mergens, Lamb's Chapel, and Witters. As Justice Thomas has explained, while the Court's Establishment Clause jurisprudence arguably is "in hopeless disarray" in several areas, the principle that government neutrality satisfies the Establishment Clause "has enjoyed an uncharacteristic degree of consensus." Rosenberger, 515 U.S. at 861 (Thomas, J., concurring). No matter what Establishment Clause test might be employed, the Court generally has held that a law neutral toward religion satisfies Establishment Clause scrutiny (with a limited exception not relevant to this case [FN7]).

> FN7. The Court has suggested that neutrality may not suffice in that limited class of cases where government monies in a neutral benefits program would go directly to religious institutions. Of course, that exception is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence establishing neutrality as an Establishment Clause safe harbor. See Rosenberger, 515 U.S. at 852-63 (Thomas, J., concurring). But this case, in any event, does not involve a funding program.

It is true, of course, that some citizens hostile to religion in any form may argue that even government neutrality toward private religion is still "too favorable" toward religion. These citizens may not want to see private displays of religion in the open public square (as in Pinette), to hear private individuals express religion in the public square (as here), to read religious speech as an expressly listed alternative in a student speech policy, to know that religion is obtaining taxpayer-funded assistance on a neutral basis (as with police and fire protection for churches), to see places of worship built alongside other buildings in residential communities (as most zoning ordinances allow). Some citizens may want to be free of *29 private religious speech and organizations just as much as they want to be free from the government's "exercise of religion." But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society -- below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.

The Religion Clauses, of course, do not require any such "hostility to religion, religious ideas, religious people, or religious schools." Kiryas Joel, 512 U.S. at 717 (O'Connor, J., concurring). On the contrary, the Constitution, this Court's precedents, and our traditions demand that government accord religious speech, religious people, and religious organizations at least the same treatment as their secular counterparts. This Court therefore has stated time and again, and often unanimously, that government neutrality toward religion-- meaning no discrimination between religious and non-religious organizations, people, and speech -- is not an Establishment Clause violation. Striking down a law neutral toward religion, the Court has said, would reflect the "hostility to religion" that the Constitution neither requires nor permits. Rosenberger, 515 U.S. at 846; see generally Eugene Volokh, Equal Treatment is Not Establishment, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999).

Respondents ask this Court to ignore the neutrality of the school policy and, as a necessary result, to cleanse public schools throughout the country of private religious speech. The Court should reject respondents' submission and affirm, as it has done many times before, that a neutral government policy of the kind maintained by Santa Fe High School satisfies the Establishment Clause.

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*30 CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,1999.
Santa Fe Independent School Dist. v. Doe
1999 WL 1272963

Briefs and Other Related Documents (Back to top)

- 2000 WL 374300, 68 USLW 3654 (Oral Argument) Oral Argument (Mar. 29, 2000)

- 2000 WL 340270 (Appellate Brief) SUPPLEMENTAL BRIEF FOR PETITIONER (Mar. 28, 2000)

- 2000 WL 340266 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Mar. 27, 2000)

- 2000 WL 263824 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Mar. 08, 2000)

- 2000 WL 140838 (Appellate Brief) BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS , NATIONAL PEARL, PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS (Feb. 02, 2000)

- 2000 WL 140928 (Appellate Brief) BRIEF FOR RESPONDENTS (Feb. 02, 2000)

- 2000 WL 126190 (Appellate Brief) BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS (Jan. 31, 2000)

- 1999 WL 1272941 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

- 1999 WL 1272942 (Appellate Brief) Brief on the Merits of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Dec. 30, 1999)

- 1999 WL 1272948 (Appellate Brief) BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

- 1999 WL 1272950 (Appellate Brief) BRIEF OF AMICI CURIAE SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DI STRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER (Dec. 30, 1999)

- 1999 WL 1272967 (Appellate Brief) BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

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• 1999 WL 1269304 (Appellate Brief) BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1269325 (Appellate Brief) BRIEF FOR PETITIONER (Dec. 29, 1999)

• 1999 WL 1272953 (Appellate Brief) BRIEF OF AMICUS CURIAE THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1272970 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1276928 (Appellate Brief) BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R yPA 16yr2000026040;0001;;ES;PAADCS16;1000636;r), RICHARD K. ARMEY (R TX 26), TOM DELAY (R TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BA RR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX (Dec. 29, 1999)

• 1999 WL 33612744 (Joint Appendix) (Dec. 29, 1999)

• 1999 WL 1269303 (Appellate Brief) BRIEF AMICI CURIAE FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER (Dec. 28, 1999)

• 1999 WL 1259991 (Appellate Brief) BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER (Dec. 23, 1999)

• 1999 WL 1267471 (Appellate Brief) BRIEF OF STUDENT PRESS LAW CENTER, AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY (Dec. 23, 1999)

• 1999 WL 33611439 (Appellate Filing) Response to Petition for Writ of Certiorari (Oct. 08, 1999)

• 1999 WL 33611367 (Appellate Filing) Petitioner's Supplemental Brief in Support of the Petition for Writ of Certiorari (Aug. 24, 1999)

• 1999 WL 33611382 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

• 1999 WL 33611383 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

• 1999 WL 33611385 (Appellate Filing) Brief of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Aug. 06, 1999)

• 1999 WL 33611384 (Appellate Filing) Brief Amici Curiae for Stephanie Vega and Other Students and Parents of Santa Fe Independent School District in Support of Petitioner (Aug. 04, 1999)

• 1999 WL 33611365 (Appellate Filing) Petition for Writ of Certiorari (Jul. 06,

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Briefs and Other Related Documents

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,
v.
Jane DOE, Individually and as Next Friend for Her Minor Children, Jane and John Doe, et al.

No. 99-62.

Argued March 29, 2000.
Decided June 19, 2000.

Students and their parents filed § 1983 action against school district, alleging that district's policies and practices, including policy of permitting student-led, student-initiated **prayer** before football games, violated Establishment Clause and demanding prospective injunctive and declaratory relief in addition to money damages. The United States District Court for the Southern District of Texas, Samual B. Kent, J., ordered district to enact more restrictive policy, allowing only nonsectarian, nonproselytizing **prayer,** and appeals were taken. The United States Court of Appeals for the Fifth Circuit, 168 F.3d 806, determined that even modified policy violated Establishment Clause. District's petition for certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) student-led, student-initiated invocations prior to football games did not amount to private speech; (2) policy of permitting such invocations was impermissibly coercive; and (3) challenge to policy was not premature, as it was invalid on its face.

Affirmed.

Chief Justice Rehnquist filed a dissenting opinion, in which Justices Scalia and Thomas joined.

West Headnotes

[1] Constitutional Law ⚿274(2)
92k274(2)

The Fourteenth Amendment imposes the First Amendment's substantive limitations on the legislative power of the States and their political subdivisions. U.S.C.A. Const.Amends. 1, 14.

[2] Constitutional Law ⚿84.5(3)
92k84.5(3)

[2] Schools ⚿165
345k165

Student-led, student-initiated invocations prior to football games, as authorized by policy of public school district, did not amount to private speech, for purposes of Establishment Clause, as invocations were given over school's public address system by speaker who was elected by majority of student body, invocations took place on government property at government- sponsored, school-related events, expressed purposes of policy encouraged selection of religious message, and audience would perceive message as public expression of majority views delivered with district's approval. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚿82(9)
92k82(9)

Selective access does not transform government property into a public forum for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law ⚿82(1)
92k82(1)

Fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

[5] Constitutional Law ⚿84.1
92k84.1

The Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ⚿84.5(3)
92k84.5(3)

In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of **prayer** in

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public schools. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 84.1
92k84.1

When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is entitled to some deference, but it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 84.5(3)
92k84.5(3)

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 84.5(3)
92k84.5(3)

[9] Schools 165
345k165

Public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games was impermissibly coercive, despite policy's mechanism of authorizing student elections to determine whether invocations would be given and which student would lead them, as such elections were product of district decision and encouraged divisiveness along religious lines, students' decision to attend football games could not be deemed entirely voluntary, and, even if attendance was voluntary, district could not compel student to choose between religious conformity and foregoing attendance at game. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 84.1
92k84.1

The preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 84.1
92k84.1

It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 84.1
92k84.1

The government may no more use social pressure to enforce religious orthodoxy than it may use more direct means. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 84.5(3)
92k84.5(3)

The Religion Clauses of the First Amendment do not impose a prohibition on all religious activity in public schools. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 84.5(3)
92k84.5(3)

First Amendment's Religion Clauses do not prohibit any public school student from voluntarily praying at any time before, during, or after the schoolday. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 46(1)
92k46(1)

Students' and parents' challenge to constitutionality of public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games was not premature, although no message had actually been delivered under policy, as policy was invalid on its face because it established improper majoritarian, student-body election on religion, and had purpose of, and created perception of, encouraging delivery of **prayer** at series of important school events. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 84.1
92k84.1

Under the *Lemon* standard, a court must invalidate a statute challenged under the Establishment Clause if it lacks a secular legislative purpose. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 84.5(3)
92k84.5(3)

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[17] Schools ⚿165
345k165

Public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games lacked valid secular purpose, but was instead implemented with purpose of endorsing school **prayer,** in light of text of policy, which reflected district's involvement in election of speaker and content of message, and evolution of policy, which arose in response to issue of school **prayer.** U.S.C.A. Const.Amend. 1.

[18] Constitutional Law ⚿84.1
92k84.1

Whether a government activity violates the Establishment Clause is in large part a legal question to be answered on the basis of judicial interpretation of social facts; every government practice must be judged in its unique circumstances. U.S.C.A. Const.Amend. 1.

****2268 *290** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Prior to 1995, a student elected as **Santa Fe** High School's student council chaplain delivered a **prayer** over the public address system before each home varsity football game. Respondents, Mormon and Catholic students or alumni and their mothers, filed a suit challenging this practice and others under the Establishment Clause of the First Amendment. While the suit was pending, petitioner school district (District) adopted a different policy, ****2269** which authorizes two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students held elections authorizing such **prayers** and selecting a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian, nonproselytizing **prayer.** The Fifth Circuit held that, even as modified by the District Court, the football **prayer** policy was invalid.

Held: The District's policy permitting student-led, student-initiated **prayer** at football games violates the Establishment Clause. Pp. 2275-2283.

(a) The Court's analysis is guided by the principles endorsed in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There, in concluding that a **prayer** delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so, *id.,* at 587, 112 S.Ct. 2649. The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here--on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public **prayer**--is not properly characterized as "private" speech. Although the District relies heavily on this Court's cases addressing public forums, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, it is clear that the District's ***291** pregame ceremony is not the type of forum discussed in such cases. The District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally, see, *e.g., Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592, but, rather, allows only one student, the same student for the entire season, to give the invocation, which is subject to particular regulations that confine the content and topic of the student's message. The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. See *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193. Moreover, the District has failed to divorce itself from the invocations' religious content. The policy involves both perceived and actual endorsement of religion, see *Lee,* 505 U.S., at 590, 112 S.Ct. 2649, declaring that the student elections take place because the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "[u]pon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemniz[ing] the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an

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appeal for divine assistance and, as used in the past at **Santa Fe** High School, has always entailed a focused religious message. A conclusion that the message is not "private speech" is also established by factors beyond the policy's text, including the official setting in which the invocation is delivered, see, *e.g., Wallace v. Jaffree,* 472 U.S. 38, 73, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29, by the policy's sham secular purposes, see *id.,* at 75, 105 S.Ct. 2479, and by its history, which indicates that the District intended to preserve its long-sanctioned practice of **prayer** before football games, see *Lee,* 505 U.S., at 596, 112 S.Ct. 2649. Pp. 2275-2279.

2270 (b) The Court rejects the District's argument that its policy is distinguishable from the graduation **prayer in *Lee* because it does not coerce students to participate in religious observances. The first part of this argument--that there is no impermissible government coercion because the pregame messages are the product of student choices--fails for the reasons discussed above explaining why the mechanism of the dual elections and student speaker do not turn public speech into private speech. The issue resolved in the first election was whether a student would deliver **prayer** at varsity football games, and the controversy in this case demonstrates that the students' views are not unanimous on that issue. One of the Establishment Clause's purposes is to remove debate over this kind of issue from governmental supervision or control. See *Lee,* 505 U.S., at 589, 112 S.Ct. 2649. Although the ultimate choice of student speaker is attributable to the students, the District's decision *292 to hold the constitutionally problematic election is clearly a choice attributable to the State, *id.,* at 587, 112 S.Ct. 2649. The second part of the District's argument--that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary--is unpersuasive. For some students, such as cheerleaders, members of the band, and the team members themselves, attendance at football games is mandated, sometimes for class credit. The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football. *Id.,* at 593, 112 S.Ct. 2649. The Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals. See *id.,* at 596, 112 S.Ct. 2649. Pp. 2279-2281.

(c) The Court also rejects the District's argument that respondents' facial challenge to the policy necessarily must fail because it is premature: No invocation has as yet been delivered under the policy. This argument assumes that the Court is concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that the Court keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, *Lynch v. Donnelly,* 465 U.S. 668, 694, 104 S.Ct. 1355, 79 L.Ed.2d 604, and guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. See, *e.g., Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520; *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745. As discussed above, the policy's text and the circumstances surrounding its enactment reveal that it has such a purpose. Another constitutional violation warranting the Court's attention is the District's implementation of an electoral process that subjects the issue of **prayer** to a majoritarian vote. Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Cf. *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193. For the foregoing reasons, the policy is invalid on its face. Pp. 2281-2283.

168 F.3d 806, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, *293 C.J., filed a dissenting opinion, in which **2271 SCALIA and THOMAS, JJ., joined, *post,* p. 2283.

Jay A. Sekulow, for petitioner.

John Cornyn, Austin, TX, for Texas, et al., as amici curiae by special leave of the Court.

Anthony P. Griffin, Galveston, TX, for respondent.

*294 Justice STEVENS delivered the opinion of the Court.

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Prior to 1995, the **Santa Fe** High School student who occupied the school's elective office of student council chaplain delivered a **prayer** over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, **prayer** initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing **prayer.** The Court of Appeals held that, even as modified by the District Court, the football **prayer** policy was invalid. We granted the school district's petition for certiorari to review that holding.

I

The **Santa Fe** Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the State. The District includes the **Santa Fe** High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment. [FN1]

FN1. A decision, the Fifth Circuit Court of Appeals noted, that many District officials "apparently neither agreed with nor particularly respected." 168 F.3d 806, 809, n. 1 (C.A.5 1999). About a month after the complaint was filed, the District Court entered an order that provided, in part:
"[A]ny further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." App. 34-35.

***295** Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, ****2272** [FN2] and to deliver overtly Christian **prayers** over the public address system at home football games.

FN2. At the 1994 graduation ceremony the senior class president delivered this invocation:
"Please bow your heads.
"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of **Santa Fe.** We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray." *Id.*, at 19.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. [FN3] With respect ***296** to the impending graduation, the order provided that "non-denominational **prayer**" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the **prayer** was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the **prayer** is non-proselytizing." App. 32.

FN3. For example, it prohibited school officials from endorsing or participating in the baccalaureate ceremony sponsored by the **Santa Fe** Ministerial Alliance, and ordered the District to establish

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policies to deal with
"manifest First Amendment infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental." *Id.*, at 34.

In response to that portion of the order, the District adopted a series of policies over several months dealing with **prayer** at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

" 'The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing ***297** their graduation ceremonies.' " 168 F.3d 806, 811 (C.A.5 1999) (emphasis deleted).

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include **prayer** at the high school graduation." App. 52. In a second vote the class elected two seniors to deliver the invocation and benediction. [FN4]

FN4. The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen." *Id.*, at 53. The student benediction was similar in content and closed: "Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways. Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen." *Id.*, at 54.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian ****2273** and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "**Prayer** at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytising," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation: "[T]he district's high school students voted to determine whether a student would deliver **prayer** at varsity football games.... The students chose to allow a ***298** student to say a **prayer** at football games." *Id.*, at 65. A week later, in a separate election, they selected a student "to deliver the **prayer** at varsity football games." *Id.*, at 66.

The final policy (October policy) is essentially the same as the August policy, though it omits the word " **prayer**" from its title, and refers to "messages" and "statements" as well as "invocations." [FN5] It is the validity of that policy that is before us. [FN6]

FN5. Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

FN6. It provides:
"STUDENT ACTIVITIES:
"PRE-GAME CEREMONIES AT FOOTBALL GAMES
"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether

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such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.*, at 104-105.

***299** The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it held that the school's "action must not 'coerce anyone to support or participate in' a religious exercise." App. to Pet. for Cert. E7. Applying that test, it concluded that the graduation **prayers** appealed "to distinctively Christian beliefs," [FN7] and that delivering a ****2274 prayer** "over the school's public address system prior to each football and baseball game coerces student participation in religious events." [FN8] Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals majority agreed with the Does.

FN7. "The graduation **prayers** at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these **prayers** during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause." App. to Pet. for Cert. E8.

FN8. *Id.*, at E8-E9.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992), that court held that student-led **prayer** that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school ***300** graduations and that school-encouraged **prayer** was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist.,* 70 F.3d 402 (C.A.5 1995), it had described a high school graduation as "a significant, once in-a- lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." *Id.*, at 406-407. [FN9]

FN9. Because the dissent overlooks this case, it incorrectly assumes that a "**prayer**-only policy" at football games was permissible in the Fifth Circuit. See *post,* at 2286 (opinion of REHNQUIST, C.J.).

In its opinion in this case, the Court of Appeals explained:

"The controlling feature here is the same as in *Duncanville:* The **prayers** are to be delivered *at football games*--hardly the sober type of annual event that can be appropriately solemnized with **prayer.** The distinction to which [the District] points is simply one without difference. Regardless of whether the **prayers** are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the **prayers.** Thus, as we indicated in *Duncanville,* our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek **Prayer** Policy cannot survive. We therefore reverse the district court's holding that [the District's] alternative Clear Creek **Prayer** Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions." 168 F.3d, at 823.

The dissenting judge rejected the majority's distinction between graduation ceremonies and football games. In his ***301** opinion the District's

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October policy created a limited public forum that had a secular purpose [FN10] and provided neutral accommodation of noncoerced, private, religious speech. [FN11]

FN10. "There are in fact several secular reasons for allowing a brief, serious message before football games--some of which [the District] has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.
"Having again relinquished all editorial control, [the District] has created a limited public forum for the students to give brief statements or **prayers** concerning the value of those goals and the methods for achieving them." 168 F.3d, at 835.

FN11. "The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non- coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious speech." *Id.*, at 836.

2275 We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated **prayer at football games violates the Establishment Clause." 528 U.S. 1002, 120 S.Ct. 494, 145 L.Ed.2d 381 (1999). We conclude, as did the Court of Appeals, that it does.

II

[1] The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Wallace v. Jaffree,* 472 U.S. 38, 49-50, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) . In *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), we held that a **prayer** delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student **prayer** at a different *302 type of school function, our analysis is properly guided by the principles that we endorsed in *Lee.* As we held in that case:

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Id.,* at 587, 112 S.Ct. 2649 (citations omitted) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)).

[2] In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (opinion of O'CONNOR, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

[3] These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such *303 forums, [FN12] it is clear that the pregame ceremony is not the type of forum discussed in those cases. [FN13] **2276 The **Santa Fe** school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' ... by the student body generally." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or

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invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message, see *infra,* at 2277-2278, 2278-2279. By comparison, in *Perry* we rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here. [FN14] As we concluded in *Perry,* "selective access does not transform government property into a public forum." 460 U.S., at 47, 103 S.Ct. 948.

FN12. See, *e.g.,* Brief for Petitioner 44-48, citing *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (limited public forum); *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (limited public forum); *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (traditional public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (limited public forum). Although the District relies on these public forum cases, it does not actually argue that the pregame ceremony constitutes such a forum.

FN13. A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause. See, *e.g., Pinette,* 515 U.S., at 772, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment) ("I see no necessity to carve out ... an exception to the endorsement test for the public forum context").

FN14. The school's internal mail system in *Perry* was open to various private organizations such as "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units." 460 U.S., at 39, n. 2, 103 S.Ct. 948.

***304** Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, **Santa Fe's** student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

[4] Recently, in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

> "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here." *Id.,* at 235, 120 S.Ct. 1346.

Like the student referendum for funding in *Southworth,* this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. [FN15] Because "fundamental rights may not be ***305** submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the District's elections are insufficient safeguards of diverse student speech.

FN15. If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.

The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen." *Post,* at 2285.

In *Lee,* the school district made the related argument that its policy of endorsing only "civic or nonsectarian" **prayer** was acceptable because it minimized the intrusion on the audience as a whole. We ****2277** rejected that claim by explaining that such a majoritarian policy "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." 505 U.S., at 594, 112 S.Ct. 2649. Similarly, while **Santa Fe's** majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself

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from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is " 'one of neutrality rather than endorsement' " [FN16] or by characterizing the individual student as the "circuit-breaker" [FN17] in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee,* the "degree of school involvement" makes it clear that the pregame **prayers** bear "the imprint of the State and thus put school-age children who objected in an untenable position." *Id.,* at 590, 112 S.Ct. 2649.

FN16. Brief for Petitioner 19 (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)).

FN17. Tr. of Oral Arg. 7.

The District has attempted to disentangle itself from the religious messages by developing the two-step student ***306** election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board *has chosen to permit* students to deliver a brief invocation and/or message." App. 104 (emphasis added). The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." *Id.,* at 104-105. The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.*

[5] In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good sportsmanship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. [FN18] Indeed, the only type of message that is expressly endorsed in the text is an "invocation"--a term that primarily describes an appeal for divine ***307** assistance. [FN19] In fact, as used in the past at **Santa Fe** High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely ****2278** how the students understand the policy. The results of the elections described in the parties' stipulation [FN20] make it clear that the students understood that the central question before them was whether **prayer** should be a part of the pregame ceremony. [FN21] We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public **prayer** as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

FN18. THE CHIEF JUSTICE's hypothetical of the student body president asked by the school to introduce a guest speaker with a biography of her accomplishments, see *post,* at 2287-2288 (dissenting opinion), obviously would pose no problems under the Establishment Clause.

FN19. See, *e.g.,* Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a **prayer** of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship").

FN20. See *supra,* at 2272-2273, and n. 4.

FN21. Even if the plain language of the October policy were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S., at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 534-535, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (making the same point in the Free Exercise Clause context).

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is

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selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is ***308** clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

[6] In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of **prayer** in public schools." *Wallace,* 472 U.S., at 73, 76, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective **Santa Fe** High School student will unquestionably perceive the inevitable pregame **prayer** as stamped with her school's seal of approval.

[7] The text and history of this policy, moreover, reinforce our objective student's perception that the **prayer** is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace,* 472 U.S., at 75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment).

***309** According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis [h] an appropriate environment ****2279** for competition." Brief for Petitioner 14. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste [r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes **prayer** sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet nonreligious.

Most striking to us is the evolution of the current policy from the long- sanctioned office of "Student Chaplain" to the candidly titled "**Prayer** at Football Games" regulation. This history indicates that the District intended to preserve the practice of **prayer** before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led **prayer** at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee,* 505 U.S., at 596, 112 S.Ct. 2649.

[8] School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying ***310** message to adherents that they are insiders, favored members of the political community." *Lynch,* 465 U.S., at 688, 104 S.Ct. 1355 (O'CONNOR, J., concurring). The delivery of such a message--over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public **prayer**--is not properly characterized as "private" speech.

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III

[9] The District next argues that its football policy is distinguishable from the graduation **prayer** in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was "whether a student would deliver **prayer** at varsity football games," App. 65, and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

[10] One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." 505 U.S., at 589, 112 S.Ct. 2649. The two student elections authorized ***311** by the policy, coupled with ****2280** the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee,* 505 U.S., at 587, 112 S.Ct. 2649.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Brief for Petitioner 41. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

[11] There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee,* "[l]aw reaches past formalism." 505 U.S., at 595, 112 S.Ct. 2649. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." *Ibid.* We stressed in *Lee* the ***312** obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.,* at 593, 112 S.Ct. 2649. High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.,* at 596, 112 S.Ct. 2649.

[12] Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame **prayer** has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no

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more use social pressure to enforce orthodoxy than it may use more direct means." *Id.*, at 594, 112 S.Ct. 2649. As in *Lee*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.*, at 592, 112 S.Ct. 2649. The constitutional command will not permit the District "to exact religious conformity from a student as the **2281 price" of joining her classmates at a varsity football game. [FN22]

FN22. "We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands." *Lee*, 505 U.S., at 595-596, 112 S.Ct. 2649.

[13][14] *313 The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Wallace*, 472 U.S., at 59, 105 S.Ct. 2479. Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of **prayer.**

IV

[15] Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship *314 because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch*, 465 U.S., at 694, 104 S.Ct. 1355 (O'CONNOR, J., concurring), and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of **prayer** to a majoritarian vote.

[16] The District argues that the facial challenge must fail because "**Santa Fe's** Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Brief for Petitioner 17 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 613, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen*, THE CHIEF JUSTICE concluded that "[a]s in previous cases involving facial challenges on Establishment Clause grounds, *e.g.*, *Edwards v. Aguillard*, [482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)]; *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, **2282 77 L.Ed.2d 721 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ..., which guides '[t]he general nature of our inquiry in this area,' *Mueller v. Allen*, *supra*, at 394, 103 S.Ct. 3062." 487 U.S., at 602, 108 S.Ct. 2562. Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91

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S.Ct. 2105, 29 L.Ed.2d 745 (1971). It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

[17] As discussed, *supra,* at 2277-2278, 2278-2279, the text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker ***315** and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message--that of **Santa Fe's** traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

[18] This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led **prayer** at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such **prayers** from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts.... Every government practice must be judged in its unique circumstances...." *Lynch,* 465 U.S., at 693-694, 104 S.Ct. 1355 (O'CONNOR, J., concurring). Our discussion in the previous sections, *supra,* at 2277-2279, demonstrates that in this case the District's direct involvement with school **prayer** exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every **Santa Fe** High School student understands clearly--that this policy is about **prayer.** The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school **prayer.**

***316** Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student **prayer,** was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace,* for example, we invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of **prayer** activities for one minute at the beginning of each school day." 472 U.S., at 60, 105 S.Ct. 2479; see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Therefore, even if no **Santa Fe** High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage **prayer** is also at issue. Government efforts to endorse religion cannot evade constitutional ****2283** reproach based solely on the remote possibility that those attempts may fail.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of **prayer.** Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. [FN23] Like the referendum in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. ***317** 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. [FN24] No further injury is required for the policy to fail a facial challenge.

FN23. THE CHIEF JUSTICE accuses us of "essentially invalidat[ing] all student elections," see *post,* at 2285. This is obvious hyperbole. We have concluded that the resulting religious message under

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this policy would be attributable to the school, not just the student, see *supra,* at 2275- 2279. For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored **prayer** violates the Establishment Clause.

FN24. THE CHIEF JUSTICE contends that we have "misconstrue[d] the nature ... [of] the policy as being an election on '**prayer**' and 'religion,' " *post,* at 2285. We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver ***prayer*** at varsity football games," that the "students chose to allow a student to say a ***prayer*** at football games," and that a second election was then held "to determine which student would deliver the ***prayer.***" App. 65-66 (emphases added). Furthermore, the policy was titled "***Prayer*** at Football Games." *Id.,* at 99 (emphasis added). Although the District has since eliminated the word "**prayer**" from the policy, it apparently viewed that change as sufficiently minor as to make holding a new election unnecessary.

To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum," *Pinette,* 515 U.S., at 780, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment). Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of **prayer** at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

***318** Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and **prayer,** to be observed by acknowledging with grateful hearts the many and signal favors of Almighty ****2284** God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." See also *Bowen v. Kendrick,* 487 U.S. 589, 612, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). While there is an exception to this principle in the First Amendment overbreadth context because of our concern that people may refrain from speech out of fear of prosecution, *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32, 38-40, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999), there is no similar justification for Establishment Clause cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question is not whether the district's policy *may be* applied in violation of the Establishment Clause, but whether it inevitably will be.

***319** The Court, venturing into the realm of prophecy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante,* at 2282. To do so, it applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). [FN1]

FN1. The Court rightly points out that in facial challenges in the Establishment Clause context, we have looked to *Lemon's* three factors to "guid[e][t]he general nature of our inquiry." *Ante,* at 2282 (internal quotation marks omitted) (citing *Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). In *Bowen,* we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." 487 U.S., at 612, 108 S.Ct. 2562 (internal quotation marks omitted). But here the Court, rather

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than looking to *Lemon* as a guide, applies *Lemon's* factors stringently and ignores *Bowen's* admonition that mere anticipation of unconstitutional applications does not warrant striking a policy on its face.

Lemon has had a checkered career in the decisional law of this Court. See, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 398-399, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace v. Jaffree,* 472 U.S. 38, 108-114, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting) (stating that *Lemon's* "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty v. Regan,* 444 U.S. 646, 671, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) (STEVENS, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon* "). We have even gone so far as to state that it has never been binding on us. *Lynch v. Donnelly,* 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area .... In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh* ***320** *v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)]"). Indeed, in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), an opinion upon which the Court relies heavily today, we mentioned, but did not feel compelled to apply, the *Lemon* test. See also *Agostini v. Felton,* 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 **2285 (1997) (stating that *Lemon's* entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair,* 413 U.S. 734, 741, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face. The Court applies *Lemon* and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of **prayer** at a series of important school events." *Ante,* at 2283. The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "**prayer**" and "religion." [FN2] See *ante,* at 2281, 2283. To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. App. 104-105. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will ***321** pray if elected. It is also conceivable that the election could lead to a Christian **prayer** before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on **prayer,** but on public speaking ability or social popularity. And if student campaigning did begin to focus on **prayer,** the school might decide to implement reasonable campaign restrictions. [FN3]

FN2. The Court attempts to support its misinterpretation of the nature of the election process by noting that the district stipulated to facts about the most recent election. See *ante,* at 2283, n. 24. Of course, the most recent election was conducted under the *previous* policy--a policy that required an elected student speaker to give a pregame invocation. See App. 65-66, 99-100. There has not been an election under the policy at issue here, which expressly allows the student speaker to give a message as opposed to an invocation.

FN3. The Court's reliance on language regarding the student referendum in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), to support its conclusion with respect to the election process is misplaced. That case primarily concerned free speech, and, more particularly, mandated financial support of a public forum. But as stated above, if this case were in the "as applied" context and we were presented with the appropriate record, our language in *Southworth* could become more applicable. In fact, *Southworth* itself demonstrates the impropriety of making a decision with respect to the election process without a record of its operation. There we remanded in part for a determination of

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how the referendum functions. See *id.*, at 235-236, 120 S.Ct. 1346.

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." *Ante,* at 2283. The Court so holds despite that any speech that may occur as a result of the election process here would be *private,* not *government,* speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say **prayers.** Under the Court's view, the mere grant of power ***322** to the students to vote for such ****2286** offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student **prayer,** was a constitutional violation." *Ante,* at 2282. But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104-105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace,* 472 U.S., at 74-75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Mueller v. Allen,* 463 U.S. 388, 394-395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (stressing this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). The Court grants no deference to--and appears openly hostile toward--the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante,* at 2277; Cf. *Lynch,* 465 U. S, at 693, 104 S.Ct. 1355 (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante,* at 2277. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.' " Under the Court's logic, a public school that sponsors ***323** the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice. [FN4]

FN4. The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante,* at 2277-2278. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the Free Exercise Clause mandates such tolerance. See *ante,* at 2281 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch v. Donnelly,* 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

The Court bases its conclusion that the true purpose of the policy is to endorse student **prayer** on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." *Ante,* at 2278-2279, 2282. But the context-- attempted compliance with a District Court order--actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a **prayer**-only policy. See *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992). But the school district went further than required by the District Court order and eventually settled ****2287** on a policy that gave the student speaker a choice to

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deliver either an *324 invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose. [FN5]

FN5. *Wallace v. Jaffree,* 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to **prayer** to an existing statute providing a moment of silence for meditation. *Id.,* at 59, 105 S.Ct. 2479. Here the school district added a secular alternative to a policy that originally provided only for **prayer.** More importantly, in *Wallace,* there was "unrebutted evidence" that pointed to a wholly religious purpose, *id.,* at 58, 105 S.Ct. 2479, and Alabama "conceded in the courts below that the purpose of the statute was to make **prayer** part of daily classroom activity," *id.,* at 77-78, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

The Court also relies on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), to support its conclusion. In *Lee,* we concluded that the content of the speech at issue, a graduation **prayer** given by a rabbi, was "directed and controlled" by a school official. *Id.,* at 588, 112 S.Ct. 2649. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria--like good public speaking skills or social popularity--and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy *325 would likely pass constitutional muster. See *Lee, supra,* at 630, n. 8, 112 S.Ct. 2649 (SOUTER, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. See *ante,* at 2276-2277. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment *speech* cases and is used as a guide for determining when we apply strict scrutiny. For example, we look to "content neutrality" in reviewing loudness restrictions imposed on speech in public forums, see *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and regulations against picketing, see *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. See *ante,* at 2276-2277.

But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, *e.g., Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). **2288 Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" **prayer** and the policy's content limitations *326 prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante,* at 2277.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

Briefs and Other Related Documents (Back to top)

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. 2000 WL 374300, 68 USLW 3654 (Oral Argument) Oral Argument (Mar. 29, 2000)

. 2000 WL 340270 (Appellate Brief) SUPPLEMENTAL BRIEF FOR PETITIONER (Mar. 28, 2000)

. 2000 WL 340266 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Mar. 27, 2000)

. 2000 WL 263824 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Mar. 08, 2000)

. 2000 WL 140838 (Appellate Brief) BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS , NATIONAL PEARL,. PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS (Feb. 02, 2000)

. 2000 WL 140928 (Appellate Brief) BRIEF FOR RESPONDENTS (Feb. 02, 2000)

. 2000 WL 126190 (Appellate Brief) BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS (Jan. 31, 2000)

. 1999 WL 1272941 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272942 (Appellate Brief) Brief on the Merits of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Dec. 30, 1999)

. 1999 WL 1272948 (Appellate Brief) BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272950 (Appellate Brief) BRIEF OF AMICI CURIAE SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DI STRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272963 (Appellate Brief) BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272967 (Appellate Brief) BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1269304 (Appellate Brief) BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1269325 (Appellate Brief) BRIEF FOR PETITIONER (Dec. 29, 1999)

. 1999 WL 1272953 (Appellate Brief) BRIEF OF AMICUS CURIAE THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1272970 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1276928 (Appellate Brief) BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R yPA 16yr2000026040;0001;;ES;PAADCS16;1000636;r), RICHARD K. ARMEY (R TX 26), TOM DELAY (R

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TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BA RR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX (Dec. 29, 1999)

. 1999 WL 33612744 (Joint Appendix) (Dec. 29, 1999)

. 1999 WL 1269303 (Appellate Brief) BRIEF AMICI CURIAE FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER (Dec. 28, 1999)

. 1999 WL 1259991 (Appellate Brief) BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER (Dec. 23, 1999)

. 1999 WL 1267471 (Appellate Brief) BRIEF OF STUDENT PRESS LAW CENTER, AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY (Dec. 23, 1999)

. 1999 WL 33611439 (Appellate Filing) Response to Petition for Writ of Certiorari (Oct. 08, 1999)

. 1999 WL 33611367 (Appellate Filing) Petitioner's Supplemental Brief in Support of the Petition for Writ of Certiorari (Aug. 24, 1999)

. 1999 WL 33611382 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

. 1999 WL 33611383 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

. 1999 WL 33611385 (Appellate Filing) Brief of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Aug. 06, 1999)

. 1999 WL 33611384 (Appellate Filing) Brief Amici Curiae for Stephanie Vega and Other Students and Parents of Santa Fe Independent School District in Support of Petitioner (Aug. 04, 1999)

. 1999 WL 33611365 (Appellate Filing) Petition for Writ of Certiorari (Jul. 06, 1999)

END OF DOCUMENT

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Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents**.
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools**. A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, <u>regardless</u> of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

District Court of Appeal of Florida,
First District.

John Ellis "Jeb" BUSH, in his official capacity as Governor of the State of Florida and Chairman of the State Board of Education; Attorney General Robert A. Butterworth, Secretary of Education Tom Gallagher, Secretary of State Katherine Harris, Comptroller Robert Milligan, Commissioner of Insurance and State Treasurer Bill Nelson, Commissioner of Agriculture Bob Crawford, in their official capacities and as members of the State Board of Education; and Florida Department of Education, Appellants,

v.

Ruth D. HOLMES; Gregory and Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; The Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers, Appellees.

Brenda McShane, in her own behalf as natural guardian of her child, Brenisha McShane; Dermita Merkman, in her own behalf and as natural guardian of her child, Jessica Merkman; Tracy Richardson, in her own behalf and as natural guardian of her child, Khaliah Clanton; Sharon Mallety, in her own behalf and as natural guardian of her child, Jermall Bell; Barbara Landrum, in her own behalf and as natural guardian of her children, Laquila and Stacy Marie Wheeler; and Urban League Of Greater Miami, Inc., Appellants,

v.

Ruth D. Holmes; Gregory And Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers,
Appellees.

Nos. 1D00-1121 and 1D00-1150.

Oct. 3, 2000.

Individuals filed separate complaints alleging that opportunity scholarship program (OSP) statute violated state and federal constitutions. The Circuit Court, Leon County, L. Ralph Smith, J., granted motion to consolidate and found that OSP, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is unconstitutional on its face under constitutional section providing for public education. State defendants and parents of students receiving opportunity scholarships appealed. The District Court of Appeal, Kahn, J., held that: (1) entering judgment holding OSP statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, and (2) OSP statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education.

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Reversed and remanded.

West Headnotes

[1] Judgment ⚿183
228k183

[1] Pleading ⚿343
302k343

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings was erroneous. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[2] Appeal and Error ⚿1073(1)
30k1073(1)

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, where prejudice was not demonstrated and parties had adequate notice, time to respond, and opportunity to be heard. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. §§ 59.041, 229.0537
.

[3] Schools ⚿3
345k3

Opportunity scholarship program (OSP) statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education; although constitution directs that public education be accomplished through system of free public schools, nothing clearly prohibits legislature from allowing well delineated use of public funds for private school education. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[4] Constitutional Law ⚿26
92k26

The Florida Constitution is a limitation upon, rather than a grant of, power.

[5] Constitutional Law ⚿48(1)
92k48(1)

Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document.

[6] Constitutional Law ⚿48(1)
92k48(1)

[6] Constitutional Law ⚿48(3)
92k48(3)

When a legislative enactment is challenged, the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt.

[7] Constitutional Law ⚿14
92k14

The principle of "expressio unius est exclusio alterius," which holds that to express or include one thing implies the exclusion of the other or of the alternative, should be used sparingly with respect to the constitution.

[8] Constitutional Law ⚿12
92k12

[8] Constitutional Law ⚿13
92k13

Courts must be mindful that the constitution is what the people intended it to be; its dominant note is the general welfare, and it was not intended to bind like a strait-jacket, but contemplated experimentation for the common good.

[9] Appeal and Error ⚿170(2)
30k170(2)

District Court of Appeal would decline to consider constitutional arguments challenging statute, where trial court determined that such arguments contained mixed questions of law and fact and did not address arguments, but only addressed alternative claim of facial constitutionality that could be decided without presentation of evidence.

***670** Frank R. Jimenez, Acting General Counsel, and Reginald J. Brown, Deputy General Counsel, Tallahassee; Charles T. Canady, Washington, D.C.; Carol A. Licko, Thomson, Muraro, Razook & Hart, P.A., Miami; and Jay P. Lefkowitz and Brett M. Kavanaugh of Kirkland & Ellis, Washington, D.C.,

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for Appellants John Ellis" Jeb" Bush, et al.

Thomas E. Warner, Solicitor General of Florida, Louis F. Hubener, Assistant Attorney General, James A. Peters, Special Counsel, and Richard A. Hixson, Deputy Solicitor General, Tallahassee, for Robert A. Butterworth, Attorney General of Florida.

Harry L. Hooper, General Counsel, Comptroller's Office, Tallahassee, for Robert Milligan, Florida Comptroller.

Michael Olenick, General Counsel, Tallahassee, for Florida Department of Education.

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Frank A. Shepherd of Pacific Legal Foundation, Miami, for Amici Curiae Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, Robert N. Wright, and Pacific Legal Foundation; and Paul D. Clement, Jeffrey M. Telep, and Jeffrey S. Bucholtz of King & Spalding, Washington, D.C., for Amici Curiae The Center for Education Reform, American Education Reform Foundation, American Legislative Exchange Council, Children First CEO America, Education Leaders Council, Floridians for School Choice, " I Have a Dream" Foundation of Washington, D.C., and Mayor Bret Schundler, Republican Mayor of Jersey City, New Jersey, and founder of Empower the People on behalf of Appellants Brenda McShane, et al.

Ronald G. Meyer of Meyer and Brooks, P.A., Tallahassee; Robert H. Chanin, John M. West, and Alice O'Brien of Bredhoff & Kaiser, P.L.L.C., Washington, D.C.; Andrew H. Kayton, American Civil Liberties Union Foundation of Florida, Inc., Miami; Michael A. Sussman of National Association for Advancement of Colored People, New York; Julie Underwood, General Counsel of National School Boards Association, Virginia; Elliot M. Mincberg and Judith E. Schaeffer, of People for the American Way Foundation, Washington, D.C.; Marc D. Stern of American Jewish Congress, New York; Steven K. Green and Ayesha N. Khan, Americans United for Separation of Church and State, Washington, D.C.; Steven R. Shapiro of American Civil Liberties Union Foundation, New York; Jeffrey P. Sinensky and Kara H. Stein of the American Jewish Committee, New York; Joan Peppard, Anti-Defamation League, Miami; and Elizabeth J. Coleman and Steven M. Freeman of Anti-Defamation League, New York, for Appellees Ruth D. Holmes, et al.

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KAHN, J.

This is a consolidated appeal from a final judgment declaring section 229.0537, Florida Statutes (1999), "insofar as it establishes a program through which the State pays for certain students to attend private schools," facially unconstitutional under article IX, section 1 of the Florida Constitution. [FN1] Section 229.0537 contains the provisions ***671** of Florida's Opportunity Scholarship Program (OSP) and is part of a larger comprehensive legislative program addressing Florida's public schools. *See* Ch. 99-398, Laws of Fla. For the reasons explained below, we reverse and remand this case for further proceedings. In so doing, we emphasize that our holding addresses only the narrow issue of the facial constitutionality of the OSP under article IX, section 1 of the Florida Constitution.

> FN1. Article IX, section 1 provides:
> Public education.--The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

I. BACKGROUND

Section 229.0537 became law on June 21, 1999. *See* Ch. 99-398, § 78, at 4368, Laws of Fla. The next day, the appellees in this consolidated appeal, a group of parents, Florida citizens, and interest groups, filed a

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complaint alleging that section 229.0537 violated certain constitutional provisions: (1) article I, section 3 of the Florida Constitution [FN2]; (2) article IX, section 1 of the Florida Constitution; (3) article IX, section 6 of the Florida Constitution [FN3]; and (4) the Establishment Clause of the First Amendment to the U.S. Constitution. On July 29, 1999, the Florida Education Association and others (FEA), filed a complaint challenging the constitutionality of section 229.0537 on the same four grounds raised by the appellees. [FN4] The complaints named as defendants Governor John Ellis "Jeb" Bush and cabinet members, in their official capacities and as members of the State Board of Education, in addition to the Florida Department of Education ("State defendants").

FN2. Article 1, section 3 provides:
Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

FN3. Article IX, section 6 provides:
State school fund.--The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

FN4. The record on appeal does not contain the complaint(s) filed by the FEA.

The FEA filed a motion to consolidate the two cases and the trial court granted this motion. A group of parents and guardians of students receiving opportunity scholarships ("the parents"), moved to intervene in both cases, and the trial court also granted these motions. The parents thereafter moved to dismiss the article IX, section 1 claims for lack of standing, justiciability, and failure to state a claim. Following a hearing, the trial court denied these motions.

The trial court held a case management conference on December 2, 1999. The court explained that the purpose of the conference was for the parties to identify "the issues that would require the presentation of evidence to resolve those issues and those issues that dealt with the challenge of the constitutionality of the statute on its face." After hearing arguments from the parties, the court deferred consideration of whether the statute was unconstitutional under the religion clauses in the Florida and U.S. constitutions. The court did decide, however, that it could consider the argument that section 229.0537 violated article IX, section 1 on its face because, in the trial court's view, this challenge did not require an evidentiary basis. Accordingly, on December 8, 1999, the trial court entered an order setting ***672** a final hearing for February 24, 2000, and directing the parties to file briefs on "the issue of the facial constitutionality of the Opportunity Scholarship Program, Fla. Stat., Section 229.0537, under Article IX, Section 1 of the Florida Constitution...."

On December 30, 1999, the plaintiffs filed separate briefs and attachments. On January 28, 2000, the State defendants filed Objections to Final Hearing Procedure or, in the Alternative, Motion to Strike Plaintiffs' Briefs. The State defendants argued for the first time that the trial court's summary resolution of the facial constitutionality of the statute "is on the brink of an abyss." The State defendants also argued that the plaintiffs "present myriad factual arguments masked as legal arguments."

On February 4, 2000, the plaintiffs filed responses challenging the timeliness of the defendants' objections, and on February 7, 2000, the trial court conducted a hearing on the objections. The court stated that "[t]his is the final hearing on the facial constitutionality of this statute" and ruled that it was "exercising its inherent power to limit the issues that are going to be tried, and these issues are going to be strictly matters of law." The trial court denied the State's motion to strike the initial briefs and confirmed the final hearing date of February 24, 2000. On February 17, the court rendered an order in accordance with these rulings and denying defendants' objections to the final hearing procedure.

On February 24, the court heard oral argument from the parties and amici curiae. On March 14, 2000, the trial court entered a final judgment holding that "[s]ection 229.0537, Fla. Stat., insofar as it establishes a program through which the State pays tuition for certain students to attend private schools, is declared to be unconstitutional on its face under Article IX, § 1 of the Florida Constitution."

The State defendants filed a timely notice of appeal, assigned case number 1D00-1121 in this court. The parents filed a separate notice of appeal, assigned

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case number 1D00-1150. This court granted appellees' motion to consolidate the cases.

Appellants raise essentially two points in this consolidated appeal. First, appellants assert that the trial court denied them due process and a fair trial by ignoring the Florida Rules of Civil Procedure and entering final judgment without trial or evidence, upon disputed facts, and without a motion for summary judgment or judgment on the pleadings. Second, appellants assert that the trial court erred in holding the OSP facially unconstitutional under article IX, section 1 of the Florida Constitution.

II. WHETHER THE PROCEDURE EMPLOYED BY THE TRIAL COURT WARRANTS REVERSAL

[1][2] Regarding the first point, the trial court did err in the procedure it employed because nothing in the Florida Rules of Civil Procedure authorizes this procedure. We find this constituted harmless error, however, because the parties had adequate notice, time to respond, and an opportunity to be heard, and appellants have not demonstrated any prejudice much less "a miscarriage of justice." *See* § 59.041, Fla. Stat. (1999) ("No judgment shall be set aside or reversed ... for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."). The cases relied upon by appellants involve situations where a trial court failed to set a matter for trial pursuant to Rule 1.440. *See Orange Lake Country Club, Inc. v. Levin,* 645 So.2d 60, 62 (Fla. 5th DCA 1994) (finding trial court erred in entering judgment where, among other things, trial court failed to set matter for trial pursuant to Rule 1.440); *Ramos v. Menks,* 509 So.2d 1123, 1124 (Fla. 1st DCA 1986) (reversing final judgment and remanding for further proceedings where trial court failed to follow ***673** Rule 1.440); *Bennett v. Continental Chems. Inc.,* 492 So.2d 724, 727 (Fla. 1st DCA 1986) (en banc) (holding that "strict compliance with rule 1.440 is mandatory"). That is not the situation here. Moreover, appellants appear to have acquiesced in the procedure adopted by the trial court, objecting only to the plaintiffs' fact-intensive assertions. *See Bennett v. Ward,* 667 So.2d 378, 380 (Fla. 1st DCA 1995) (explaining that appellant "may have waived objection not only to notice of trial but, more fundamentally, to the apparent omission altogether of any bench trial or evidentiary hearing" where, although no motion for summary judgment was ever filed, trial court held hearing and entered final judgment of foreclosure); *Frank v. Pioneer Metals, Inc.,* 121 So.2d 685, 688 (Fla. 3d DCA 1960) (rejecting appellant's argument that the trial court erred by transferring the case to the equity side of the court: "[W]e are constrained to point out that by the appellant's failure to timely object to that procedure which she now contends to be irregular, she will be deemed to have waived the objection by acquiescence. Procedural matters not objected to in the trial court cannot be raised upon appeal."). We thus conclude that the procedure employed by the trial court, although erroneous, does not warrant reversal.

III. WHETHER THE OSP IS FACIALLY UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION I OF THE FLORIDA CONSTITUTION

[3] As a substantive matter, appellants argue that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. In particular, appellants assert that the trial court should not have relied on the principle of expressio unius est exclusio alterius in finding that the Florida Constitution does not permit the Legislature to enact the OSP. We agree with appellants and, for the reasons set forth below, we reverse on this point and remand this case for further proceedings.

A.

In striking the OSP as facially unconstitutional, the trial court stated:

> By providing state funds for some students to obtain a K-12 education through private schools, as an alternative to the high quality education available through the system of free public schools, the legislature has violated the mandate of the Florida Constitution, adopted by the electorate of this state. Tax dollars may not be used to send the children of this state to private schools as provided by the Opportunity Scholarship Program.

Recognizing that nothing in the constitution directly limits the authority of the Legislature to establish the OSP, the trial court nonetheless concluded, "[T]he negative implication is evident."

[4][5][6] The Florida Constitution is a limitation upon, rather than a grant of, power. *See Board of Public Instruction for County of Sumter v. Wright,* 76 So.2d 863, 864 (Fla.1955) ("This court has consistently adhered to the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power."); *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 881 (1944) (" 'Our state constitution is

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a limitation upon power, and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid.' ") (quoting *Chapman v. Reddick,* 41 Fla. 120, 25 So. 673, 677 (1899)). Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document. Indeed, "[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt." *Taylor,* 19 So.2d at 882. Recognizing these principles, appellants argue that the trial court ***674** erred in relying on another maxim, expressio unius est exclusio alterius, in finding section 229.0537 facially unconstitutional.

[7] This argument has merit. The principle of expressio unius est exclusio alterius is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* 602 (7th ed.1999). This principle should be used sparingly with respect to the constitution. *See Taylor,* 19 So.2d at 881 (explaining that the expressio unius maxim "should be sparingly used in construing the constitution"). As appellants explain, and appellees acknowledge, the trial court did not find that article IX, section 1, by its terms, expressly prohibits state-funded scholarships for children to attend a private school; instead, the trial court found an implied prohibition. Specifically, the trial court found that "[b]ecause Article IX, section 1 directs that public education, K-12, be accomplished through a 'system of free public schools,' that is, in effect, a prohibition on the Legislature to provide a K-12 public education in any other way." Despite the fact that the constitution does not, by its terms, expressly direct that the State may only fulfill its obligation to provide education "through" the public school system, the trial court arrived at the "evident" negative implication.

In applying the expressio unius principle to this case, the trial court quoted a portion of the Florida Supreme Court's opinion in *Weinberger v. Board of Public Instruction of St. Johns County* :

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

93 Fla. 470, 112 So. 253, 256 (1927) (citations omitted). In *Weinberger* and the other cases relied upon by the trial court, however, the expressio unius principle found its way into the analysis only because the constitution forbade any action other than that specified in the constitution, and the action taken by the Legislature defeated the purpose of the constitutional provision. *See id.* at 254-56 (finding bonds proposed to be issued by Board of Public Instruction void ab initio because their maturity dates did not conform to article 12, section 17 of the Florida Constitution, which specified that "[a]ny bonds issued hereunder shall become payable within thirty years from the date of issuance in annual installments which shall commence not more than three years after the date of issue"); *State ex rel. Murphy v. Barnes,* 24 Fla. 29, 3 So. 433, 433-34 (1888) (finding that statute providing for compensation of county solicitors by the State violated Florida Constitution provision that "[t]he compensation of all county school officers shall be paid from the school fund of their respective counties, and all other county officers receiving stated salaries shall be paid from the general funds of their respective counties" and explaining that "[w]hen a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way"). *See also Sullivan v. Askew,* 348 So.2d 312, 315-16 (Fla.1977) (quoting *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 (Fla.1975) (quoting *Weinberger*), and holding that Governor had sole, unrestricted, and unlimited discretion to exercise pardon power and procedures adopted by Governor for exercise of that exclusive power were consistent with constitutional grant of authority); *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 ***675** (Fla.1975) (quoting *Weinberger* and advising that provisions for suspension and automatic reinstatement of civil rights contained in Correctional Reform Act of 1974 infringed on Governor's constitutional duties and responsibilities relating to executive clemency); *In re Investigation of a Circuit Judge,* 93 So.2d 601, 606-08 (Fla.1957) (citing *Weinberger* and finding

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that where constitution creates office, fixes its term, and provides under what conditions officer may be removed before expiration of term, neither Legislature nor any other authority has power to remove or suspend such officer in any manner other than that provided in constitution); *State ex rel. Ellars v. Board of County Comm'rs of Orange County,* 147 Fla. 278, 3 So.2d 360, 362-63 (1941) (quoting *Weinberger* and finding statute, which fixed compensation of county solicitors of criminal courts of record in counties having population between 70,000 and 100,000, was valid general law applicable to office of county solicitor of criminal court of Orange County and was not subject to constitutional prohibition against enactment of special or local laws regulating fees of county officers); *State ex rel. Church v. Yeats,* 74 Fla. 509, 77 So. 262, 264 (1917) ("Article 19 leaves the determination of its enforcement to the registered voters of the counties and election districts, irrespective of race or color, to be determined by a majority of the aggregate; the statute requires two majorities, one of the white and the other the colored registered voters, and in this it clearly defeats the purpose of the Constitution in local option article, which this court has said was to remit to the registered voters of each county the settlement of the issue whether the sale of intoxicating wines or beer should be prohibited within the county.").

In contrast, in this case, nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use [FN5] of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary. We therefore reject the trial court's finding that the constitution not only mandates that the State "make adequate provision for the education of all children" in Florida, but that it also prescribes the sole means for implementation of that mandate. Contrary to the conclusion of the trial court, and the argument advanced by appellees, article IX, section 1 does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system.

> FN5. *See* § 229.0537(2)(a), Fla. Stat. (1999) (explaining that to receive an opportunity scholarship to attend a participating private school, a student must have "spent the prior school year in attendance at a public school that has been designated pursuant to s. 229.57 as performance grade category 'F,' failing to make adequate progress, and that has had two school years in a 4-year period of such low performance, and the student's attendance occurred during a school year in which such designation was in effect" or the student has been assigned to such a school for the next school year).

[8] In passing section 229.0537, the Legislature made specific findings indicating it sought to advance, not defeat, the purpose of article IX, section 1:

> The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. *The Legislature finds that the State Constitution requires the state to provide the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent or guardian, to remain in a school found by the state to be failing for 2 years in a 4-year period.* The Legislature shall make available opportunity ***676** scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school as provided in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the educational public purpose, as delineated in subsection (4).

§ 229.0537(1), Fla. Stat. (1999) (emphasis added). Although, in establishing the OSP, the Legislature recognized that some public schools may not perform at an acceptable level, the Legislature attempted to improve those schools by raising expectations for and creating competition among schools, while at the same time not penalizing the students attending failing schools. *See* Ch. 99-398, at 4273, Laws of Fla. ("WHEREAS, children will have the best opportunity to obtain a high-quality education in the public education system of this state and that system can best be enhanced when positive parental influences are present, when we allocate resources efficiently and concentrate resources to enhance a safe, secure, and disciplined classroom learning environment, when we support teachers, when we reinforce shared high academic expectations, and when we promptly reward success and promptly identify failure, as well as

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promptly appraise the public of both successes and failures ..."). We must be mindful that "[t]he Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good." *State v. State Bd. of Admin.,* 157 Fla. 360, 25 So.2d 880, 884 (1946).

B.

We note that the Legislature has, in the past, established a program providing public funds for certain students to attend private schools. *See Scavella v. School Bd. of Dade County,* 363 So.2d 1095 (Fla.1978). In *Scavella* the Florida Supreme Court indicated that "the state is responsible for providing adequate educational opportunities for all children" and "all Florida residents have the right to attend this public school system for free." *Id.* at 1098. The court explained that "[r]ealizing that the public schools may not have the special facilities or instructional personnel to provide an adequate educational opportunity for the exceptional students, the legislature has allowed the school boards to make contractual arrangements with private schools." *Id.; see* § 230.23(4)(m)2., Fla. Stat. (1977).

Scavella involved a challenge to a statute that allowed school boards to cap the amount of money paid to a private school in these contractual arrangements. *See Scavella,* 363 So.2d at 1098; § 230.23(4)(m)7., Fla. Stat. (1977). The supreme court interpreted this statute to mean that school boards could not impose a cap that would deprive "any student of a right to a free education" and found the statute, as interpreted, constitutional. *See Scavella,* 363 So.2d at 1099. As pointed out by appellees and the trial court, however, *Scavella* did not involve a challenge under article IX, section 1.

Nevertheless, in *Scavella,* the supreme court upheld a legislative program authorizing the payment of private school tuition for students whose needs could not be met in the public schools and specified that, in implementing this program, students could not be deprived of "a right to a free education." By analogy, the OSP statute does not deprive students of "a right to a free education" and requires participating private schools to "[a]ccept as full tuition and fees the amount provided by the state for each student." § 229.0537(4)(i), Fla. Stat. (1999).

*677 C.

Based on the foregoing, we hold that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. Nothing in that constitutional provision prohibits the action taken by the Legislature. The trial court erred by employing the exclusio unius principle to find an implied prohibition.

IV. OTHER CONSTITUTIONAL ISSUES

[9] Appellees have asserted that, even if the trial court erred in its application of article IX, section 1, the order on appeal should be affirmed on alternative constitutional grounds. Specifically, appellees assert that the OSP violates (1) article IX, section 6 of the Florida Constitution; (2) article I, section 3 of the Florida Constitution; and (3) the Establishment Clause of the United States Constitution.

Following the case management conference, the trial court determined that only the facial constitutionality of the OSP under article IX, section 1, could be decided without the presentation of evidence. In the court's view, the remaining issues appeared to constitute mixed questions of fact and law. This court has explained that such issues are inappropriate for initial determination on appeal:

> The rule followed by the Florida courts, as we interpret prior decisions, is that the question of the constitutionality of a statute is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute. While there are circumstances in which trial courts are permitted to adjudicate the merits of constitutional issues in ruling on a motion to dismiss, ... the circumstances of the particular case determine whether this is appropriate. The preferable rule, properly applied here, appears to be that if the complaint's well-pleaded allegations entitle the plaintiff to a declaration of rights, the motion to dismiss should be denied and the plaintiff allowed to adduce evidence in behalf of his pleading.
>
> The wisdom of this rule is particularly evident in this case where we have been asked to rule for the first time on constitutional questions of considerable magnitude, without the benefit of any record except the various complaints and motions directed to the complaints, including appellees' motion to dismiss, the granting of which sparked this appeal. It is a familiar canon of appellate review that appellate courts are loath to rule upon

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> issues not directly ruled upon by the trial court. Courts prefer that the constitutionality of a statute be considered first by a trial court. This rule is relaxed if the constitutional issues are fully briefed and relate to matters of law exclusively, ... and the full record is before the court.

Glendale Fed. Sav. & Loan Ass'n v. State, Dep't of Ins., 485 So.2d 1321, 1324-25 (Fla. 1st DCA 1986) (citations and footnote omitted). Accordingly, we decline to consider the alternative constitutional arguments asserted by appellees.

V. CONCLUSION

In sum, although we find the trial court erred regarding the procedure it employed in considering the facial constitutionality of the OSP under article IX, section 1, we find that error harmless in this case. We further find, however, that the trial court erred in holding the OSP facially unconstitutional under this provision. The trial court must now consider the remaining allegations raised by appellees, as to which we express no opinion.

REVERSED and REMANDED for further proceedings.

WEBSTER and VAN NORTWICK, JJ., CONCUR.

767 So.2d 668, 147 Ed. Law Rep. 1125, 25 Fla. L. Weekly D2385

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Brett Kavanaugh – Race

Allegation: In a friend of the court brief, Kavanaugh joined Robert Bork in opposing a voting scheme that was intended to assist native Hawaiians by ensuring that only they could vote for board members overseeing a trust for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495 (2000). Before the case was heard, he was quoted as saying that "this case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of the government." Warren Richey, *New Case May Clarify Court's Stand on Race*, THE CHRISTIAN SCIENCE MONITOR (Oct. 6, 1999).

Facts:

- **The Supreme Court agreed with the position taken by Mr. Kavanaugh's client, that limiting voting for candidates to a statewide office that disbursed state and federal funds based on racial ancestry violated the Constitution. The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any other State on account of race, color, or previous condition of servitude." U.S. CONST. Amend. XV § 1.**
  - ✓ **In a 7 to 2 decision, with the majority including Justices Breyer, Souter, and O'Connor**, the Court reaffirmed the basic premise upon which the brief was based: that "[t]he National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race." *Rice*, 120 S. Ct. at 1054.
  - ✓ The Court explained, "The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Id.* at 523.
  - ✓ The Court added, "Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others." *Id.*
- The brief submitted by Mr. Kavanaugh on behalf of his clients sought to enforce the Fifteenth Amendment against a state law that prohibited citizens from voting in a statewide election based on their race.
  - ✓ When Hawaii was admitted as the 50th State of the Union in 1959, the state adopted the Hawaiian Homes Commission Act, passed by Congress, as part of its Constitution. The Act set aside 200,000 acres of public lands and granted the state over 1.2 million additional acres of land to be held "as a public trust."

- The proceeds and income from the lands were to be used for one or more of five purposes: (1) support of public schools and other public educational institutions, (2) betterment of native Hawaiians, (3) development of farm and home ownership, (4) public improvements, and (5) provisions of land for public use.

✓ In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer special trust revenues "for the betterment of the conditions of native Hawaiians," and any appropriations that were made for the benefit of "native Hawaiians" and/or "Hawaiians."

- The term "native Hawaiian" and "Hawaiian" are defined as descendants of aboriginal peoples or races inhabiting the Hawaiian Islands previous to 1778.

✓ The Hawaii Constitution limited membership on the OHA board of trustees to "Hawaiians," and explicitly provided that the trustees shall be "elected by ... Hawaiians."

✓ Although petitioner was a citizen of Hawaii, and his ancestors were residents of the Hawaiian Islands prior to U.S. annexation in 1959, he did not meet the statutory definitions and was thus precluded from voting.

➢ The racial qualification in the Hawaiian law categorically excluded members of certain racial minorities, such as African-Americans and Japanese-Americans, who were members of groups historically discriminated against in the U.S.

➢ One of Mr. Kavanaugh's clients on the brief was the New York Civil Rights Coalition, a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste or discrimination.

➢ Mr. Kavanaugh's statement regarding the Rice case was consistent with statements made by Justice O'Connor in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), where the Supreme Court upheld the University of Michigan Law School's race-conscious admissions policy. Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

For opinion see 120 S.Ct. 1044, 120 S.Ct. 31, 119 S.Ct. 1248

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of the State of Hawaii, Respondent.
No. 98-818.
October Term, 1998.
May 27, 1999.
On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CENTER FOR EQUAL OPPORTUNITY, NEW YORK CIVIL RIGHTS COALITION, CARL COHEN, AND ABIGAIL THERNSTROM IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

*ii TABLE OF CONTENTS

QUESTION PRESENTED ... i

TABLE OF CONTENTS ... ii

TABLE OF AUTHORITIES ... iv

INTEREST OF AMICI CURIAE ... 1

SUMMARY OF ARGUMENT ... 2

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ARGUMENT ... 4

INTRODUCTION ... 4

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS ... 7

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS ... 10

A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment ... 11

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest ... 14

C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny ... 19

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship with Hawaiians Do Not Justify Hawaii's Racial Voting Qualification ... 21

*iii E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed ... 24

CONCLUSION ... 30

*iv TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ... passim

Anderson v. Martin, 206 F. Supp. 700 (E.D. La. 1962), rev'd, 375 U.S. 399 (1964) ... 14, 20

Anderson v. Martin, 375 U.S. 399 (1964) ... 4

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Ball v. James, 451 U.S. 355 (1981) ... 10

Batson v. Kentucky, 476 U.S. 79 (1986) ... 14

Bazemore v. Friday, 478 U.S. 385 (1986) ... 20

Bell v. Maryland, 378 U.S. 226 (1964) ... 12

Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) ... 6, 24

Brown v. Board of Education, 347 U.S. 483 (1954) ... 3, 13, 24

Buchanan v. Warley, 245 U.S. 60 (1917) ... 10

Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997) ... 29

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) ... 25

Chisom v. Roemer, 501 U.S. 380 (1991) ... 8

*v City of Mobile v. Bolden, 446 U.S. 55 (1980) ... 8, 13

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ... passim

Defunis v. Odegaard, 416 U.S. 312 (1974) ... 12, 28

Fullilove v. Klutznick, 448 U.S. 448 (1980) ... passim

Gomillion v. Lightfoot, 364 U.S. 339 (1960) ... 4, 8, 9, 13

Guinn v. United States, 238 U.S. 347 (1915) ... 4, 8, 9

Hirabayashi v. United States, 320 U.S. 81 (1943) ... 12

Holder v. Hall, 512 U.S. 874 (1994) ... 7

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Hunt v. Cromartie, No. 98-85, 1999 WL 303677 (May 17, 1999) ... 12, 14

Johnson v. De Grandy, 512 U.S. 997 (1994) ... 13

Korematsu v. United States, 323 U.S. 214 (1944) ... 7, 18

Loving v. Virginia, 388 U.S. 1 (1967) ... passim

McLaughlin v. Florida, 379 U.S. 184 (1964) ... 11, 12

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ... passim

Miller v. Johnson, 515 U.S. 900 (1995) ... 11, 12, 14, 23

***vi** Morrison v. Olson, 487 U.S. 654 (1988) ... 6

Morton v. Mancari, 417 U.S. 535 (1974) ... 26-28

Oyama v. California, 332 U.S. 633 (1948) ... 4

Palmore v. Sidoti, 466 U.S. 429 (1984) ... 11, 15

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) ... 12, 15

Plessy v. Ferguson, 163 U.S. 537 (1896) ... 12, 13, 24

Powers v. Ohio, 499 U.S. 400 (1991) ... 10, 11, 13, 23

Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985) ... 30

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) ... 13, 16, 28

Reynolds v. Sims, 377 U.S. 533 (1964) ... 10

Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) ... 10

Shaw v. Reno, 509 U.S. 630 (1993) ... passim

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Smith v. Allwright, 321 U.S. 649 (1944) ... 8

South Carolina v. Katzenbach, 383 U.S. 301 (1966) ... 7

Strauder v. West Virginia, 100 U.S. 303 (1880) ... 11

*vii United States v. Antelope, 430 U.S. 641 (1977) ... 26

United States v. Holliday, 70 U.S. 407 (1865) ... 29

United States v. Paradise, 480 U.S. 149 (1987) ... 17

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) ... 29, 30

Washington v. Davis, 426 U.S. 229 (1976) ... 14

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) ... 15, 16

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ... 4

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. amend. xiv. ... passim

U.S. Const. amend. xv. ... passim

U.S. Const. art. i, § 8 ... 25

U.S. Const. art. ii, § 2 ... 25

25 C.F.R. § 83 ... 30

25 C.F.R. § 83.2 ... 29

42 U.S.C. § 1973 ... 20

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Admission Act of March 18, 1959, 73 Stat. 4, § 5(f) ... 4, 5

Haw. Const. art. xii ... 5

Haw. Rev. Stat. § 10-3(1) ... 5

Haw. Rev. Stat. § 10-13.5 ... 5

Haw. Rev. Stat. § 13D-3(b) ... 5, 7

***viii** S. Ct. R. 37.3 ... 1

S. Ct. R. 37.6 ... 1

MISCELLANEOUS

Michael Barone & Grant Ujifusa, The Almanac of American Politics (1998) ... 24

Stuart M. Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996) ... 22, 27, 30

Rachael Paschal, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 Wash. L. Rev. 209 (1991) ... 29

Laurence H. Tribe, American Constitutional Law (2d ed. 1988) ... 9

*1 INTEREST OF AMICI CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. See id.

The Center for Equal Opportunity is a non-profit organization dedicated to the idea that America should be one nation and that citizens of all races, colors, and ethnicities *2 should be treated equally. The New York Civil Rights Coalition is a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste, or discrimination. Carl Cohen is a Professor of Philosophy at the University of Michigan, has served for many years in the leadership of the American Civil

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Liberties Union, and is the author of Naked Racial Preference (1995). Abigail Thernstrom is the co-author of America in Black and White: One Nation, Indivisible (1997) and the author of Whose Votes Count? Affirmative Action and Minority Voting Rights (1987). Amici submit that the Fourteenth and Fifteenth Amendments prohibit Hawaii's racial voting qualification.

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment, by its language and history, applies to all state elections.

Notwithstanding the clear language of the Fifteenth Amendment, Hawaii determines a citizen's qualifications to vote in elections for the Office of Hawaiian Affairs solely on the basis of the citizen's race. Hawaii's racial voting qualification is a clear violation of the Fifteenth Amendment, and that violation alone requires reversal of the decision of the court of appeals.

The racial voting qualification also violates the Equal Protection Clause of the Fourteenth Amendment. This Court's cases establish that the Equal Protection Clause prohibits racial classifications except when such classifications are necessary and narrowly tailored to serve a compelling government interest.

***3** Outside of an immediate threat to life or limb, as in a prison race riot, a compelling government interest exists only when the government has imposed the racial classification as a remedy for past, identified discrimination in that jurisdiction and field (such as discrimination in the schools in a particular jurisdiction). Hawaii has not shown or attempted to show that its racial voting qualification in elections for the Office of Hawaiian Affairs is designed to remedy past discrimination in voting against """Hawaiians" in Hawaii.

In any event, even assuming such past discrimination, a racial qualification to vote has never been held necessary and narrowly tailored to remedy past discrimination. Moreover, this racial voting qualification is not narrowly tailored in scope: It is a strict racial qualification that categorically excludes members of certain racial groups (all but "Hawaiians") from the ballot in elections for the Office of Hawaiian Affairs -- including members of racial groups historically discriminated against in the United States and in Hawaii. Nor is the racial qualification narrowly tailored in duration: Hawaii established the racial classification in 1978, and it has no termination date.

Hawaii has explained that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But a state has no right to engage in racial classifications on the right to vote in a state election simply to preserve a particular culture. This Court has forbidden analogous "cultural" justifications for racial classifications in cases ranging from Brown v. Board of Education to Loving v. Virginia.

Finally, Hawaii's attempt to end-run the Equal Protection Clause by analogizing "Hawaiians" to American Indian tribes is entirely unavailing. As this Court repeatedly has held, differential treatment of Indian tribes as tribes is justified by the Constitution's specific reference to Indian tribes as separate sovereigns. The Constitution does not contain a Hawaiian ***4** Commerce Clause, and Hawaiians do not and could not qualify as an American Indian tribe.

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ARGUMENT

INTRODUCTION

Hawaii determines a citizen's qualifications to vote in state elections for the Office of Hawaiian Affairs on the basis of the citizen's race. As is clear from that introductory sentence alone, Hawaii's racial restriction on voting is a patent violation of the United States Constitution. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Loving v. Virginia, 388 U.S. 1 (1967); Anderson v. Martin, 375 U.S. 399 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Guinn v. United States, 238 U.S. 347 (1915). [FN2]

FN2. We will use the terms "race" and "racial" throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny. See Oyama v. California, 332 U.S. 633, 646 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). We will adopt the convention of state law and use the term " " "Hawaiian" to refer to those whose ancestors were Hawaiian. For purposes of our brief, there is no need to further distinguish by blood amount between " "Hawaiians" and "native Hawaiians," although state law does so.

Two provisions of law provide the backdrop for this controversy: the federal Admission Act of 1959 and the Hawaii Constitution, as amended in 1978. The Admission Act, enacted by Congress at the time of Hawaii's admission to the Union, ceded to the State approximately 1,800,000 acres of land that the United States had owned since 1898. The Admission Act restricted the State's use of land to five purposes: (1) support of public schools; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership on as widespread a basis as possible; (4) making of public improvements; and (5) provision of lands for public use. Admission Act of March 18, 1959, 73 Stat. 4, § 5(f).

*5 The Admission Act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide." Id. The Act thereby permitted the State to use those lands in a race-neutral way and/or for the benefit of all citizens of Hawaii. Indeed, that is precisely how the State administered the lands from 1959 to 1978 when the State used money from the lands on a race-neutral basis primarily for state educational purposes. Pet. App. 5a. [FN3]

FN3. A discrete block of 200,000 acres is administered by the State's Department of Hawaiian Home Lands pursuant to a separate statutory regime. A 1920 federal statute (the Hawaii Homes Commission Act, 42 Stat. 108) dealt with those lands by means of an express racial classification, albeit one that was not applied in the decades that followed. In any event, the HHCA program is not at issue here, although it also has serious constitutional problems to the extent that it relies on racial classifications.

In 1978, however, Hawaii dramatically changed course. The State enacted a constitutional amendment, see Haw. Const. art. xii, which along with a statute enacted shortly thereafter accomplished three things. First, the State required that 20% of the proceeds from the Admission Act lands be used solely to benefit certain native Hawaiians. Id.; Haw. Rev. Stat. § § 10-3(1); 10- 13.5. Second, the State created the Office of Hawaiian Affairs (OHA) to administer that 20% portion of the proceeds and to administer solely for the benefit of Hawaiians other monies

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received from general state funds. The OHA's officers must be Hawaiians. Haw. Const. art. xii. Third, the State imposed still another racial qualification, allowing only Hawaiians to vote in the OHA elections. Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian ....").

*6 The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century. See generally Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring in judgment). The scheme benefits one preferred racial class within the State of Hawaii to the exclusion of all others and creates collateral racial classifications that are unnecessary even to serve that (itself unconstitutional) purpose. The scheme is a clearcut and extensive violation of the Constitution: None of its three elements, particularly the voting qualification at issue here, is constitutional.

Under the State's theory, the State of Massachusetts could declare certain state funds in Massachusetts to be distributed for the benefit of Irish- Americans, establish an Office of Irish Affairs composed solely of Irish- Americans to administer the funds, and restrict the vote for that Office to those citizens of Massachusetts with Irish blood. The State of Florida could do the same for Cuban-Americans, the State of Wisconsin for German-Americans, the State of Texas for Mexican-Americans, and so on. As a matter of logic and of constitutional law, affirmance of the court of appeals decision could usher in an extraordinary racial patronage and spoils system.

Hawaii no doubt will label such concerns an exaggeration, suggesting that other states would not adopt such a scheme. But we do not possess so clear a crystal ball as to confidently predict how a state 10 or 25 or 50 years from now might utilize a decision in Hawaii's favor in this case. And ultimately the Court must consider what a ruling in Hawaii's favor would authorize. See Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). As Justice Jackson stated, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court *7 for all time has validated the principle of racial discrimination .... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Korematsu v. United States 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The aspect of the OHA program specifically at issue here is the racial voting qualification, which violates both the Fifteenth Amendment and the Fourteenth Amendment.

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

The Fifteenth Amendment to the Constitution, ratified in the wake of the Civil War on February 3, 1870, speaks clearly and definitively: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment repaired the Constitution's original tolerance of racial restrictions on the right to vote and stands as a legal bulwark against the racial strife and ethnic balkanization that has troubled this country since its founding -- and that to this day plagues this Nation and others around the globe. See generally Holder v. Hall, 512 U.S. 874, 894-95 (1994) (Thomas, J., concurring in judgment); South

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Carolina v. Katzenbach, 383 U.S. 301, 309-13 (1966).

Since 1978, however, the State of Hawaii has prohibited citizens of certain races, because of their race, from voting in elections for the Office of Hawaiian Affairs -- a government office that controls and disburses a significant amount of state funds, formulates policy, and administers certain state lands. See Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person ... is Hawaiian...."). Hawaii excludes not just *8 Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.

The primary question presented to this Court is whether Hawaii, by prohibiting individuals from voting in a state election because of their race, has violated the Fifteenth Amendment, which prohibits States from denying individuals the right to vote because of their race. To pose the question is to resolve the case. As this Court has stated, the Fifteenth Amendment is "unequivocal[]" and prohibits race-based voting qualifications (as well as facially race-neutral voting qualifications that are intended to harm members of a particular race). Shaw v. Reno, 509 U.S. 630, 639 (1993); see City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); Gomillion, 364 U.S. at 339; Smith v. Allwright, 321 U.S. 649, 657 (1944); Guinn, 238 U.S. at 347; cf. Chisom v. Roemer, 501 U.S. 380, 392 (1991) ("every election in which registered electors are permitted to vote" is covered under § 2 of Voting Rights Act of 1965, which enforces the Fifteenth Amendment) (quotation omitted; emphasis added).

Hawaii has offered an array of historical and policy considerations in support of its racial voting scheme, primarily based on preserving the culture of Hawaiians. But all such arguments are, for purposes of the Fifteenth Amendment, nothing but diversions. Hawaii restricts the right to vote in a state election based on a citizen's race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.

What is perhaps most telling about the unconstitutionality of Hawaii's racial voting qualification is that in the nearly 130 years since the Fifteenth Amendment was ratified -- troubled though those years have been with respect to racial relations and racially motivated voting devices -- no State so far as we are aware has thought it permissible to enact into law a facial *9 racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try to evade what all understood to be the meaning of the Fifteenth Amendment. See Shaw, 509 U.S. at 639-40 (describing various forms of "[o]stensibly race- neutral devices" used "to deprive black voters of the franchise"); see Gomillion, 364 U.S. at 341; Guinn, 238 U.S. at 364-65.

In light of the plain conflict between Hawaii's racial qualification for voting and the clear language of the Fifteenth Amendment, the question that comes to the fore in this case focuses on the court of appeals: How did it go so far astray? The court of appeals recognized, after all, that the voter qualification at issue here was "expressly racial" and "clearly racial on its face." Pet. App. 10a, 15a. The court also acknowledged that the Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote." Pet. App. 15a (quoting Laurence H. Tribe, American Constitutional Law 335 n.2 (2d ed. 1988)).

The court explained, however, that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for." Pet. App. 11a. The court concluded that a state could allow racial restrictions on the right to vote

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when the underlying state office was, in essence, devoted to distributing funds for the benefit of a racially restricted class. Pet. App. 15a. The court held that such a scheme "does not deny non-Hawaiians the right to vote in any meaningful sense." Pet. App. 15a (emphasis added). The court did not explain, however, from what source it derived a "meaningful sense" exception to the Fifteenth Amendment's ban on racial voting qualifications, nor did it say how voting in elections to a state office that, among other things, controls and spends substantial sums of state money is not "meaningful."

***10** The court said that it found guidance in cases in which this Court has held that limited special-purpose elections are consistent with the right to vote that the Court has inferred from the Fourteenth Amendment. See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); cf. Reynolds v. Sims, 377 U.S. 533 (1964). But in relying on those cases, the court of appeals overlooked a critical point: Those cases did not deal with racial restrictions on the right to vote. The Fifteenth Amendment places voting qualifications based on race in a constitutionally different class from voting qualifications based on non- suspect characteristics. Thus, the Constitution does not expressly provide that all citizens in a jurisdiction can vote in all elections (a point confirmed by the Salyer case), but it expressly prohibits denial of the right to vote in any state election on account of race. Cf. Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); Buchanan v. Warley, 245 U.S. 60, 74-75, 82 (1917) (state can limit property rights, but cannot do so on the basis of race).

In sum, this Court's resolution of this case should be quite straightforward. Nearly 130 years after the Fifteenth Amendment's ratification, the State of Hawaii seeks the Court's blessing to strip an American citizen of his right to vote in a state election based on his race. The words of the Fifteenth Amendment mean what they say, however, and the Fifteenth Amendment thus flatly bars Hawaii's denial of the right to vote in a state election on account of race.

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

Hawaii's racial restriction on voting also violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

***11** A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment, also ratified in the wake of the Civil War on July 9, 1868, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While not phrased in the plain and crystalline terms of the Fifteenth Amendment, the """central purpose" of the amendment is "to prevent the States from purposefully discriminating between individuals on the basis of race." Shaw, 509 U.S. at 642 (emphasis added). [FN4]

FN4. See Miller v. Johnson, 515 U.S. 900, 904 (1995) ("central mandate is racial neutrality in governmental decisionmaking"); Powers, 499 U.S. at 415 (Fourteenth Amendment's mandate is that "race discrimination be eliminated from all official acts and proceedings of the State"); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); Loving, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth

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Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"); Strauder v. West Virginia, 100 U.S. 303, 307 (1880) ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States ....").

To be sure, the Court has not as yet adopted the most stringent rule for analyzing racial classifications under the Equal Protection Clause--that "only a social emergency rising to the level of imminent danger to life and limb ... can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens." ***12**Croson, 488 U.S. at 521 (Scalia, J., concurring in judgment) (quotation omitted). [FN5] The Court's decisions have nonetheless established that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979). As a result, "all laws that classify citizens on the basis of race ... are constitutionally suspect and must be strictly scrutinized." Hunt v. Cromartie, No. 98-85, 1999 WL 303677, at *4 (May 17, 1999); see Adarand, 515 U.S. at 235-36; Shaw, 509 U.S. at 642-43; Croson, 488 U.S. at 493-94 (plurality).

FN5. See also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); Defunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting); McLaughlin, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); Bell v. Maryland, 378 U.S. 226, 287-88 (1964) (Goldberg, J., joined by Warren, C.J., concurring); Hirabayashi v. United States, 320 U.S. 81, 110-11 (1943) (Murphy, J., concurring); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

The Court has stressed that racial classifications must be strictly scrutinized because classifications of citizens solely on the basis of race """are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." Shaw, 509 U.S. at 657. They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution." Miller, 515 U.S. at 912 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). And they reflect "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from ***13** those of other citizens." Johnson v. DeGrandy, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring) (quotation omitted). [FN6]

FN6. Strict scrutiny applies regardless of the race benefited or burdened because a "benign racial classification is a contradiction in terms," Metro Broadcasting, 497 U.S. at 609 (O'Connor, J., dissenting) (quotation omitted), and there is "no principled basis for deciding which groups would merit

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heightened judicial solicitude and which would not," Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 296 (1978) (Powell, J.). Strict scrutiny also applies, of course, even when the racial classification burdens or benefits the races equally. Powers, 499 U.S. at 410; Brown v. Board of Education, 347 U.S. 483, 494-95 (1954).

Racial classifications are offensive to the Constitution for a more practical reason as well. There is no way to apply them without formal rules for deciding who is and is not a member of a given race and without some governing body to apply and enforce those rules. Cf. Plessy, 163 U.S. at 552. As Justice Stevens has emphasized, however, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." Fullilove, 448 U.S. at 535 n.5 (Stevens, J., dissenting). Justice Stevens thus stated in Fullilove that a "serious effort" to "define racial classes" must "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." Id.; see also Metro Broadcasting, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (comparing racial set-aside to South African Population Registration Act). This case illustrates the point: The State of Hawaii has struggled mightily to define who exactly is a "Hawaiian," an enterprise that has led to a variety of conflicting definitions and generated numerous lawsuits.

Strict scrutiny under the Equal Protection Clause applies with particular force to racial classifications affecting the voting process. See Shaw, 509 U.S. at 644. [FN7] The Court has ***14** stated that "[r]acial classifications with respect to voting carry particular dangers" -- including "balkaniz[ing] us into competing racial factions." Shaw, 509 U.S. at 657 (emphasis added). """When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." Miller, 515 U.S. at 911-12 (quotation omitted); cf. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986). As Judge Wisdom stated over a generation ago, "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." Anderson v. Martin, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting) (emphasis added), rev'd, 375 U.S. 399 (1964). [FN8]

FN7. See Gomillion, 364 U.S. at 349 (Whittaker, J., concurring); see also City of Mobile, 446 U.S. at 86 (Stevens, J., concurring in judgment) (Gomillion is "compelled by the Equal Protection Clause").

FN8. The Justices who dissented in Shaw still would consider a "direct and outright deprivation of the right to vote" on account of race (as here) subject to the strictest scrutiny. Shaw, 509 U.S. at 659 (White, J., dissenting); id. at 682 (Souter, J., dissenting).

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest.

Hawaii's law facially discriminates on the basis of race in determining which voters are qualified to vote in elections for the Office of Hawaiian Affairs. [FN9] Because the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial ***15**

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classifications -- or, at most, only rarely allows them -- the Court has held that racial classifications such as Hawaii's racial voting qualification are "presumptively invalid" and subject to strict scrutiny under the Fourteenth Amendment, meaning that they can be upheld only if based upon an "extraordinary justification." Feeney, 442 U.S. at 272 (quoted in Shaw, 509 U.S. at 643- 44). Under the strict scrutiny standard, racial classifications thus violate the Equal Protection Clause unless they are both necessary and narrowly tailored to serve a compelling state interest. Shaw, 509 U.S. at 643; Croson, 488 U.S. at 509 (plurality) (Only in the "extreme case" may "some form of narrowly tailored racial preference ... be necessary.") (emphases added). [FN10]

FN9. When, as here, "the racial classification appears on the face of the statute," then "[n]o inquiry into legislative purpose is necessary" to determine whether the law is designed to harm members of a particular race. Shaw, 509 U.S. at 642; see Hunt, 1999 WL 303677; cf. Washington v. Davis, 426 U.S. 229 (1976).

FN10. See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality); id. at 286 (O'Connor, J., concurring); Palmore, 466 U.S. at 432 (classifications must be "necessary" to accomplishment of " " "compelling governmental interest"); Fullilove, 448 U.S. at 496 (Powell, J., concurring) ("racial classification ... is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); Loving, 388 U.S. at 11 (racial classifications, "if they are ever to be upheld, ... must be shown to be necessary to the accomplishment of some permissible state objective"). In some cases, the Court has used the term "necessary"; in some cases, the Court has used the term "narrowly tailored"; and in some cases, the Court has used both terms. The Court's consistent analysis incorporates both ideas. The Court has made it clear, for example, that past discrimination does not justify a racial classification if race-neutral alternatives are available.

These requirements impose a number of important barriers that a government entity must surmount before it may impose a racial classification. The rationale is simple: "If there is no duty to attempt ... to measure the recovery by the wrong ... our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members." Croson, 488 U.S. at 510-11 (plurality) (quoting Fullilove, 448 U.S. at 539 (Stevens, J., dissenting)). Taken together, as ***16** Justice Kennedy has pointed out, these stringent requirements explain why the strict scrutiny standard "operate[s] in a manner generally consistent with the imperative of race neutrality." Croson, 488 U.S. at 519 (Kennedy, J., concurring).

First, the government must show a compelling interest that justifies its racial classification. Except in situations where there is an imminent threat to life or limb (as in a prison race riot), racial classifications must be """strictly reserved for remedial settings." Id. at 494 (plurality); Metro Broadcasting, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); Wygant, 476 U.S. at 274- 76 (plurality). Furthermore, the bare desire to remedy societal discrimination is too "amorphous" a concept of injury to qualify as a "compelling interest." Croson, 488 U.S. at 497 (plurality) (quoting Bakke, 438 U.S. at 307 (Powell, J.)); see also Wygant, 476 U.S. at 274 (plurality) ("This Court never has held that societal discrimination alone is sufficient to

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justify a racial classification."). In order for the government to show that the classification is truly remedial, the classification must be preceded by """judicial, legislative, or administrative findings of constitutional or statutory violations." Croson, 488 U.S. at 497 (plurality) (quoting Bakke, 438 U.S. at 308-09 (Powell, J.)). [FN11] In Croson, for example, the Court explained that there was "nothing approaching ... a constitutional or statutory violation by anyone in the Richmond construction industry." Id. at 500.

FN11. Any legislative or executive findings must be strictly scrutinized, for "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." Croson, 488 U.S. at 501.

Second, the government must show that the classification remedies discrimination that was committed both within that jurisdiction, and within the industry or field in which the ***17** classification is imposed (such as school segregation in a district). Id. at 500, 504-05. The Court explained the point in Croson: "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond ... does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy." Id. at 505 (emphasis added). The Court added that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." Id. (emphasis added). The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another." Id.

Third, the government must show that the racial classification is necessary in the sense that race-neutral remedies have been or would be ineffective in remedying the discrimination. Adarand, 515 U.S. at 237-38 (court of appeals """did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means") (quotation omitted); Croson, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."); United States v. Paradise, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."); id. at 201 (O'Connor, J., dissenting) ("strict scrutiny requires ... that the District Court expressly evaluate the available alternative remedies."). The decision in Croson illustrated the importance of this requirement: Only in the "extreme case" may "some form of narrowly tailored racial preference ... be necessary ...." Croson, 488 U.S. at 509 (plurality) (emphases added). In Croson, the Court stated that a racial set- aside was not necessary because a "race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation" and remedy any discrimination that had occurred. Id. at 507.

***18** Fourth, the government must show that it cannot devise an individualized procedure to "tailor remedial relief to those who truly have suffered the effects of prior discrimination" -- in other words, that the racial classification is not simply a product of "administrative convenience." Id. at 508; cf. Korematsu, 323 U.S. at 241 (Murphy, J., dissenting) ("[n] o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal"). The interest in "avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." Croson, 488 U.S. at 508.

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Fifth, the government must show that it has minimized harm to innocent members of other racial groups. For this reason, a specific numerical quota, or outright racial exclusion, rarely (if ever) could satisfy the narrow tailoring requirement. See id. The Court applied this principle in Croson: "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur ... enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination." Id. (emphasis added); see also id. at 515 (Stevens, J., concurring) ("Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.").

Sixth, the government must show that the racial classification is tailored in terms of duration: that it "will not last longer than the discriminatory effects it is designed to eliminate." Adarand, 515 U.S. at 238 (quoting Fullilove, 448 U.S. at 513 (Powell, J., concurring)).

***19** C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny.

Based on the foregoing principles, it is plain that Hawaii's racial voting qualification violates the Equal Protection Clause for any one of a host of alternative and independent reasons.

At the outset, Justice Ginsburg's opinion in Adarand identified the simplest reason for holding this racial voting qualification violative of the Equal Protection Clause. As she explained, while this Court has not as yet held that the strict scrutiny standard is automatically fatal for all racial classifications, at a minimum "the strict scrutiny standard" is "fatal for classifications burdening groups that have suffered discrimination in our society." Adarand, 515 U.S. at 275 (Ginsburg, J., dissenting). The principle identified by Justice Ginsburg applies here. In elections for the Office of Hawaiian Affairs, Hawaii turns away would-be voters who are, for example, African-Americans, Japanese-Americans, Chinese-Americans, Mexican-Americans, and even American Indians -- all of whom belong to racial groups whose members """have suffered discrimination in our society" and some of whom have suffered discrimination in Hawaii. As Justice Ginsburg rightly suggested, therefore, the strict scrutiny analysis is "fatal" to Hawaii's racial voting qualification, and no further equal protection analysis is necessary.

Apart from that threshold point, the racial classification here fails to meet any of the specific requirements (much less all of them) that the government must meet in order to show that a racial classification is necessary and narrowly tailored to serve a compelling governmental interest.

First, Hawaii has not shown that its racial voting qualification remedies prior discrimination. In particular, Hawaii has not identified any competent judicial, legislative, or administrative findings of constitutional or statutory violations by any party to justify its racial voting qualification.

***20** Second, and as a necessary consequence of the first point, Hawaii obviously has not shown that its racial voting qualification remedies a prior denial or infringement of the ability of Hawaiians to vote in Hawaii. Hawaii's racial classification thus fails to meet a critical requirement under this Court's equal protection jurisprudence for a racial classification -- that it serve a compelling governmental interest in remedying prior discrimination in the jurisdiction and field in which the classification is imposed.

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Third, even had the State shown prior abridgements on the ability of Hawaiians to vote, it has not shown that a race-based voting scheme is necessary to remedy that discrimination. Indeed, an outright denial of the right to vote on the basis of race can never be sufficiently necessary to remedy past discrimination in voting. To be sure, there is a compelling governmental interest in remedying prior racial restrictions on the right to vote, but the constitutionally authorized remedy is imposition of a race-neutral voting scheme (and, if needed, the elimination of various race-neutral voting devices that can be a pretext for racial discrimination). See, e.g., 42 U.S.C. § 1973; Fullilove, 448 U.S. at 546-47 (Stevens, J., dissenting) (Voting Rights Act, if it required that 10% of elected officials be minorities, "would merely create the kind of inequality that an impartial sovereign cannot tolerate"); cf. Bazemore v. Friday, 478 U.S. 385, 407-09 (1986) (race-neutral admissions policy is constitutionally proper remedy for club's prior discriminatory admissions). In this regard, we cannot improve upon Judge Wisdom: "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." Anderson, 206 F. Supp. at 705 (Wisdom, J., dissenting).

Fourth, even assuming prior denials of the right to vote, Hawaii has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior voting discrimination -- ***21** in other words, to show that the racial classification is not simply a product of "administrative convenience" in grouping together all Hawaiians. Cf. Croson, 488 U.S. at 508.

Fifth, Hawaii has imposed a 100% racial voting set-aside in OHA elections that absolutely excludes members of races other than Hawaiian from the ballot. Faced with a 30% set-aside in Croson, the Court found "it obvious that such a program [wa]s not narrowly tailored to remedy the effects of prior discrimination." Id. at 508 (emphasis added). Given Hawaii's 100% exclusion of individuals who are not Hawaiian from the ballot in OHA elections (particularly when combined with the lack of findings of prior discrimination), the same conclusion applies here a fortiori.

Sixth, Hawaii's racial qualification is not limited in time. The State established it in 1978, and it is scheduled to last indefinitely. This qualification is not tailored "such that it will not last longer than the discriminatory effects it is designed to eliminate." Adarand, 515 U.S. at 238 (quotation omitted).

In sum, Hawaii's law satisfies none of the requirements this Court has imposed for holding a racial classification permissible under the Equal Protection Clause.

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship With Hawaiians Do Not Justify Hawaii's Racial Voting Qualification.

The State has constructed a tortured defense of its racial voting qualification that links (a) the racial restriction on the beneficiaries of OHA-controlled funds, (b) the racial qualifications to be an OHA officer, and (c) the racial qualifications for voting in elections for OHA officers. To begin with, this defense does not purport to meet the requirements this Court has imposed for racial classifications.

Even addressing the State's argument on its own terms, moreover, the short answer to it is fairly simple: Three blatant ***22** constitutional wrongs do not make a right. A massive unconstitutional scheme of racially restricted distribution of state funds, racial restrictions on serving in the state office that oversees and distributes those funds, and racially restricted elections to that office hardly makes the State's voting restriction more constitutionally palatable. See Stuart M.

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Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 594 (1996) ("""It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet [strict scrutiny] standards. The compelling interest requirement alone would pose an enormous hurdle.").

Hawaii has suggested that the racial voting qualification is constitutional because the racial restriction on the use of the OHA-controlled funds is constitutional and is not challenged here. As a matter of logic, that conclusion makes no sense even if the premise is accepted. If a state refused to hire a black teacher for an all-white school in 1952 because of his race, it could not have defended against a claimed equal protection violation by saying that the racial restriction on hiring was constitutional because the racially segregated schools were not challenged and had not yet been declared unconstitutional.

In addition, the racial restriction on the use of funds is itself unnecessary and not narrowly tailored to serve a compelling interest. Even assuming, for example, that the average Hawaiian suffers poverty to a greater extent than the average individual of another race, the State can institute a race-neutral social welfare program. It cannot engage, however, in a racially restricted distribution of funds that is both over-inclusive and under-inclusive.

Even if the State had a justification to pay monies to members of a racial group because of their race, a state does not have a compelling interest in establishing a racially restricted office whose members are elected in racially restricted elections in order to administer the program. In that regard, it ***23** bears emphasis that a racial voting qualification is perhaps the most pernicious of all racial classifications because it implies that "individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens." Miller, 515 U.S. at 914 (quotation omitted). This is the "precise use of race as a proxy the Constitution prohibits." Id.; cf. Powers, 499 U.S. at 410. Here, only by assuming that all Hawaiians think differently and vote differently from all other Hawaiian citizens can the categorical racial voting qualification be explained. Such an offensive assumption is patently unconstitutional under this Court's precedent.

Hawaii has invoked the term "trust" to describe its scheme and the term "trust lands" to describe lands transferred to the State by the 1959 Admission Act. But the terminology is simply camouflage for Hawaii's 1978 decision that certain state funds (derived both from the state lands and from other state funds) will be used to benefit a racially defined group -- even though the State is free to use those funds in a race-neutral way. [FN12] In any event, the existence of trust lands does not justify a racial qualification to vote in state elections for the state office that oversees and administers the lands.

FN12. Even were the State compelled by federal law to impose a racial classification (which it is not), Adarand establishes that the constitutional analysis would remain the same.

Hawaii also has explained -- correctly -- that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But the State has no right to engage in a racially restricted distribution of state funds, or racial classifications on the right to vote in a ***24** state election, simply to preserve a particular "culture." [FN13] As Justice

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Kennedy has explained, "There is more than a fine line, however, between the voluntary association that leads to a political community ... and the forced separation that occurs when the government draws explicit political boundaries ...." Kiryas Joel, 512 U.S. at 730 (Kennedy, J., concurring in judgment).

FN13. As two leading political and social commentators said of Hawaii: "It is one thing to celebrate a cultural heritage and a sometimes tragic history, but it is another, as Canadians have learned, to widen splits and schisms in a state that more than almost any place in the world has proved that diverse people can live amicably and successfully together." Michael Barone & Grant Ujifusa, The Almanac of American Politics 439 (1998).

The dangers of allowing a state's cultural justifications to supersede the limitations of the Equal Protection Clause are quite evident: One need only change the state from Hawaii to Louisiana and the year from 1999 to 1896. See Plessy, 163 U.S. at 550 (legislature is free "to act with reference to the established usages, customs, and traditions of the people"). This Court has forbidden that kind of "cultural" justification for racial classifications in cases ranging from Brown v. Board of Education to Loving v. Virginia. Now is no time to return to an era when "cultural" justifications could trump the dictates of the Equal Protection Clause. Cf. Loving, 388 U.S. at 11 (ban on interracial marriage designed to "maintain White Supremacy").

E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed.

The lower courts suggested that American Indian tribes are exempt from the Equal Protection Clause (at least, treatment of Indian tribes that facilitates self-government is exempt), and that Hawaiians as a group are sufficiently similar to American Indian tribes that discrimination in favor of Hawaiians can be *25 permitted under the Equal Protection Clause. See, e.g., Pet. App. 13a-14a, 17a.

This argument is flawed at every turn. To begin with, it misconceives the basis for differential treatment of American Indian tribes under the Constitution. And it simultaneously creates from whole cloth a constitutional authorization for members of other racial and ethnic groups (for example, African-Americans, Latino-Americans, and Korean-Americans) to assert ipse dixit that they are "similar to American Indian tribes" for purposes of equal protection analysis.

1. American Indian tribes are a distinctive category in our law. See Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States -- and have been so considered since before the Constitution was ratified. The Commerce Clause thus provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. i, § 8. In addition, the Treaty Clause, which grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," has been a source of authority for the federal government to deal with American Indian tribes as sovereigns. U.S. Const. art. ii, § 2.

As mandated by the Constitution, this Court has drawn a clear constitutional distinction between (a) laws that benefit or burden Indian tribes (or tribal members) with respect to self-governance or activities on or near an Indian reservation and (b) laws that burden or benefit Indians solely because of their race and do not relate to tribal activities (in which case, American Indians are

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treated like members of other races).

Equal protection strict scrutiny thus applies to classifications by race of individuals who happen to be American Indian so long as the classification in question does not relate to their tribal membership and their activities on or near the reservation. In both Adarand and Croson, for *26 example, the Court held that a racial preference program that gave preferences to American Indians, as well as members of other racial groups, was subject to strict scrutiny. As the Court stated in Croson, "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." 488 U.S. at 506 (emphasis added). In Adarand as well, the program provided a preference for "Native Americans," but the Court held that all racial classifications are subject to strict scrutiny. (In dissent, Justice Stevens raised the subject of American Indians, 515 U.S. at 244-45 n.3, but the Court did not distinguish American Indians from the other racial groups.) So, too, in both Fullilove and Metro Broadcasting, the laws at issue gave a preference to American Indians, see Metro Broadcasting, 497 U.S. at 553 n.1; Fullilove, 448 U.S. at 454, but no member of this Court suggested that a racial preference for African-Americans is more strictly scrutinized than a preference for American Indians.

2. In holding Hawaii's special treatment of Hawaiians consistent with the Equal Protection Clause, the courts below erroneously relied in part on this Court's decision in Morton v. Mancari, 417 U.S. 535 (1974). In that case, the Court upheld a hiring preference granted to tribal Indians for employment in the Bureau of Indian Affairs.

Three points about Mancari are critical, however, and completely undercut the lower courts' reliance on it. First, the Court in Mancari stated that the justification for differential treatment for Indian tribes stemmed not from some idiosyncratic ordering of different racial groups, but "from the Constitution itself" -- namely, the Indian Commerce Clause and the Treaty Clause. Id. at 552; see also Adarand, 515 U.S. at 244-45 n.3 (Stevens, J., dissenting) (Mancari relied in part on "plenary power of Congress to legislate on behalf of Indian tribes"); United States v. Antelope, 430 U.S. 641, 646 (1977) (Mancari "involved preferences ... directly promoting Indian *27 interests in self-government.... Federal regulation of Indian tribes ... is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians.") (quotation omitted; emphasis added). So, too, the government's brief in Mancari, advocating the position that the Court adopted, cautioned that the Constitution "permits special arrangements [with respect to Indian tribes] that might not be appropriate with respect to other groups." Br. for Appellants, No. 73-362, at 33 (emphasis added). By linking its decision to the Indian Commerce Clause, the Court accepted that argument. The Court did not adopt, by contrast, the suggestion of an amicus curiae who argued that benign racial preferences are not subject to strict scrutiny, and that preferences to """members of a minority group" such as American Indians "are constitutional." Br. for Amicus Curiae Mexican American Legal Defense and Educational Fund, Nos. 73-362, 73- 364, at 22-23.

Second, consistent with its view of the proper scope of the equal protection exception for Indian tribes embodied in the Indian Commerce and Treaty Clauses, the Mancari Court went out of its way to make clear that the BIA preference applied only to Indians who were members of Indian tribes and thus "operate[d] to exclude many individuals who are racially to be classified as Indians." Mancari, 417 U.S. at 554 n.24. In particular, the Court relied on the definition of Indian used in BIA regulations, which expressly conditioned the preference on tribal membership. Id.; see Benjamin, 106 Yale L.J. at 612 n.38 ("One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory

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definition of 'Indian' and looked only to the BIA regulation's definition."); see also id. at n.121. The government stressed at oral argument, moreover, that the "preference is limited to Indians who are members of federally recognized [tribes]." Tr. of Oral Arg., Nos. 73-362, 73-364, at 7. The government pointed out that members of terminated tribes or never-recognized tribes were not eligible for the preference and noted *28 that "there are many Indians, many people who racially could be considered an Indian who don't get this preference." Id. at 13.

Third, the Court treated the preference as an aspect of constitutionally authorized Indian self-governance. See 417 U.S. at 553 (preference provision designed to give "Indians a greater control of their own destinies"). Indeed, as the government pointed out at argument, some 11,500 BIA employees out of approximately 14,000 at the time worked on the reservations. Tr. of Oral Arg. at 5-6. Moreover, the preference had actually begun as a substitute for a proposal to provide Indian tribes an absolute veto over any person the BIA proposed to send to work on the reservation. Id. at 12. The Court took all of that into account, noting that an "obviously more difficult question ... would be presented" by a general Indian preference in government employment. 417 U.S. at 554. [FN14]

FN14. That "question," which was unanswered at the time, was whether the same level of scrutiny afforded racial discrimination against minorities would apply to racial preferences for minorities -- a question before the Court that Term, Defunis v. Odegaard, 416 U.S. 312 (1974), and which was subsequently addressed in cases such as Bakke, Fullilove, Croson, and Adarand.

In reaching its conclusion, the Court stated that the BIA classification was not "in this sense" a "racial" preference. Id. at 553 & n.24. By that, the Court clearly meant that a classification involving Indian tribes (or involving Indian tribal members engaged in activities of self-governance or activities on or near a reservation) must be analyzed differently from purely racial classifications.

Mancari is thus simply another in the line of cases in which the Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that *29 might otherwise be constitutionally offensive." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) (quotation omitted; emphasis added).

3. Hawaii's attempts to analogize Hawaiians to Indian tribes for purposes of this case are unavailing for two main reasons.

First, the Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause. Pet. App. 14a. Under the Constitution, therefore, a state's differential treatment of Hawaiians is no more acceptable than a state's differential treatment of Croatian-Americans or African-Americans or Italian-Americans.

Second, Hawaiians are not a federally recognized Indian tribe such that Hawaiians could receive the same treatment as American Indian tribes under the Constitution. Since the annexation in 1898, the United States has not dealt with Hawaiians as a sovereign nation. To be sure, certain federal statutes refer to Hawaiians, just as certain statutes refer to African-Americans, but Congress has never established that Hawaiians are an Indian tribe. This is not a trivial point. Without such recognition, a group of people united by race or ethnicity is not entitled to the

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same treatment as an American Indian tribe. As the BIA puts it, express federal recognition as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; see Rachael Paschal, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 Wash. L. Rev. 209, 215-16 (1991).

As a matter of law and tradition, moreover, federal courts do not grant tribal status that neither Congress nor the Executive has granted. United States v. Holliday, 70 U.S. 407, 419 (1865); see *30Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1496 (D.C. Cir. 1997). Therefore, this Court cannot simply declare that Hawaiians are an American Indian tribe.

Indeed, the constitutional constraints on Congress and the Executive in recognizing tribes, as well as existing BIA regulations, establish that Hawaiians could not possibly qualify as a tribe. See 25 C.F.R. § 83; Price v. Hawaii, 764 F.2d 623, 628 (9th Cir. 1985) (group of Hawaiians not a tribe and thus could not sue under jurisdictional statute granting Indian tribes right to sue); Benjamin, 106 Yale L.J. at 574, 576 ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and """there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe' ...."). Even the courts below recognized that Hawaiians have not and could not at this time receive formal recognition as an Indian tribe. Pet. App. 14a.

In any event, even were Hawaiians a recognized Indian tribe, the OHA's racial restriction on voting in elections for a state government office dealing with such an "Indian tribe" would still be unconstitutional. The "unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, ... [but] States do not enjoy the same unique relationship with Indians ...." Yakima Nation, 439 U.S. at 500-01 (quotation omitted; emphases added).

For all of these reasons, the State's attempt to analogize Hawaiians to American Indians does not justify its racial voting qualification in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,1999.
Rice v. Cayetano
1999 WL 345639

Briefs and Other Related Documents (Back to top)

- 1999 WL 955376, 68 USLW 3288 (Oral Argument) Oral Argument (Oct. 06, 1999)
- 1999 WL 691999 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Sep. 03, 1999)
- 1999 WL 557073 (Appellate Brief) BRIEF FOR RESPONDENT (Jul. 28, 1999)
- 1999 WL 557268 (Appellate Brief) BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII (Jul. 28, 1999)

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• 1999 WL 557271 (Appellate Brief) BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT (Jul. 28, 1999)

• 1999 WL 557275 (Appellate Brief) BRIEF OF AMICI CURIAE STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, HUI K?AKO'O =BQP:0003='?AINA HO'OPULAPULA, KALAMA'ULA HOMESTEAD ASSOCIATION AND HAWAIIAN HOMES COMMISSION IN SUPPORT OF RESPONDENT=EQP:0003= (Jul. 28, 1999)

• 1999 WL 557279 (Appellate Brief) BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 557287 (Appellate Brief) BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY CO UNCIL, HA HAWAII, HUI KALAIAINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS AMICI CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

• 1999 WL 557289 (Appellate Brief) BRIEF FOR THE HAWAI'I CONGRESSIONAL DELEGATION AS AMICUS CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

• 1999 WL 631668 (Appellate Brief) BRIEF OF AMICI CURIAE ALASKA FEDERATION OF NATIVES AND COOK INLET REGION, INC. IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 569475 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT (Jul. 23, 1999)

• 1999 WL 374574 (Appellate Brief) BRIEF FOR PETITIONER (May. 27, 1999)

• 1999 WL 374578 (Appellate Brief) BRIEF OF AMICI CURIAE, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES (May. 27, 1999)

• 1999 WL 374577 (Appellate Brief) BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER (May. 26, 1999)

• 1999 WL 332717 (Appellate Brief) BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER (May. 24, 1999)

• 1999 WL 33609269 (Appellate Filing) Reply Brief for Petitioner (Jan. 06, 1999)

• 1998 WL 34081124 (Appellate Filing) Respondent's Brief in Opposition (Dec. 29, 1998)

• 1998 WL 34080883 (Appellate Filing) Petition for a Writ of Certiorari (Nov. 17, 1998)

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Briefs and Other Related Documents

Supreme Court of the United States

Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of Hawaii.

No. 98-818.

Argued Oct. 6, 1999.
Decided Feb. 23, 2000.

Citizen of Hawai'i brought § 1983 action against state officials, challenging eligibility requirement for voting for trustees for Office of Hawaiian Affairs (OHA). The United States District Court of the District of Hawai'i, David A. Ezra, J., 963 F.Supp. 1547, upheld voter qualification. Citizen appealed. The Court of Appeals for the Ninth Circuit, Rymer, Circuit Judge, 146 F.3d 1075, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated Fifteenth Amendment by using ancestry as proxy for race, and thereby enacting a race-based voting qualification; (2) exclusion of non-Hawaiians from voting for OHA trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes; (3) voting qualification was not permissible under cases holding that one-person, one-vote rule did not pertain to certain special purpose districts; and (4) voting qualification was not saved from unconstitutionality on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust.

Reversed.

Justice Breyer filed an opinion concurring in the result, in which Justice Souter joined.

Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined in part.

Justice Ginsburg filed a dissenting opinion.

West Headnotes

[1] **Constitutional Law** 82(8)
92k82(8) Most Cited Cases

Fifteenth Amendment, which prohibits federal government and the states from denying or abridging the right to vote on account of race, grants protection to all persons, not just members of a particular race. U.S.C.A. Const.Amend. 15.

[2] **Constitutional Law** 82(8)
92k82(8) Most Cited Cases

[2] **States** 46
360k46 Most Cited Cases

Provision of Hawai'i Constitution governing election of trustees for Office of Hawaiian Affairs (OHA), under which voter eligibility was limited to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian" as defined by statute, violated Fifteenth Amendment, since voting structure granted the vote to persons of defined ancestry and to no others, and ancestry was a proxy for race, to extent that object of statutory definitions in question was to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[3] **States** 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA) was not permissible under cases allowing the differential treatment of certain members of Indian tribes, since, even assuming there was authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress could not authorize a State to create a voting scheme which excluded whole classes of citizens from decisionmaking in critical state affairs based on their race. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[4] **Constitutional Law** 82(8)
92k82(8) Most Cited Cases

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[4] **Constitutional Law** 215.3
92k215.3 Most Cited Cases

[4] **States** 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA), which constituted a race-based abridgement of the right to vote, was not permissible under cases holding that the one-person, one-vote rule did not pertain to certain special purpose districts, since compliance with Fourteenth Amendment's one-person, one-vote rule did not excuse noncompliance with the Fifteenth Amendment. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[5] **Constitutional Law** 82(8)
92k82(8) Most Cited Cases

[5] **States** 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA) was not saved from being struck down under Fifteenth Amendment on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust, and thus that the restriction was based on beneficiary status rather than race; it was not clear that voting classification was symmetric with beneficiaries of programs administered by OHA, and, in any event, State's argument rested on demeaning premise that citizens of a particular race were somehow more qualified than others to vote on certain matters, a premise inconsistent with the Fifteenth Amendment. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

****1045 *495** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. The agency administers programs designed for the benefit of two subclasses of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defines "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the islands before 1778, and "Hawaiians"--a larger class that includes "native Hawaiians"--as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The trustees are chosen in a statewide election in which only "Hawaiians" may vote. Petitioner Rice, a Hawaiian citizen without the requisite ancestry to be a "Hawaiian" under state law, applied to vote in OHA trustee elections. When his application was denied, he sued respondent Governor (hereinafter State), claiming, *inter alia,* that the voting exclusion was invalid under the Fourteenth and Fifteenth Amendments. The Federal District Court granted the State summary judgment. Surveying the history of the islands and their people, it determined that Congress and Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which is analogous to the relationship between the United States and Indian tribes. It examined the voting qualifications with the latitude applied to legislation passed pursuant to Congress' power over Indian affairs, see *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290, and found that the electoral scheme was rationally related to the State's responsibility under its Admission Act to utilize a part of the proceeds from certain public lands for the native Hawaiians' benefit. The Ninth Circuit affirmed, finding that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." 146 F.3d 1075, 1079.

Held: Hawaii's denial of Rice's right to vote in OHA trustee elections violates the Fifteenth Amendment. Pp. 1054-1060.

****1046** (a) The Amendment's purpose and command are set forth in explicit and comprehensive language. The National Government and the States may not deny or abridge the right to vote on account of race. The Amendment reaffirms the equality of races at the most basic level ***496** of the democratic process, the exercise of the voting franchise. It protects all persons, not just members of a particular race. Important precedents give instruction in the instant case. The Amendment was quite sufficient to invalidate a grandfather clause that did not mention race but instead used ancestry in an attempt to

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confine and restrict the voting franchise, *Guinn v. United States*, 238 U.S. 347, 364-365, 35 S.Ct. 926, 59 L.Ed. 1340; and it sufficed to strike down the white primary systems designed to exclude one racial class (at least) from voting, see, *e.g.*, *Terry v. Adams*, 345 U.S. 461, 469-470, 73 S.Ct. 809, 97 L.Ed. 1152. The voting structure in this case is neither subtle nor indirect; it specifically grants the vote to persons of the defined ancestry and to no others. Ancestry can be a proxy for race. It is that proxy here. For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. The provisions at issue reflect the State's effort to preserve that commonality to the present day. In interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582. The very object of the statutory definition here is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The history of the State's definition also demonstrates that the State has used ancestry as a racial definition and for a racial purpose. The drafters of the definitions of "Hawaiian" and "native Hawaiian" emphasized the explicit tie to race. The State's additional argument that the restriction is race neutral because it differentiates even among Polynesian people based on the date of an ancestor's residence in Hawaii is undermined by the classification's express racial purpose and its actual effects. The ancestral inquiry in this case implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities. The State's ancestral inquiry is forbidden by the Fifteenth Amendment for the further reason that using racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. The State's electoral restriction enacts a race-based voting qualification. Pp. 1054-1057.

(b) The State's three principal defenses of its voting law are rejected. It argues first that the exclusion of non-Hawaiians from voting is permitted under this Court's cases allowing the differential treatment of Indian tribes. However, even if Congress had the authority, delegated ***497** to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of the sort created here. Congress may not authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens. The elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. *Morton v. Mancari, supra,* distinguished. The State's further contention that the limited voting franchise is sustainable under this Court's cases holding that the one-person, one-vote rule does ****1047** not pertain to certain special purpose districts such as water or irrigation districts also fails, for compliance with the one- person, one-vote rule of the Fourteenth Amendment does not excuse compliance with the Fifteenth Amendment. Hawaii's final argument that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. While the bulk of the funds appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for trustees. The argument fails on more essential grounds; it rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Pp. 1057- 1060.

146 F.3d 1075, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, AND THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the result, in which SOUTER, J., joined, *post,* p. 1060. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post,* p. 1062. GINSBURG, J., filed a dissenting opinion, *post,* p. 1073.

Theodore B. Olson, Washington, DC, for petitioner.

John G. Roberts, Jr., Washington, DC, for respondent.

***498** Edwin S. Kneedler, Washington, DC, for

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United States, as amicus curiae, by special leave of the Court.

Justice KENNEDY delivered the opinion of the Court.

A citizen of Hawaii comes before us claiming that an explicit, race-based voting qualification has barred him from voting in a statewide election. The Fifteenth Amendment to the Constitution of the United States, binding on the National Government, the States, and their political subdivisions, controls the case.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose ***499** the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. Haw. Const., Art. XII, § 5. The agency administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as "native Hawaiians," defined by statute, with certain supplementary language later set out in full, as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778. Haw.Rev.Stat. § 10-2 (1993). The second, larger class of persons benefited by OHA programs is "Hawaiians," defined to be, with refinements contained in the statute we later quote, those persons who are descendants of people inhabiting the Hawaiian Islands in 1778. *Ibid.* The right to vote for trustees is limited to "Hawaiians," the second, larger class of persons, which of course includes the smaller class of "native Hawaiians." Haw. Const., Art. XII, § 5.

Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a "Hawaiian" in terms of the statute; so he may not vote in the trustee election. The issue presented by this case is whether Rice may be so barred. Rejecting the State's arguments that the classification in question is not racial or that, if it is, it is nevertheless valid for other reasons, we hold Hawaii's denial of petitioner's ****1048** right to vote to be a clear violation of the Fifteenth Amendment.

I

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ***500** ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources. See L. Fuchs, Hawaii Pono: An Ethnic and Political History (1961) (hereinafter Fuchs); 1-3 R. Kuykendall, The Hawaiian Kingdom (1938); (1953); (1967) (hereinafter Kuykendall).

The origins of the first Hawaiian people and the date they reached the islands are not established with certainty, but the usual assumption is that they were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. Fuchs 4; 1 Kuykendall 3; see also G. Daws, Shoal of Time: A History of the Hawaiian Islands xii-xiii (1968) (Marquesas Islands and Tahiti). When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion. Agriculture and fishing sustained the people, and, though population estimates vary, some modern historians conclude that the population in 1778 was about 200,000-300,000. See Fuchs 4; R. Schmitt, Historical Statistics of Hawaii 7 (1977) (hereinafter Schmitt). The accounts of Hawaiian life often remark upon the people's capacity to find beauty and pleasure in their island existence, but life was not altogether idyllic. In Cook's time the islands were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering. Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject. The society was one, however, with its own identity, its own cohesive forces, its own history.

In the years after Cook's voyage many expeditions would follow. A few members of the ships' companies remained on ***501** the islands, some as

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authorized advisers, others as deserters. Their intermarriage with the inhabitants of Hawaii was not infrequent.

In 1810, the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I. It is difficult to say how many settlers from Europe and America were in Hawaii when the King consolidated his power. One historian estimates there were no more than 60 or so settlers at that time. 1 Kuykendall 27. An influx was soon to follow. Beginning about 1820, missionaries arrived, of whom Congregationalists from New England were dominant in the early years. They sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.

The 1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom. Rights to land became a principal concern, and there was unremitting pressure to allow non-Hawaiians to use and to own land and to be secure in their title. Westerners were not the only ones with pressing concerns, however, for the disposition and ownership of land came to be an unsettled matter among the Hawaiians themselves.

****1049** The status of Hawaiian lands has presented issues of complexity and controversy from at least the rule of Kamehameha I to the present day. We do not attempt to interpret that history, lest our comments be thought to bear upon issues not before us. It suffices to refer to various of the historical conclusions that appear to have been persuasive to Congress and to the State when they enacted the laws soon to be discussed.

When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our own cases as "feudal." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 166, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). A well-known description of the King's early decrees is contained ***502** in an 1864 opinion of the Supreme Court of the Kingdom of Hawaii. The court, in turn, drew extensively upon an earlier report which recited, in part, as follows:

> " 'When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.... The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust.' " *In re Estate of Kamehameha IV*, 2 Haw. 715, 718-719 (quoting Principles Adopted by the Board of Commissioners to Quiet Land Titles, 2 Stat. Laws 81-82 (Haw. Kingdom 1847)).

Beginning in 1839 and through the next decade, a successive ruler, Kamehameha III, approved a series of decrees and laws designed to accommodate demands for ownership and security of title. In the words of the Hawaiian Supreme Court, "[t]he subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished." 2 Haw., at 721. ***503** Arrangements were made to confer freehold title in some lands to certain chiefs and other individuals. The King retained vast lands for himself, and directed that other extensive lands be held by the government, which by 1840 had adopted the first Constitution of the islands. Thus was effected a fundamental and historic division, known as the Great Mahele. In 1850, foreigners, in turn, were given the right of land ownership.

The new policies did not result in wide dispersal of ownership. Though some provisions had been attempted by which tenants could claim lands, these proved ineffective in many instances, and ownership became concentrated. In 1920, the Congress of the United States, in a Report on the bill establishing the Hawaiian Homes Commission, made an assessment of Hawaiian land policy in the following terms:

> "Your committee thus finds that since the institution of private ownership of lands in Hawaii the native Hawaiians, outside of the King and the

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chiefs, were granted and have held but a very small portion of the lands of the Islands. Under the homestead laws somewhat more ****1050** than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws. Thus the tax returns for 1919 show that only 6.23 per centum of the property of the Islands is held by native Hawaiians and this for the most part is lands in the possession of approximately a thousand wealthy Hawaiians, the ***504** descendents of the chiefs." H.R.Rep. No. 839, 66th Cong., 2d Sess., 6 (1920).

While these developments were unfolding, the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first "articles of arrangement" between the United States and the Kingdom of Hawaii were signed in 1826, 8 Department of State, Treaties and Other International Agreements of the United States of America 1776-1949, p. 861 (C. Bevans comp.1968), and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887, see Treaty with the Hawaiian Islands, 9 Stat. 977 (1849) (friendship, commerce, and navigation); Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875) (commercial reciprocity); Supplementary Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 25 Stat. 1399 (1887) (same). The United States was not the only country interested in Hawaii and its affairs, but by the later part of the century the reality of American dominance in trade, settlement, economic expansion, and political influence became apparent.

Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and western business interests and property owners on the other. The conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the right to vote to non-Hawaiians. 3 Kuykendall 344-372.

Tensions continued through 1893, when they again peaked, this time in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects. A so-called ***505** Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. On December 18 of the same year, President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for restoration of the Hawaiian monarchy. Message of the President to the Senate and House of Representatives, reprinted in H.R.Rep. No. 243, 53d Cong., 2d Sess., 3-15 (1893). The Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated her throne a year later.

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. 30 Stat. 750. According to the Joint Resolution, the Republic of Hawaii ****1051** ceded all former Crown, government, and public lands to the United States. *Ibid.* The resolution further provided that revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.* Two years later the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands "in the possession, use, and control of the government of the Territory of Hawaii ... until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159.

In 1993, a century after the intervention by the Committee of Safety, the Congress of the United States reviewed this history, and in particular the role of Minister Stevens. Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people. 107 Stat. 1510.

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***506** Before we turn to the relevant provisions two other important matters, which affected the demographics of Hawaii, must be recounted. The first is the tragedy inflicted on the early Hawaiian people by the introduction of western diseases and infectious agents. As early as the establishment of the rule of Kamehameha I, it was becoming apparent that the native population had serious vulnerability to diseases borne to the islands by settlers. High mortality figures were experienced in infancy and adulthood, even from common illnesses such as diarrhea, colds, and measles. Fuchs 13; see Schmitt 58. More serious diseases took even greater tolls. In the smallpox epidemic of 1853, thousands of lives were lost. *Ibid.* By 1878, 100 years after Cook's arrival, the native population had been reduced to about 47,500 people. *Id.,* at 25. These mortal illnesses no doubt were an initial cause of the despair, disenchantment, and despondency some commentators later noted in descendents of the early Hawaiian people. See Fuchs 13.

The other important feature of Hawaiian demographics to be noted is the immigration to the islands by people of many different races and cultures. Mostly in response to the demand of the sugar industry for arduous labor in the cane fields, successive immigration waves brought Chinese, Portuguese, Japanese, and Filipinos to Hawaii. Beginning with the immigration of 293 Chinese in 1852, the plantations alone drew to Hawaii, in one estimate, something over 400,000 men, women, and children over the next century. *Id.,* at 24; A. Lind, Hawaii's People 6-7 (4th ed.1980). Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands. See E. Nordyke, The Peopling of Hawai'i 28-98 (2d ed.1989). The 1990 census figures show the resulting ethnic diversity of the Hawaiian population. U.S. Dept. of Commerce, Bureau of Census, 1990 Census of Population, ***507** Supplementary Reports, Detailed Ancestry Groups for States (Oct. 1992).

With this background we turn to the legislative enactments of direct relevance to the case before us.

II

Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. See H.R.Rep. No. 839, at 2-6; Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii before the House Committee on the Territories, 66th Cong., 2d Sess. (1920). Reciting its purpose to rehabilitate the native Hawaiian population, see H.R.Rep. No. 839, at 1-2, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. Act of ****1052** July 9, 1921, ch. 42, 42 Stat. 108. The Act defined "native Hawaiian [s]" to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Ibid.*

Hawaii was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. Pub.L. 86-3, § § 4, 7, 73 Stat. 5, 7 (Admission Act); see Haw. Const., Art. XII, § § 1-3. In addition, the United States granted Hawaii title to all public lands and public property within the boundaries of the State, save those which the Federal Government retained for its own use. Admission Act § § 5(b)-(d), 73 Stat. 5. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million additional acres of land. Brief for United States as *Amicus Curiae* 4.

The legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to ***508** be held "as a public trust" to be "managed and disposed of for one or more of" five purposes:

> "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [,][4] for the making of public improvements, and [5] for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6.

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

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In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs, Haw. Const., Art. XII, § 5, which has as its mission "[t]he betterment of conditions of native Hawaiians ... [and] Hawaiians," Haw.Rev.Stat. § 10-3 (1993). Members of the 1978 constitutional convention, at which the new amendments were drafted and proposed, set forth the purpose of the proposed agency:

> "Members [of the Committee of the Whole] were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, p. 1018 (1980).

***509** Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer "for the betterment of the conditions of native Hawaiians," Haw.Rev.Stat. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. See generally Haw.Rev.Stat. § § 10-1 to 10-16. (The 200,000 acres set aside under the Hawaiian Homes Commission Act are administered by a separate agency. See Haw.Rev.Stat. § 26-17 (1993).) The Hawaiian Legislature has charged OHA with the mission of "[s]erving as the principal public agency ... responsible for the performance, development, and coordination of programs and activities relating ****1053** to native Hawaiians and Hawaiians," "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a receptacle for reparations." § 10-3.

OHA is overseen by a nine-member board of trustees, the members of which "shall be Hawaiians" and--presenting the precise issue in this case-- shall be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const., Art. XII, § 5; see Haw.Rev.Stat. § § 13D-1, 13D- 3(b)(1) (1993). The term "Hawaiian" is defined by statute:

> " 'Hawaiian' means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." § 10-2.

The statute defines "native Hawaiian" as follows:

> ***510** " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Ibid.*

Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 natives, and so he is neither "native Hawaiian" nor "Hawaiian" as defined by the statute. Rice applied in March 1996 to vote in the elections for OHA trustees. To register to vote for the office of trustee he was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." Affidavit on Application for Voter Registration, Lodging by Petitioner, Tab 2. Rice marked through the words "am also Hawaiian and," then checked the form "yes." The State denied his application.

Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii. (The Governor was sued in his official capacity, and the Attorney General of Hawaii defends the challenged enactments. We refer to the respondent as "the State.") Rice contested his exclusion from voting in elections for OHA trustees and from voting in a special election relating to native Hawaiian sovereignty which was held in August 1996. After the District Court rejected the latter challenge, see *Rice v. Cayetano*, 941 F.Supp. 1529 (1996) (a decision not before us), the parties moved for summary judgment on the claim that the Fourteenth and Fifteenth Amendments to the United States Constitution invalidate the law excluding Rice from the OHA trustee elections.

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***511** The District Court granted summary judgment to the State. 963 F.Supp. 1547 (D.Haw.1997). Surveying the history of the islands and their people, the District Court determined that Congress and the State of Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which the court found analogous to the relationship between the United States and the Indian tribes. *Id.*, at 1551-1554. On this premise, the court examined the voting qualification with the latitude that we have applied to legislation passed pursuant to Congress' power over Indian affairs. *Id.*, at 1554-1555 (citing *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). Finding that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of ****1054** Native Hawaiians," the District Court held that the voting restriction did not violate the Constitution's ban on racial classifications. 963 F.Supp., at 1554- 1555.

The Court of Appeals affirmed. 146 F.3d 1075 (C.A.9 1998). The court noted that Rice had not challenged the constitutionality of the underlying programs or of OHA itself. *Id.*, at 1079. Considering itself bound to "accept the trusts and their administrative structure as [it found] them, and assume that both are lawful," the court held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Ibid.* The court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes "contain a racial classification on their face." *Ibid.*

We granted certiorari, 526 U.S. 1016, 119 S.Ct. 1248, 143 L.Ed.2d 346 (1999), and now reverse.

III

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. ***512** The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race. Color and previous condition of servitude, too, are forbidden criteria or classifications, though it is unnecessary to consider them in the present case.

[1] Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom. Vital as its objective remains, the Amendment goes beyond it. Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. "[B]y the inherent power of the Amendment the word white disappeared" from our voting laws, bringing those who had been excluded by reason of race within "the generic grant of suffrage made by the State." *Guinn v. United States*, 238 U.S. 347, 363, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); see also *Neal v. Delaware*, 103 U.S. 370, 389, 26 L.Ed. 567 (1881). The Court has acknowledged the Amendment's mandate of neutrality in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese*, 92 U.S. 214, 218, 23 L.Ed. 563 (1876).

***513** Though the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks. We have cataloged before the "variety and persistence" of these techniques. *South Carolina v. Katzenbach*, 383 U.S. 301, 311-312, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (citing, *e.g.*, *Guinn, supra* (grandfather clause); *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349 (1915) (same); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) ("procedural hurdles"); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (white primary); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (same); ****1055** *United States v. Thomas*, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535 (1960) *(per curiam)* (registration

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challenges); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering); *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) ("interpretation tests")). Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter. See 383 U.S., at 313-315, 86 S.Ct. 803.

Important precedents did emerge, however, which give instruction in the case now before us. The Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise. In 1910, the State of Oklahoma enacted a literacy requirement for voting eligibility, but exempted from that requirement the " 'lineal descendant[s]' " of persons who were " 'on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation.' " *Guinn, supra*, at 357, 35 S.Ct. 926. Those persons whose ancestors were entitled to vote under the State's previous, discriminatory voting laws were thus exempted from the eligibility test. Recognizing that the test served only to perpetuate those old laws and to effect a transparent racial exclusion, the Court invalidated it. 238 U.S., at 364-365, 35 S.Ct. 926.

More subtle, perhaps, than the grandfather device in *Guinn* were the evasions attempted in the white primary cases; but the Fifteenth Amendment, again by its own terms, sufficed to strike down these voting systems, systems designed ***514** to exclude one racial class (at least) from voting. See *Terry, supra*, at 469-470, 73 S.Ct. 809; *Allwright, supra*, at 663-666, 64 S.Ct. 757 (overruling *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)). The Fifteenth Amendment, the Court held, could not be so circumvented: "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy ... not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." *Terry, supra*, at 467, 73 S.Ct. 809.

[2] Unlike the cited cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others. The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. Brief for Respondent 38-40. The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti. *Id.*, at 38-39, and n. 15. Furthermore, the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date. *Ibid.* These factors, it is said, mean the restriction is not a racial classification. We reject this line of argument.

Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. But that is not this case. For centuries Hawaii was isolated from migration. 1 Kuykendall 3. The inhabitants shared common physical characteristics, ***515** and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. Hawaii Senate ****1056** Journal, Standing Committee Rep. No. 784, at 1354; see *ibid.* ("Modern scholarship also identified such race of people as culturally distinguishable from other Polynesian peoples"). The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

The history of the State's definition demonstrates the point. As we have noted, the statute defines "Hawaiian" as

> "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands

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> in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993).

A different definition of "Hawaiian" was first promulgated in 1978 as one of the proposed amendments to the State Constitution. As proposed, "Hawaiian" was defined as "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, at 1018. Rejected as not ratified in a valid manner, see *Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979), ***516** the definition was modified and in the end promulgated in statutory form as quoted above. See Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1350, 1353-1354; *id.*, Conf. Comm. Rep. No. 77, at 998. By the drafters' own admission, however, any changes to the language were at most cosmetic. Noting that "[t]he definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races,' " the drafters of the revised definition "stress[ed] that this change is non-substantive, and that 'peoples' does mean 'races.' " *Ibid.*; see also *id.*, at 999 ("[T]he word 'peoples' has been substituted for 'races' in the definition of 'Hawaiian'. Again, your Committee wishes to emphasize that this substitution is merely technical, and that 'peoples' does mean 'races' ").

The next definition in Hawaii's compilation of statutes incorporates the new definition of "Hawaiian" and preserves the explicit tie to race:

> " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993).

This provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." *Ibid.*

As for the further argument that the restriction differentiates even among Polynesian people and is based simply on the date of an ancestor's residence in Hawaii, this too is insufficient to prove the classification is nonracial in purpose and operation. Simply because a class defined by ancestry does not include all members of the race does not suffice to ***517** make the classification race neutral. Here, the State's argument is undermined by its express ****1057** racial purpose and by its actual effects.

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State's electoral restriction enacts a race-based voting qualification.

IV

The State offers three principal defenses of its voting law, any of which, it contends, allows it to prevail even if the classification is a racial one under the Fifteenth Amendment. We examine, and reject, each of these arguments.

***518** A

[3] The most far reaching of the State's arguments is that exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes. The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi- sovereign authority, even after cession of

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their lands to the United States. See *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 425, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (plurality opinion); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). The retained tribal authority relates to self-governance. *Brendale, supra*, at 425, 109 S.Ct. 2994 (plurality opinion). In reliance on that theory the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. *Mancari*, 417 U.S., at 553-555, 94 S.Ct. 2474. The *Mancari* case, and the theory upon which it rests, are invoked by the State to defend its decision to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians.

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State--and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993--has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the ****1058**Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, ***519**Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996). We can stay far off that difficult terrain, however.

The State's argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.

Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 673, n. 20, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (treaties securing preferential fishing rights); *United States v. Antelope*, 430 U.S. 641, 645-647, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (distribution of tribal property); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (Indian immunity from state taxes); *Fisher v. District Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390-391, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) *(per curiam)* (exclusive tribal court jurisdiction over tribal adoptions). As we have observed, "every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians." *Mancari, supra*, at 552, 94 S.Ct. 2474.

Mancari, upon which many of the above cases rely, presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference which favored individuals who were " 'one-fourth or more degree Indian blood and ... member[s] of a Federally-recognized tribe.' " 417 U.S., at 553, n. 24, 94 S.Ct. 2474 (quoting 44 BIAM 335, 3.1 (1972)). Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,' " but rather "only to members of 'federally ***520** recognized' tribes." 417 U.S., at 553, n. 24, 94 S.Ct. 2474. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Ibid.*; see also *id.*, at 554, 94 S.Ct. 2474 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"). Because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. *Id.*, at 555, 94 S.Ct. 2474. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as "*sui generis*." *Id.*, at 554, 94 S.Ct. 2474.

Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA--and the challenged voting provision--is to afford Hawaiians a measure of self- governance," and so it

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fits the model of *Mancari.* Brief for Respondent 34. It does not follow from *Mancari,* however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

The tribal elections established by the federal statutes the State cites illuminate its error. See Brief for Respondent 22 (citing, *e.g.,* the Menominee Restoration Act, 25 U.S.C. § 903b, and the Indian Reorganization Act, 25 U.S.C. § 476). If a ****1059** non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations. See Haw. Const., Art. XII, § § 5-6. The Hawaiian Legislature has declared that OHA exists to serve "as the principal public agency in th[e] ***521** State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." Haw.Rev.Stat. § 10-3(3) (1993); see also Lodging by Petitioner, Tab 6, OHA Annual Report 1993-1994, p. 5 (May 27, 1994) (admitting that "OHA is technically a part of the Hawaii state government," while asserting that "it operates as a semi-autonomous entity"). Foremost among the obligations entrusted to this agency is the administration of a share of the revenues and proceeds from public lands, granted to Hawaii to "be held by said State as a public trust." Admission Act § § 5(b), (f), 73 Stat. 5, 6; see Haw. Const., Art. XII, § 4.

The delegates to the 1978 constitutional convention explained the position of OHA in the state structure:

> "The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor's cabinet. The status of the Office of Hawaiian Affairs is to be unique and special .... The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645.

Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State.

The validity of the voting restriction is the only question before us. As the Court of Appeals did, we assume the validity ***522** of the underlying administrative structure and trusts, without intimating any opinion on that point. Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.

B

[4] Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. See *Ball v. James,* 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.,* 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973). Just as the *Mancari* argument would have involved a significant extension or new application of that case, so too it is far from clear that the *Salyer* line of cases would be at all applicable to statewide elections for an agency with the powers and responsibilities of OHA.

We would not find those cases dispositive in any event, however. The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment. Our special purpose district cases have not suggested that compliance with the one-person, one-****1060** vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment. We reject that argument here. We held four decades ago that state authority over the boundaries of political subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution." *Gomillion,* 364 U.S., at 345, 81 S.Ct. 125. The Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to

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vote on account of race, and this law does so.

***523** C

[5] Hawaii's final argument is that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. Thus, the contention goes, the restriction is based on beneficiary status rather than race.

As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.

Hawaii's argument fails on more essential grounds. The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry*, 345 U.S., at 468, 73 S.Ct. 809. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry. Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, ***524** the Amendment was designed to eliminate. The voting restriction under review is prohibited by the Fifteenth Amendment.

* * *

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice SOUTER joins, concurring in the result.

I agree with much of what the Court says and with its result, but I do not agree with the critical rationale that underlies that result. Hawaii seeks to justify its voting scheme by drawing an analogy between ****1061** its Office of Hawaiian Affairs (OHA) and a trust for the benefit of an Indian tribe. The majority does not directly deny the analogy. It instead at one point assumes, at least for argument's sake, that the "revenues and proceeds" at issue are from a " 'public trust.' " *Ante,* at 1059. It also assumes without deciding that the State could "treat Hawaiians or native Hawaiians as tribes." *Ante,* at 1058. Leaving these issues undecided, it holds that the Fifteenth Amendment forbids Hawaii's voting scheme, because the "OHA is a state agency," and thus ***525** election to the OHA board is not "the internal affair of a quasi sovereign," such as an Indian tribe. *Ante,* at 1059.

I see no need, however, to decide this case on the basis of so vague a concept as "quasi sovereign," and I do not subscribe to the Court's consequently sweeping prohibition. Rather, in my view, we should reject Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.

The majority seems to agree, though it does not decide, that the OHA bears little resemblance to a trust for native Hawaiians. It notes that the Hawaii

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Constitution uses the word "trust" when referring to the 1.2 million acres of land granted in the Admission Act. *Ante,* at 1052, 1053-1054. But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are "native." Admission Act § 5(f).

Moreover, OHA funding comes from several different sources. See, *e.g.,* OHA Fiscal 1998 Annual Report 38 (hereinafter Annual Report) ($15 million from the 1.2 million acres of public lands; $11 million from "[d]ividend and interest income"; $3 million from legislative appropriations; $400,000 from federal and other grants). All of OHA's funding is authorized by ordinary state statutes. See, *e.g.,* Haw.Rev.Stat. § § 10-4, 10-6, 10-13.5 (1993); see also Annual Report 11 ("OHA's fiscal 1998-99 legislative budget was passed as Acts 240 and 115 by the 1997 legislature"). The amounts of funding and funding sources are thus subject to change by ordinary legislation. OHA spends most, but not all, of its money to benefit native Hawaiians in many different ways. See Annual Report (OHA projects support education, housing,***526** health, culture, economic development, and nonprofit organizations). As the majority makes clear, OHA is simply a special purpose department of Hawaii's state government. *Ante,* at 1058-1059.

As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1998). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA electorate.

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or ****1062** Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll--but in the far less distant past. See, *e.g.,* Constitution of the Choctaw Nation of Oklahoma, Art. II (membership consists of persons on final rolls approved in 1906 and their lineal descendants); Constitution of the Sac and Fox Tribe of Indians of Oklahoma, Art. II (membership consists of persons on official roll of 1937, children since born to two members of the Tribe, and children born to one member ***527** and a nonmember if admitted by the council); Revised Constitution of the Jicarilla Apache Tribe, Art. III (membership consists of persons on official roll of 1968 and children of one member of the Tribe who are at least three-eighths Jicarilla Apache Indian blood); Revised Constitution Mescalero Apache Tribe, Art. IV (membership consists of persons on the official roll of 1936 and children born to at least one enrolled member who are at least one-fourth degree Mescalero Apache blood).

Of course, a Native American tribe has broad authority to define its membership. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72, n. 32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members--leaving some combination of luck and interest to determine which potential members become actual voters--goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.

These circumstances are sufficient, in my view, to destroy the analogy on which Hawaii's justification must depend. This is not to say that Hawaii's definitions themselves independently violate the Constitution, cf. *post,* at 1066-1068, n. 11 (Justice STEVENS, dissenting); it is only to say that the analogies they here offer are too distant to save a

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race-based voting definition that in their absence would clearly violate the Fifteenth Amendment. For that reason I agree with the majority's ultimate conclusion.

Justice STEVENS, with whom Justice GINSBURG joins as to Part II, dissenting.

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application ***528** to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.

I

According to the terms of the federal Act by which Hawaii was admitted to the Union, and to the terms of that State's Constitution and laws, the Office of Hawaiian Affairs (OHA) is charged with managing vast acres of land held in trust for the descendants of the Polynesians who occupied the Hawaiian Islands before the 1778 arrival of Captain Cook. In addition to administering the proceeds from these assets, OHA is responsible for programs providing special benefits for native Hawaiians. Established in 1978 by an amendment to the State Constitution, OHA was intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past ****1063** wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival. As explained by the senior Senator from Hawaii, Senator Inouye, who is not himself a native Hawaiian but rather (like petitioner) is a member of the majority of Hawaiian voters who supported the 1978 amendments, the amendments reflect "an honest and sincere attempt on the part of the people of Hawai'i to rectify the wrongs of the past, and to put into being the mandate [of] our Federal government--the betterment of the conditions of Native Hawaiians." [FN1]

FN1. App. E to Brief for Hawaii Congressional Delegation as *Amicus Curiae* E-3. In a statement explaining the cultural motivation for the amendments, Senator Akaka pointed out that the "fact that the entire State of Hawaii voted to amend the State Constitution in 1978 to establish the Office of Hawaiian Affairs is significant because it illustrates the recognition of the importance of Hawaiian culture and traditions as the foundation for the *Aloha* spirit." *Id.*, at E-5.

***529** Today the Court concludes that Hawaii's method of electing the trustees of OHA violates the Fifteenth Amendment. In reaching that conclusion, the Court has assumed that the programs administered by OHA are valid. That assumption is surely correct. In my judgment, however, the reasons supporting the legitimacy of OHA and its programs in general undermine the basis for the Court's decision holding its trustee election provision invalid. The OHA election provision violates neither the Fourteenth Amendment nor the Fifteenth.

That conclusion is in keeping with three overlapping principles. First, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians, whose lands are now a part of the territory of the United States. In addition, there exists in this case the State's own fiduciary responsibility--arising from its establishment of a public trust--for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians. Finally, even if one were to ignore the more than two centuries of Indian law precedent and practice on which this case follows, there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any.

II

Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of Native Americans [FN2] and the fiduciary character of the special ***530** federal relationship with descendants of those once sovereign peoples. [FN3] The source of the Federal Government's responsibility toward the Nation's native inhabitants, who were subject to European and then American military conquest, has been explained by this Court in the crudest terms, but they remain instructive nonetheless.

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FN2. See, *e.g.*, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531, n. 6, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998); *United States v. Wheeler*, 435 U.S. 313, 319, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-565, 23 S.Ct. 216, 47 L.Ed. 299 (1903); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

FN3. See, *e.g.*, *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *Kagama*, 118 U.S., at 384-385, 6 S.Ct. 1109; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831).

"These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights .... From their very weakness and helplessness, ****1064** so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States v. Kagama*, 118 U.S. 375, 383-384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) (emphasis in original).

As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special " 'care and protection.' " [FN4] With respect to the Pueblos in New Mexico, for example, "public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction." *United States v. Sandoval*, 231 U.S. 28, 39- 40, 34 S.Ct. 1, 58 L.Ed. 107 (1913). Today, the Federal Bureau of Indian Affairs (BIA) administers countless modern programs responding to comparably pragmatic concerns, including health, education, housing, and impoverishment. See Office of the Federal Register, United States Government Manual 1999/2000, pp. 311-312. Federal regulation in this area is not limited to the strictly practical ***531** but has encompassed as well the protection of cultural values; for example, the desecration of Native American graves and other sacred sites led to the passage of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

FN4. *Sandoval*, 231 U.S., at 45, 34 S.Ct. 1; *Kagama*, 118 U.S., at 384-385, 6 S.Ct. 1109.

Critically, neither the extent of Congress' sweeping power nor the character of the trust relationship with indigenous peoples has depended on the ancient racial origins of the people, the allotment of tribal lands, [FN5] the coherence or existence of tribal self-government, [FN6] or the varying definitions of "Indian" Congress has chosen to adopt. [FN7] Rather, when it comes to the exercise of Congress' plenary power in Indian affairs, this Court has taken account of the "numerous occasions" on which "legislation that singles out Indians for particular and special treatment" has been upheld, and has concluded that as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation ***532** towards the Indians, such legislative judgments will not be disturbed." *Morton v. Mancari*, 417 U.S. 535, 554-555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

FN5. See, *e.g.*, *United States v. Celestine*, 215 U.S. 278, 286-287, 30 S.Ct. 93, 54 L.Ed. 195 (1909).

FN6. See *United States v. John*, 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them"); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 82, n. 14, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (whether or not federal statute providing financial benefits to descendants of Delaware Tribe included nontribal Indian beneficiaries, Congress' choice need only be " 'tied rationally to the fulfillment of Congress' unique obligation toward the

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Indians' " (quoting *Morton v. Mancari*, 417 U.S., at 555, 94 S.Ct. 2474)).

FN7. See generally F. Cohen, Handbook of Federal Indian Law 19-20 (1982). Compare 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians") with § 1603(c)(3) (Indian is any person "considered by the Secretary of the Interior to be an Indian for any purpose").

As the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming. Shortly before its annexation in 1898, the Republic of Hawaii (installed ****1065** by United States merchants in a revolution facilitated by the United States Government) expropriated some 1.8 million acres of land that it then ceded to the United States. In the Organic Act establishing the Territory of Hawaii, Congress provided that those lands should remain under the control of the territorial government "until otherwise provided for by Congress," Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159. By 1921, Congress recognized that the influx of foreign infectious diseases, mass immigration coupled with poor housing and sanitation, hunger, and malnutrition had taken their toll. See *ante*, at 1051. Confronted with the reality that the Hawaiian people had been "frozen out of their lands and driven into the cities," H.R.Rep. No. 839, 66th Cong., 2d Sess., 4 (1920), Congress decided that 27 specific tracts of the lands ceded in 1898, comprising about 203,500 acres, should be used to provide farms and residences for native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat. 108. Relying on the precedent of previous federal laws granting Indians special rights in public lands, Congress created the Hawaiian Homes Commission to implement its goal of rehabilitating the native people and culture. [FN8] Hawaii was required to adopt this Act as a condition ***533** of statehood in the Hawaii Statehood Admissions Act (Admissions Act), § 4, 73 Stat. 5. And in an effort to secure the Government's duty to the indigenous peoples, § 5 of the Admissions Act conveyed 1.2 million acres of land to the State to be held in trust "for the betterment of the conditions of native Hawaiians" and certain other public purposes. § 5(f), *id.*, at 1049-1050.

FN8. See H.R.Rep. No. 839, 66th Cong., 2d Sess., 4, 11 (1920). Reflecting a compromise between the sponsor of the legislation, who supported special benefits for "all who have Hawaiian blood in their veins," and plantation owners who thought that only "Hawaiians of the pure blood" should qualify, Hawaiian Homes Commission Act: Hearings before the Senate Committee on the Territories, H.R.Rep. No. 13500, 66th Cong., 3d Sess., 14-17 (1920), the statute defined a "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," 42 Stat. 108.

The nature of and motivation for the special relationship between the indigenous peoples and the United States Government was articulated in explicit detail in 1993, when Congress adopted a Joint Resolution containing a formal "apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." 107 Stat. 1510. Among other acknowledgments, the resolution stated that the 1.8 million acres of ceded lands had been obtained "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." *Id.*, at 1512.

In the end, however, one need not even rely on this official apology to discern a well-established federal trust relationship with the native Hawaiians. Among the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited. [FN9] By classifying native Hawaiians as "Native Americans" for purposes of these statutes, Congress has made clear that native Hawaiians enjoy many of "the same rights and privileges accorded to American Indian, Alaska ***534** Native, Eskimo, and Aleut communities." 42 U.S.C. § 11701(19). See also § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters

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affecting the aboriginal or indigenous peoples of ****1066** the United States includes the authority to legislate in matters affecting the native peoples of ... Hawaii").

FN9. See Brief for Hawaii Congressional Delegation as *Amicus Curiae* 7, and App. A; see also, *e.g.,* American Indian Religious Freedom Act, 42 U.S.C. § 1996 *et seq.;* Native American Programs Act of 1974, 42 U.S.C. § § 2991-2992; Comprehensive Employment and Training Act, 29 U.S.C. § 872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. § 1177; Cranston-Gonzalez National Affordable Housing Act, § 958, 104 Stat. 4422; Indian Health Care Amendments of 1988, 25 U.S.C. § 1601 *et seq.*

While splendidly acknowledging this history--specifically including the series of agreements and enactments the history reveals--the majority fails to recognize its import. The descendants of the native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States. It follows that legislation targeting the native Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that "special treatment ... be tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples. 417 U.S., at 555, 94 S.Ct. 2474.

Declining to confront the rather simple logic of the foregoing, the majority would seemingly reject the OHA voting scheme for a pair of different reasons. First, Congress' trust-based power is confined to dealings with tribes, not with individuals, and no tribe or indigenous sovereign entity is found among the native Hawaiians. *Ante,* at 1057-1059. Second, the elections are "elections of the State," not of a tribe, and upholding this law would be "to permit a State, by racial classification, to fence out whole classes of citizens from decision-making in critical state affairs." *Ante,* at 1058- 1059. In my view, neither of these reasons overcomes the otherwise compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian ***535** Islands whose historical sufferings and status parallel those of the continental Native Americans.

Membership in a tribe, the majority suggests, rather than membership in a race or class of descendants, has been the *sine qua non* of governmental power in the realm of Indian law; *Mancari* itself, the majority contends, makes this proposition clear. *Ante,* at 1058. But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court's opinion upholding the BIA preferences in *Mancari;* the hiring preference at issue in that case not only extended to nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood. [FN10] Indeed, the Federal Government simply has not been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone. See nn. 6, 7, *supra.* In light of this precedent, it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government--a possibility of which history and the actions of this Nation have deprived them. [FN11]

FN10. See, *e.g.,* Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L.Rev. 1754, 1761-1762 (1997). As is aptly explained, the BIA preference in that case was based on a statute that extended the preference to ethnic Indians-- identified by blood quantum--who were not members of federally recognized tribes. 25 U.S.C. § 479. Only the implementing regulation included a mention of tribal membership, but even that regulation required that the tribal member also " 'be one-fourth or more degree Indian blood.' " *Mancari,* 417 U.S., at 553, n. 24, 94 S.Ct. 2474.

FN11. Justice BREYER suggests that the OHA definition of native Hawaiians (*i.e.,* Hawaiians who may vote under the OHA scheme) is too broad to be "reasonable." *Ante,* at 1062 (opinion concurring in result). This suggestion does not identify a constitutional defect. The issue in this case

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is *Congress'* power to define who counts as an indigenous person, and *Congress'* power to delegate to States its special duty to persons so defined. (Justice BREYER's interest in *tribal* definitions of membership--and in this Court's holding that tribes' power to define membership is at the core of tribal sovereignty and thus "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)--is thus inapposite.) Nothing in federal law or in our Indian law jurisprudence suggests that the OHA definition of native is anything but perfectly within that power as delegated. See *supra*, at 1064-1066, and nn. 6-7. Indeed, the OHA voters match precisely the set of people to whom the congressional apology was targeted.

Federal definitions of "Indian" often rely on the ability to trace one's ancestry to a particular group at a particular time. See, *e.g.*, 25 CFR, ch. 1, § 5.1 (1999) (extending BIA hiring preference to "persons of Indian descent who are ... (b) [d]escendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"); see also n. 7, *supra*. It can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be "reasonable." The singular federal statute defining "native" to which Justice BREYER points, 43 U.S.C. § 1602(b) (including those defined by blood quantum without regard to membership in any group), serves to underscore the point that membership in a "tribal" structure *per se*, see *ante*, at 1061, is not the acid test for the exercise of federal power in this arena. See R. Clinton, N. Newton, & M. Price, American Indian Law 1054-1058 (3d ed.1991) (describing provisions of the Alaska Native Claims Settlement Act creating geographic regions of natives with common heritage and interest, 43 U.S.C. § 1606, requiring those regions to organize a native corporation in order to qualify for settlement benefits, § 1607, and establishing the Alaska Native Fund of federal moneys to be distributed to "enrolled natives," § § 1604-1605); see also *supra*, at 1066, and n. 10. In the end, what matters is that the determination of indigenous status or "real group membership," *ante*, at 1062 (BREYER, J., concurring in result), is one to be made by Congress--not by this Court.

****1067 *536** Of greater concern to the majority is the fact that we are confronted here with a state constitution and legislative enactment--passed by a majority of the entire population of Hawaii--rather than a law passed by Congress or a tribe itself. See, *e.g.*, *ante*, at 1058-1060. But as our own precedent makes clear, this reality does not alter our analysis. As I have explained, OHA and its trustee elections can hardly be characterized simply as an "affair of the State" alone; they are the instruments for implementing the Federal ***537** Government's trust relationship with a once sovereign indigenous people. This Court has held more than once that the federal power to pass laws fulfilling the federal trust relationship with the Indians may be delegated to the States. Most significant is our opinion in *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 500-501, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), in which we upheld against a Fourteenth Amendment challenge a state law assuming jurisdiction over Indian tribes within a State. While we recognized that States generally do not have the same special relationship with Indians that the Federal Government has, we concluded that because the state law was enacted "in response to a federal measure" intended to achieve the result accomplished by the challenged state law, the state law itself need only " 'rationally further the purpose identified by the State.' " *Id.*, at 500, 99 S.Ct. 740 (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) *(per curiam)*).

The state statutory and constitutional scheme here was without question intended to implement the express desires of the Federal Government. The Admissions Act in § 4 mandated that the provisions of the Hawaiian Homes Commission Act "shall be adopted," with its multiple provisions expressly benefiting native Hawaiians and not others. 73 Stat. 5. More, the Admissions Act required that the proceeds from the lands granted to the State "shall be held by said State as a public trust for ... the betterment of the conditions of native Hawaiians," and that those proceeds "shall be managed and disposed of ... in such manner as the constitution and laws of said State may provide, and their use for any

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other object shall constitute a breach of trust for which suit may be brought by the United States." § 5, *id.*, at 6. The terms of the trust were clear, as was the discretion granted to the State to administer the ****1068** trust as the State's laws "may provide." And Congress continues to fund OHA on the understanding that it is thereby furthering the federal trust obligation.

***538** The sole remaining question under *Mancari* and *Yakima* is thus whether the State's scheme "rationally further[s] the purpose identified by the State." Under this standard, as with the BIA preferences in *Mancari*, the OHA voting requirement is certainly reasonably designed to promote "self-government" by the descendants of the indigenous Hawaiians, and to make OHA "more responsive to the needs of its constituent groups." *Mancari*, 417 U.S., at 554, 94 S.Ct. 2474. The OHA statute provides that the agency is to be held "separate" and "independent of the [State] executive branch," Haw.Rev.Stat. § 10-4 (1993); OHA executes a trust, which, by its very character, must be administered for the benefit of Hawaiians and native Hawaiians, § § 10-2, 10-3(1), 10-13.5; and OHA is to be governed by a board of trustees that will reflect the interests of the trust's native Hawaiian beneficiaries, Haw. Const., Art. XII, § 5 (1993); Haw.Rev.Stat. § 13D-3(b) (1993). OHA is thus "directed to participation by the governed in the governing agency." *Mancari*, 417 U.S., at 554, 94 S.Ct. 2474. In this respect among others, the requirement is "reasonably and directly related to a legitimate, nonracially based goal." *Ibid.*

The foregoing reasons are to me more than sufficient to justify the OHA trust system and trustee election provision under the Fourteenth Amendment.

III

Although the Fifteenth Amendment tests the OHA scheme by a different measure, it is equally clear to me that the trustee election provision violates neither the letter nor the spirit of that Amendment. [FN12]

FN12. Just as one cannot divorce the Indian law context of this case from an analysis of the OHA scheme under the Fourteenth Amendment, neither can one pretend that this law fits simply within our non-Indian cases under the Fifteenth Amendment. As the preceding discussion of *Mancari* and our other Indian law cases reveals, this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates. It is only by refusing to face this Court's entire body of Indian law, see *ante*, at 1053-1054, that the majority is able to hold that the OHA qualification denies non-"Hawaiians" the right to vote "on account of race."

***539** Section 1 of the Fifteenth Amendment provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15.

As the majority itself must tacitly admit, *ante*, at 1055-1056, the terms of the Amendment itself do not here apply. The OHA voter qualification speaks in terms of ancestry and current residence, not of race or color. OHA trustee voters must be "Hawaiian," meaning "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples have thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993). The ability to vote is a function of the lineal *descent* of a modern-day resident of Hawaii, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the "peoples" from whom that descendant arises.

The distinction between ancestry and race is more than simply one of plain language. The ability to trace one's ancestry to a particular progenitor at a single distant point in time may convey no information about one's own apparent or acknowledged race today. Neither does it of necessity imply one's own identification ****1069** with a particular race, or the exclusion of any others "*on account of race.*" The terms manifestly carry distinct meanings, and ancestry was not included by the Framers in the Amendment's prohibitions.

Presumably recognizing this distinction, the majority relies on the fact that "[a]ncestry can be a proxy for race." *Ante*, at 1055. That is, of course, true, but it by no means ***540** follows that ancestry is always a

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proxy for race. Cases in which ancestry served as such a proxy are dramatically different from this one. For example, the literacy requirement at issue in *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), relied on such a proxy. As part of a series of blatant efforts to exclude blacks from voting, Oklahoma exempted from its literacy requirement people whose ancestors were entitled to vote prior to the enactment of the Fifteenth Amendment. The *Guinn* scheme patently "served only to perpetuate ... old [racially discriminatory voting] laws and to effect a transparent racial exclusion." *Ante,* at 1055. As in *Guinn,* the voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens--a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.

That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies. In *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), for example, the Court held that the Amendment proscribed the Texas "Jaybird primaries" that used neutral voting qualifications "with a single proviso--Negroes are excluded," *id.,* at 469, 73 S.Ct. 809. Similarly, in *Smith v. Allwright,* 321 U.S. 649, 664, 64 S.Ct. 757, 88 L.Ed. 987 (1944), it was the blatant "discrimination against Negroes" practiced by a political party that was held to be state action within the meaning of the Amendment. Cases such as these that "strike down these voting systems ... designed to exclude one racial class (at least) from voting," *ante,* at 1055, have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries ***541** of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778. A trust whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept. See 2 A. Scott & W. Fratcher, Law of Trusts § 108.3 (4th ed.1987). The Committee that drafted the voting qualification explained that the trustees here should be elected by the beneficiaries because "people to whom assets belong should have control over them .... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." [FN13] The described purpose of this aspect of the classification thus exists wholly apart from race. It is directly focused on promoting both the delegated federal mandate, and the terms of the State's own trustee responsibilities.

FN13. 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, p. 644.

The majority makes much of the fact that the OHA trust--which it assumes is legitimate--should be read as principally intended to benefit the smaller class of ****1070** "native Hawaiians," who are defined as at least one-half descended from a native islander circa 1778, Haw.Rev.Stat. § 10-2 (1993), not the larger class of "Hawaiians," which includes "any descendant" of those aboriginal people who lived in Hawaii in 1778 and "which peoples thereafter have continued to reside in Hawaii," *ibid.* See *ante,* at 1060. It is, after all, the majority notes, the larger class of Hawaiians that enjoys the suffrage right in OHA elections. There is therefore a mismatch in interest alignment between the trust beneficiaries and the trustee electors, the majority contends, and it thus cannot be said that the class of qualified voters here is defined solely by beneficiary status.

***542** While that may or may not be true depending upon the construction of the terms of the trust, there is surely nothing racially invidious about a decision to enlarge the class of eligible voters to include "any descendant" of a 1778 resident of the Islands. The broader category of eligible voters serves quite practically to ensure that, regardless how "dilute" the *race* of native Hawaiians becomes--a phenomenon also described in the majority's lavish historical summary, *ante,* at 1051--there will remain a voting interest whose ancestors were a part of a political, cultural community, and who have inherited through participation and memory the set of traditions the trust seeks to protect. The putative mismatch only underscores the reality that it cannot be purely a racial interest that either the trust or the election provision seeks to secure; the political and cultural

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interests served are--unlike *racial* survival--shared by both native Hawaiians and Hawaiians. [FN14]

> FN14. Of course, the majority's concern about the absence of alignment becomes salient only if one assumes that something other than a *Mancari*-like political classification is at stake. As this Court has approached cases involving the relationship among the Federal Government, its delegates, and the indigenous peoples--including countless federal definitions of "classes" of Indians determined by blood quantum, see n. 7, *supra*--any "racial" aspect of the voting qualification here is eclipsed by the political significance of membership in a once-sovereign indigenous class.
> Beyond even this, the majority's own historical account makes clear that the inhabitants of the Hawaiian Islands whose descendants constitute the instant class are identified and remain significant as much because of culture as because of race. By the time of Cook's arrival, "the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure ... well-established traditions and customs and ... a polytheistic religion." *Ante,* at 1048. Prior to 1778, although there "was no private ownership of land," *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the native Hawaiians "lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion," 42 U.S.C. § 11701(4). According to Senator Akaka, their society "was steeped in science [and they] honored their *'aina* (land) and environment, and therefore developed methods of irrigation, agriculture, aquaculture, navigation, medicine, fishing and other forms of subsistence whereby the land and sea were efficiently used without waste or damage. Respect for the environment and for others formed the basis of their culture and tradition.' " App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E-4. Legends and oral histories passed from one generation to another are reflected in artifacts such as carved images, colorful feathered capes, songs, and dances that survive today. For some, Pele, the God of Fire, still inhabits the crater of Kilauea, and the word of the Kahuna is still law. It is this culture, rather than the Polynesian race, that is uniquely Hawaiian and in need of protection.

543** Even if one refuses to recognize the beneficiary status of OHA trustee voters entirely, [FN15] it cannot be said that the ancestry-*1071** based voting qualification here simply stands in the ***544** shoes of a classification that would either privilege or penalize "on account of " race. The OHA voting qualification--part of a statutory scheme put in place by democratic vote of a multiracial majority of all state citizens, including those non-"Hawaiians" who are not entitled to vote in OHA trustee elections-- appropriately includes every resident of Hawaii having at least one ancestor who lived in the islands in 1778. That is, among other things, the audience to whom the congressional apology was addressed. Unlike a class including only full-blooded Polynesians--as one would imagine were the class strictly defined in terms of race--the OHA election provision *excludes* all full-blooded Polynesians currently residing in Hawaii who are not descended from a 1778 resident of Hawaii. Conversely, unlike many of the old southern voting schemes in which any potential voter with a "taint" of non-Hawaiian blood would be excluded, the OHA scheme excludes no descendant of a 1778 resident because he or she is also part European, Asian, or African as a matter of race. The classification here is thus both too inclusive and not inclusive enough to fall strictly along racial lines.

> FN15. Justice BREYER's even broader contention that "there is no 'trust' for native Hawaiians here," *ante,* at 1061, appears to make the greater mistake of conflating the public trust established by Hawaii's Constitution and laws, see *supra,* at 1067-1068, with the "trust" relationship between the Federal Government and the indigenous peoples. According to Justice BREYER, the "analogy on which Hawaii's justification must depend," *ante,* at 1062, is "destroy[ed]" in part by the fact that OHA is not a trust (in the former sense of a trust) for native Hawaiians alone. Rather than looking to the terms of the public trust itself for this proposition, Justice BREYER relies on the terms of the land conveyance to Hawaii in

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part of the Admissions Act. But the portion of the trust administered by OHA does not purport to contain in its corpus all 1.2 million acres of federal trust lands set aside for the benefit of all Hawaiians, including native Hawaiians. By its terms, only "[t]wenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians." Haw.Rev.Stat. § 10-13.5 (1993). This portion appears to coincide precisely with the one-fifth described purpose of the Admissions Act trust lands to better the conditions of native Hawaiians. Admissions Act § 5(f), 73 Stat. 6. Neither the fact that native Hawaiians have a specific, beneficial interest in only 20% of trust revenues, nor the fact that the portion of the trust administered by OHA is supplemented to varying degrees by nontrust moneys, negates the existence of the trust itself.

Moreover, neither the particular terms of the State's public trust nor the particular source of OHA funding "destroys" the centrally relevant trust "analogy" on which Hawaii relies--that of the relationship between the Federal Government and indigenous Indians on this continent, as compared with the relationship between the Federal Government and indigenous Hawaiians in the now United States-owned Hawaiian Islands. That trust relationship--the only trust relevant to the Indian law analogy--includes the power to delegate authority to the States. As we have explained, *supra,* at 1064-1066, the OHA scheme surely satisfies the established standard for testing an exercise of that power.

At pains then to identify at work here a singularly "racial purpose," *ante,* at 1056, 1057--whatever that might mean, although one might assume the phrase a "proxy" for "racial discrimination"--the majority next posits that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Ante,* at 1057. That is, of course, true when ancestry is the basis for denying or abridging one's right to vote or to share the blessings of freedom. But it is quite wrong to ignore the relevance of ancestry to claims of ***545** an interest in trust property, or to a shared interest in a proud heritage. There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees. Such a law would be equally benign, regardless of whether those descendants happened to be members of the same race. [FN16]

FN16. Indeed, "[i]n one form or another, the right to pass on property--to one's family in particular--has been part of the Anglo-American legal system since feudal times." *Hodel v. Irving,* 481 U.S. 704, 716, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. *Id.,* at 713-717. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.

****1072** In this light, it is easy to understand why the classification here is not "demeaning" at all, *ante,* at 1060, for it is simply not based on the "premise that citizens of a particular race are somehow more qualified than others to vote on certain matters," *ibid.* It is based on the permissible assumption in this context that families with "any" ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.

It thus becomes clear why the majority is likewise wrong to conclude that the OHA voting scheme is

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likely to "become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry ***546** is disclosed by their ethnic characteristics and cultural traditions." *Ante,* at 1057. The political and cultural concerns that motivated the nonnative majority of Hawaiian voters to establish OHA reflected an interest in preserving through the self-determination of a particular people ancient traditions that they value. The fact that the voting qualification was established by the entire electorate in the State--the vast majority of which is not native Hawaiian--testifies to their judgment concerning the Court's fear of "prejudice and hostility" against the majority of state residents who are not "Hawaiian," such as petitioner. Our traditional understanding of democracy and voting preferences makes it difficult to conceive that the majority of the State's voting population would have enacted a measure that discriminates against, or in any way represents prejudice and hostility toward, that self-same majority. Indeed, the best insurance against that danger is that the electorate here retains the power to revise its laws.

IV

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the "political consensus" the majority claims it seeks, *ante,* at 1060--a consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii. This was the considered and correct view of the District Judge for the United States District Court for the District of Hawaii, as well as the three Circuit Judges on the Court of Appeals for the Ninth Circuit. [FN17] As Judge Rymer explained:

> FN17. Indeed, the record indicates that none of the 20-plus judges on the Ninth Circuit to whom the petition for rehearing en banc was circulated even requested a vote on the petition. App. to Pet. for Cert. 44a.

***547** "The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity.... Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs.... Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and 'a board of trustees chosen from among those who are interested parties would be the best ****1073** way to insure proper management and adherence to the needed fiduciary principles.' " 18 The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that [petitioner's] right to vote has been denied or abridged in violation of the Fifteenth Amendment. " 18 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because 'people to whom assets belong should have control over them.... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary.' *Id.*"
146 F.3d 1075, 1081-1082 (C.A.9 1998).

In my judgment, her reasoning is far more persuasive than the wooden approach adopted by the Court today.

Accordingly, I respectfully dissent.

Justice GINSBURG, dissenting.

I dissent essentially for the reasons stated by Justice STEVENS in Part II of his dissenting opinion. *Ante,* at 1063-1068 (relying on established federal authority over Native ***548** Americans). Congress' prerogative to enter into special trust relationships with indigenous peoples, *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), as Justice STEVENS cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, whom Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples. See *ante,* at 1065-1066 and n. 9 (STEVENS, J., dissenting). That federal trust responsibility, both the Court and Justice STEVENS recognize, has been delegated by Congress to the

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State of Hawaii. Both the Office of Hawaiian Affairs and the voting scheme here at issue are "tied rationally to the fulfillment" of that obligation. See *Mancari*, 417 U.S., at 555, 94 S.Ct. 2474. No more is needed to demonstrate the validity of the Office and the voting provision under the Fourteenth and Fifteenth Amendments.

120 S.Ct. 1044, 528 U.S. 495, 145 L.Ed.2d 1007, 68 USLW 4138, 00 Cal. Daily Op. Serv. 1341, 2000 Daily Journal D.A.R. 1881, 2000 CJ C.A.R. 898, 13 Fla. L. Weekly Fed. S 105

Briefs and Other Related Documents (Back to top)

• 1999 WL 955376, 68 USLW 3288 (Oral Argument) Oral Argument (Oct. 06, 1999)

• 1999 WL 691999 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Sep. 03, 1999)

• 1999 WL 557073 (Appellate Brief) BRIEF FOR RESPONDENT (Jul. 28, 1999)

• 1999 WL 557268 (Appellate Brief) BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII (Jul. 28, 1999)

• 1999 WL 557271 (Appellate Brief) BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT (Jul. 28, 1999)

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• 1999 WL 557279 (Appellate Brief) BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 557287 (Appellate Brief) BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY CO UNCIL, HA HAWAII, HUI KALAIAINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS AMICI CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

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• 1999 WL 374574 (Appellate Brief) BRIEF FOR PETITIONER (May. 27, 1999)

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9/27/99 Wall St. J. A35

1999 WL-WSJ 24915329

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Monday, September 27, 1999

Rule of Law

Are Hawaiians Indians? The Justice Department Thinks So

By Brett M. **Kavanaugh**

The Aloha state has two classes of citizens: there are Hawaiians and then there are real Hawaiians.

At least that's the message of the state Office of Hawaiian Affairs, which doles out money to certain citizens solely because of their race -- in this case, only to Hawaiians of Polynesian origin ("native Hawaiians," for short). By law, OHA officers must be native Hawaiians and only native Hawaiians can vote in the statewide elections for officers. Hawaiians of all other ethnic backgrounds (whether Latino or African-American or Caucasian, for example) are barred because of their race from receiving OHA funds, voting in OHA elections, or serving as OHA officers.

Sound blatantly unconstitutional? It did to Harold Rice, who was born and bred in Hawaii, but is not of the preferred race (he is white). Rice brought a case against the state contesting this racial scheme, in particular, the state's racial voting qualification.

Mr. Rice's case has now reached the Supreme Court, which is scheduled to hear arguments on Oct. 6. Rice v. Cayetano has implications far beyond the 50th state. Hawaii's naked racial-spoils system, after all, makes remedial set- asides and hiring and admissions preferences look almost trivial by comparison. And if Hawaii is permitted to offer these extraordinary privileges to residents on the basis of race or ethnic heritage, so will every other state.

The Clinton Justice Department nonetheless has filed a brief contending that one's race (at least, if you're a native Hawaiian) can be the sole basis for voting in a state election, serving in a state office, and receiving awards of state money. As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency. And the simple constitutional question posed by Rice is whether Hawaii, by denying citizens the right to vote in a state election on account of race, has violated the 14th and 15th Amendments, which prohibit states from denying individuals the right to vote on account of race.

No doubt recognizing that Hawaii's racial spoils system, including its racial voting qualification, is constitutionally indefensible, the Justice Department has charted a novel legal course. Justice contends that native Hawaiians are the equivalent of an American Indian tribe because Hawaiians are descendants of an "indigenous people" just like American Indians. Therefore, Justice argues, Hawaii's racial scheme is equivalent to constitutionally permissible legislation that singles out Indian tribes and tribal members for special benefits.

But the Justice Department's argument is seriously flawed both as a legal and historical matter. The Constitution expressly established special rules for Indian tribes because the Founders considered Indian tribes to be separate sovereigns. To convert this express recognition of Indian tribal sovereignty into a sweeping license for favorable race-based treatment of the descendants of indigenous people is to allow political correctness to trump the Constitution. A group of people must, in fact, constitute an Indian tribe in order to qualify for the special treatment afforded tribes under the Constitution. The Department of Interior has established strict criteria governing recognition of Indian tribes. Those regulations specify that federal recognition as a tribe is a "prerequisite to the

protection, services and benefits of the Federal government available to Indian tribes."

But neither the Congress nor the Department of Interior has recognized native Hawaiians as an Indian tribe. What's more, Hawaiians have never even applied for recognition as an Indian tribe. The reason is obvious. Native Hawaiians couldn't possibly qualify. They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or in territorial enclaves. They don't even live together in Hawaii. Native Hawaiians are dispersed throughout the state of Hawaii and the United States. In short, native Hawaiians bear none of the indicia necessary to qualify as an Indian tribe.

If Hawaii can enact special legislation for native Hawaiians by analogizing them to Indian tribes, why can't a state do the same for African-Americans? Or for Croatian-Americans? Or for Irish-Americans? After all, Hawaiians originally came from Polynesia, yet the department calls them "indigenous," so why not the same for groups from Africa or Europe? It essentially means that any racial group with creative reasoning can qualify as an Indian tribe. The Justice Department's theory of tribal status thus threatens to end-run the constitutional restrictions on racial classifications that the Supreme Court has reinforced in the last decade.

And that's not all. By claiming that native Hawaiians deserve special privileges because their ancestors lived in Hawaii, the Justice Department's position is also fiercely anti-immigrant, flouting the principle that all American citizens have equal rights regardless of when they became citizens.

At his 1858 Fourth of July address, President Lincoln emphasized that all citizens, whether descended from signers of the Declaration of Independence or new arrivals, were the same in the eyes of the law. As to the new arrivals, he said, "when they look through that old Declaration they find, 'We hold these truths to be self-evident, that all men are created equal,' and then they feel that that moral sentiment evidences their relation to those men, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration, and so they are." But now the Justice Department has turned its back on that bedrock American ideal by arguing that some Hawaiians can't vote in certain state elections solely because their ancestors didn't live in Hawaii.

Rice v. Cayetano, then, is of great moment. The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe. Rather, the Court should rule for Harold Rice and adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: "Under our Constitution there can be no such thing as either a creditor or a debtor race . . . . In the eyes of government, we are just one race here. It is American."

Mr. **Kavanaugh** is an attorney in Washington and together with Robert H. Bork filed an amicus brief in Rice v. Cayetano supporting Harold Rice.

(See related letter: "Letters to the Editor: Righting the Wrongs Perpetrated in Hawaii" -- WSJ Oct. 18, 1999)

---- INDEX REFERENCES ----

NEWS SUBJECT: Editorial & Columns; Public-Policy and Regulatory Issues; Politics; Wall Street Journal (EDC PBP PLT WSJ)

GOVERNMENT: Justice Department; State Government (JUS STE)

REGION: Hawaii; North America; Pacific Rim; United States; Western U.S. (HI NME PRM US USW)

LAYOUT CODES: Op-Ed Articles; Rule of Law (OED RLW)

Word Count: 1089

VI. Product Liability Cases

Brett Kavanaugh – Product Liability

Allegation: Mr. Kavanaugh took the side of big business by filing an amicus brief before the Supreme Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1998), in an attempt to deny recovery to a family who lost its daughter when she fell off a boat and was killed by the propeller.

Facts:

- **The amicus brief filed by Mr. Kavanaugh's client, General Motors Corporation, was consistent with the unanimous opinion of the court below – the Eleventh Circuit – and with the decisions of many other courts across the country.**
  - ✓ The Eleventh Circuit held that the Georgia law was impliedly preempted because the Coast Guard – which had exclusive authority in boat and equipment safety standards – determined that propeller guards should not be required because their use could actually increase the danger to boaters.
- **Numerous courts, both state and federal, already had adopted the position taken by Mr. Kavanaugh in the amicus brief – that state common law claims for negligence or product liability were either expressly or impliedly preempted by the Federal Boat Safety Act.**
  - ✓ At the time the amicus brief was submitted, courts in California, Georgia, Connecticut, Ohio, Illinois, and Michigan had come to the conclusion argued in the brief filed by Mr. Kavanaugh.
  - ✓ The district court judge in *Lewis v. Brunswick*, Carter appointee Judge Dudley Bowen, also came to the conclusion that the plaintiff's negligence and strict liability claims based on the lack of a propeller guard were preempted by the Boat Safety Act.
  - ✓ The U.S. Supreme Court did not decide the case because the parties settled the claims before a decision was issued.
- Mr. Kavanaugh's client was interested in the case only because it manufactured vehicles subject to the Motor Vehicle Safety Act, which included language identical to the Boat Safety Act preemption language at issue in *Lewis v. Brunswick*.
  - ✓ Congress, in the legislative history of the Boat Safety Act, explained that the preemption provision "also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." *Id.* at 1503 (citing S.Rep. No. 92-248).
- Although nearly four years later the Supreme Court did effectively overrule this Eleventh Circuit decision in another case, *Sprietsma v. Mercury Marine*, 537 U.S. 52 (2002), the Court did state that the arguments made by Mr. Kavanaugh's clients in the *Lewis* case - that such claims are implicitly preempted by the statute and by the Coast Guard decision not to regulate propeller guards - "[b]oth are viable pre-emption theories." *Id.* at 64.

No. 97-288

IN THE

Supreme Court of the United States

October Term, 1997

[redacted]

Petitioners

v.

[redacted]

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT 6

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE 10

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE 19

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: **Page**

American Airlines v. Wolens,
513 U.S. 219 (1995) 24-25
Asahi Metal Indus. Co. v. Superior Ct.,
480 U.S. 102 (1987) 15
Beatty v. Trailmaster Prods.,
625 A.2d 1005 (Md. 1993) 23
BMW of N. Am., Inc. v. Gore,
116 S. Ct. 1589 (1996) 16
Brooks v. Beech Aircraft Corp.,
902 P.2d 54 (N.M. 1995) 22-23
Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union,
468 U.S. 491 (1984) 27
CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) ..... *passim*
Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981) 29
Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) ..... *passim*
Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 4, 18, 19
Free v. Bland,
369 U.S. 663 (1962) 27
Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 5, 7, 26
International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 6, 7, 28
Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 15
Marks v. United States,
430 U.S. 188 (1977) 14-15

CASES - Continued: **Page**

Medtronic, Inc. v. Lohr,
116 S. Ct. 2240 (1996) ..... *passim*
Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 5, 24
New York Times v. Sullivan,
376 U.S. 254 (1964) 18
Pennsylvania R.R. v. Puritan Coal Mining Co.,
237 U.S. 121 (1915) 24, 25
Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 5, 25
Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 6, 25, 29, 30
San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,
359 U.S. 236 (1959) 16
Sheehan v. Cincinnati Shaper Co.,
555 A.2d 1352 (Pa. Super. 1989) 23
South Dakota v. Yankton Sioux Tribe,
No. 96-1581,
slip op. at 17 (U.S. Jan. 26, 1998) 25
Swift v. Tyson,
41 U.S. (16 Pet.) 1 (1842) 19
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 6, 28
United Gas Improvement Co. v. Continental Oil Co.,
381 U.S. 392 (1965) 15
Wagner v. Clark Equip. Co.,
700 A.2d 38 (Conn. 1997) 22

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const. art. VI, cl. 2 ..... 18, 27
The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994) *passim*
Federal Cigarette Labeling and Advertising Act,
79 Stat. 282 (1965) 12

STATUTES - Continued: **Page**

Federal Railroad Safety Act of 1970, 84 Stat. 971 13
Medical Device Amendments of 1976, 90 Stat. 539 14
National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) 1, 2, 7
Public Health Cigarette Smoking Act of 1969, 84 Stat. 87 ..... 12, 13
Rules of Decision Act, 28 U.S.C. § 1652 ..... 18, 19
15 U.S.C. § 1334(b) 12
21 U.S.C. § 360k(a) 14
45 U.S.C. § 434 13
Kan. Stat. Ann. § 60-3304(a) (1996) 22
Mich. Comp. L. Ann. § 600.2946(4) (West 1997) 22
33 C.F.R. Pts. 175, 177, 181, 183 (1997) 9,29
36 Fed. Reg. 15,764-65 (Aug. 11, 1971) 8, 9
37 Fed. Reg. 15,777-85 (Aug. 4, 1972) 9
38 Fed. Reg. 71 (Dec. 27, 1972) 9
38 Fed. Reg. 6914-15 (Mar. 8, 1973) 9, 10
S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 8,22,23

MISCELLANEOUS:

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales v. TWA*, (No. 90-1604) 24, 25
Guido Calabresi, *A Common Law for the Age of Statutes* (1982) 17
Melvin Eisenberg, *The Nature of the Common Law*, (1988) 17
Restatement (Third) of Torts: Products Liability § 4, cmt. (proposed final draft Apr. 1, 1997) 22
Transcript of Oral Argument, *Medtronic, Inc. v. Lohr* (No. 95-754) 15

No. 97-288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKI LEWIS, ET VIR., ETC.,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.[1]

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states

[1] Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. *Amicus curiae* General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local

conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. *See, e.g., Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an *ad hoc* collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311(g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. *See Medtronic*, 116 S. Ct. at 2259 (plurality opinion) (implied-

conflict preemption inquiry is proper); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); *CSX*, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain

exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually *has* this effect, for reasons that will be discussed in more detail in Sections II and III, *infra*.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. *See* U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. *See id.*

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. *Myrick* is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. *See* U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable." *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority

conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision

operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.[2]

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

[2] Contrary to the assertions made by the Solicitor General, *see* U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that *all* common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to *stare decisis* as the Court addresses it once again in this case.[3]

[3] The Solicitor General directly disagrees with the holdings of these cases, *see* U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in *Medtronic*, *CSX*, and *Cipollone* when discussing this point. *See* Petrs. Br. 24-28.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement"

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the

[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety

(continued...)

issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 2262 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 2259

[6](...continued)
hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

(Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, *Medtronic* (No. 95-754), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46. The Government offers no explanation for this abrupt about-face from its position in *Medtronic*.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in

[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. *See BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually

codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g.*, *Medtronic*, 116

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[8] The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* U.S. Br. 18-19. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. *Id.* We agree that the suggestion is absurd; it also is *irrelevant*. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioners and their *amici* put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of

decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. *See* Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in *Medtronic*, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. *See* 116 S. Ct. at 2255; *id.* at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. *See* 46 U.S.C. § 4306. This provision

establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or

a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense,

and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "[c]ompliance with . . . this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a

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[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, *see, e.g.*, *Beatty v. Trailmaster Prods.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *see, e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

complete "anti-preemption" clause, and *all* state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, *see* Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in *Medtronic*, the position urged by petitioners and their *amici* "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. *Id.* at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." *Id.* at 2259; *see also supra* Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act.

> *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales* (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." *South Dakota v. Yankton Sioux Tribe*, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting *Morales*, 504 U.S. at 384)).[10]

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

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[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." *See id.* at 21; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. *See* Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. *See* U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in *Cipollone*, *see* 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in *CSX*, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. *See* 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in *Myrick*, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. *This argument is without merit.*

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption

analysis" in *Cipollone* itself, *id.* at 289, and had done so again in *CSX*, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, *see id.* After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. *See id.* at 287-88.

Finally, in *Medtronic*, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. *See, e.g.*, 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." *Id.* at 2259 (citing *Myrick*, 514 U.S. at 289). The statute at issue in *Medtronic*, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501

(1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry.[11]

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption.[12] For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing . . . a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted

[11] Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Cipollone*, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); *id.* at 544 (Scalia, J., concurring and dissenting in part) (same).

[12] The Solicitor General also appears to accept this proposition, for he states that "[u]nder our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, *amicus curiae* General Motors accepts the position taken by the Court of Appeals, *see* Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act.[13] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).[14]

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that

[13] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

[14] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 28-29 & n.19, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183.

requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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January 28, 1998

Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.

Vicky LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Gary Lewis, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,
v.
BRUNSWICK CORPORATION, Defendant-Appellee.

No. 96-8130.

March 21, 1997.

Parents of recreational boat passenger who died after she fell or was thrown from boat and was struck by the boat's propeller brought suit in state court against manufacturer of boat's outboard engine, asserting negligence and strict liability claims based on absence of propeller guard. Parents also asserted fraudulent misrepresentation claims, based on contention that manufacturer misrepresented performance differences between guarded engines and unguarded engines to discourage government agencies from adopting safety standard requiring propeller guards. After removal, the United States District Court for the Southern District of Georgia, No. CV 195-096, Dudley H. Bowen, Jr., J., 922 F.Supp. 613, granted summary judgment in favor of manufacturer on ground that claims were preempted by the Federal Boat Safety Act (FBSA), and plaintiffs appealed. The Court of Appeals, Carnes, Circuit Judge, held that: (1) text of the FBSA does not provide clear manifestation of intent to preempt claims, and thus they were not expressly preempted; (2) position of Coast Guard rejecting propeller guard requirement is tantamount to a ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in the form of common-law state tort claims; and (3) Coast Guard position on propeller guards also preempted fraudulent misrepresentation claim.

Affirmed.

West Headnotes

[1] **Federal Courts** 776
170Bk776 Most Cited Cases

Decision of district court granting summary judgment on ground of preemption was subject to de novo review.

[2] **States** 18.5
360k18.5 Most Cited Cases

Any state law that conflicts with federal law is preempted by the federal law and is without effect under the supremacy clause of the Constitution. U.S.C.A. Const. Art. 6, cl. 2.

[3] **States** 18.11
360k18.11 Most Cited Cases

[3] **States** 18.13
360k18.13 Most Cited Cases

State regulation established under historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress; thus, intent of Congress is the touchstone of preemption analysis.

[4] **States** 18.3
360k18.3 Most Cited Cases

Congressional intent to preempt state law may be revealed in several ways: "express preemption," in which Congress defines explicitly extent to which its enactments preempt state law; "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law stands as an obstacle to the accomplishment and execution of the full purposes

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and objectives of Congress.

[5] **States** 18.13
360k18.13 Most Cited Cases

In areas traditionally regulated by the states through their police powers, Court of Appeals applies presumption in favor of narrow interpretation of an express preemption clause.

[6] **Shipping** 11
354k11 Most Cited Cases

[6] **States** 18.65
360k18.65 Most Cited Cases

Because the Federal Boat Safety Act preempts area of safety that historically has been regulated by the states through their police powers, Court of Appeals must construe the Act's preemption clause narrowly. 46 U.S.C.A. § 4306.

[7] **Products Liability** 62
313Ak62 Most Cited Cases

[7] **States** 18.65
360k18.65 Most Cited Cases

Express preemption clause of the Federal Boat Safety Act does not cover common- law state tort claims; although preemption clause could be read to cover such claims, savings clause indicates that at least some common-law claims survive express preemption, and resulting doubt must be resolved in favor of narrower interpretation; however, conflict between express preemption clause and savings clause precludes any conclusion that such claims are expressly saved. 46 U.S.C.A. § 4306.

[8] **Products Liability** 62
313Ak62 Most Cited Cases

[8] **States** 18.65
360k18.65 Most Cited Cases

State tort claims are impliedly preempted under the Federal Boat Safety Act (FBSA) if they prevent or hinder the FBSA from operating the way Congress intended it to operate; in deciding whether claims conflict with purposes of the FBSA, Court of Appeals does not apply presumption against preemption, even though common-law tort claims are mechanism of police powers of the state, as relative importance to the state of its own law is not material when there is a conflict with a valid federal law. 46 U.S.C.A. § 4301 et seq.

[9] **States** 18.3
360k18.3 Most Cited Cases

Federal decision to forego regulation in given area may imply an authoritative federal determination that area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.

[10] **States** 18.3
360k18.3 Most Cited Cases

Although federal decision not to regulate does not always have preemptive effect, it does have such where failure of federal officials affirmatively to exercise their full authority takes on character of a ruling that no such regulation is appropriate or approved pursuant to policy of statute.

[11] **Products Liability** 62
313Ak62 Most Cited Cases

[11] **States** 18.65
360k18.65 Most Cited Cases

State common-law negligence and product liability claims against manufacturer of boat engine, based on theory that engine was defective because it lacked a propeller guard, were impliedly preempted by the Federal Boat Safety Act; because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting propeller guard requirement is tantamount to ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in form of common-law tort claims. 46 U.S.C.A. § 4301 et seq.

[12] **Products Liability** 62
313Ak62 Most Cited Cases

[12] **States** 18.65
360k18.65 Most Cited Cases

Product liability claims based on defective design or installation of products that are already installed, as opposed to claims based on failure to install a certain device, are not impliedly preempted under the Federal Boat Safety Act (FBSA); permitting such

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claims against manufacturers for negligent or defective design of products required by the Coast Guard, or product provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and is consistent with the FBSA scheme; however, claims based on failure to install product that Coast Guard has decided should not be required would conflict with purpose of the FBSA to insure regulatory uniformity. 46 U.S.C.A. § 4301 et seq.

[13] **Products Liability** 62
313Ak62 Most Cited Cases

[13] **States** 18.65
360k18.65 Most Cited Cases

State law fraudulent misrepresentation claim against manufacturer of boat engine, seeking to impose liability upon manufacturer for attempting to persuade the Coast Guard and others that propeller guards are unsafe, was impliedly preempted by Coast Guard's position that propeller guards should not be required under the Federal Boat Safety Act; necessary element of causation in claim was that but for wrongful conduct of manufacturer, propeller guards would have been required by Coast Guard; however, such judgment conflicted with Coast Guard's position that propeller guards should not be required. 46 U.S.C.A. § 4301 et seq.

***1496** David E. Hudson, William James Keogh, III, Hull, Towill, Norman & Barrett, Augusta, GA, for plaintiffs-appellants.

***1497** Ronald L. Reid, James W. Hagan, Alston & Bird, Atlanta, GA, Daniel J. Connolly, Faegre & Benson, Minneapolis, MN, for defendant- appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before BIRCH, BLACK and CARNES, Circuit Judges.

CARNES, Circuit Judge:

Gary and Vicky Lewis appeal the district court's grant of summary judgment in favor of Brunswick Corporation ("Brunswick") on the Lewises' state common law negligence, product liability, and fraudulent misrepresentation claims. The Lewises sued Brunswick to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and then struck by a Brunswick engine propeller. According to the Lewises, the Brunswick engine involved in their daughter's death was defective because it lacked a propeller guard. Upon Brunswick's motion for summary judgment, the district court held that the Lewises' claims were preempted by the Federal Boat Safety Act, 46 U.S.C. § § 4301-4311 ("the FBSA" or "the Act"). We affirm.

In Part I of this opinion, we describe the facts and the procedural history of this case. We describe the standard of review in Part II, and we outline the Act and its regulatory scheme in Part III. In Part IV, we recount the actions taken by the Coast Guard regarding propeller guards. We then summarize the positions of the parties in Part V of the opinion. In Part VI, we describe in general terms how state law may be preempted. We then proceed to consider, in Parts VII and VIII of the opinion, whether the Lewises' claims are preempted by the Act.

As we will explain in Part VII, the preemption clause and the savings clause in the Act provide contradictory indications of congressional intent relating to whether the Lewises' claims are expressly preempted. Because the text of the FBSA does not provide a clear manifestation of intent to preempt the claims, we cannot hold that they are expressly preempted. On the other hand, due to the conflict between the preemption clause and the savings clause, we cannot hold that those claims are expressly saved from preemption either. Consequently, our resolution of the question of preemption in this case turns on whether the Lewises' claims are impliedly preempted by the Act. We hold that they are, because those claims conflict with the Coast Guard's position that propeller guards should not be required.

I. FACTS AND PROCEDURAL HISTORY

On June 6, 1993, Kathryn Lewis was spending the day with her boyfriend's family in a boat on Strom Thurmond Lake in Georgia. While the boat was pulling Kathryn's boyfriend on an inner tube, the driver made a right-hand turn. Kathryn fell or was thrown from the left side of the boat. Once in the water, Kathryn was struck repeatedly in the head and body by the propeller of an engine designed and manufactured by Brunswick. The engine did not have a propeller guard. Kathryn died instantly.

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The Lewises filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product. They also claim that Brunswick committed negligence by failing to install a propeller guard on the engine. The Lewises' third claim avers that Brunswick attempted to suppress the production of propeller guards by third persons and exaggerated the performance differences between guarded engines and unguarded engines to discourage government agencies from adopting a safety standard requiring propeller guards.

Brunswick removed this case to federal district court on diversity grounds and moved for summary judgment. In its summary judgment motion, Brunswick contended that all of the Lewises' claims were preempted by the FBSA. The district court agreed ***1498** and granted summary judgment in favor of Brunswick. The Lewises appeal.

II. STANDARD OF REVIEW

[1] We apply the same legal standards in our preemption analysis that the district court was required to apply in its order granting summary judgment; therefore, we review the district court's decision *de novo*. *E.g.*, *Southern Solvents, Inc. v. New Hampshire Ins. Co.*, 91 F.3d 102, 104 (11th Cir.1996).

III. THE FEDERAL BOAT SAFETY ACT

The FBSA was enacted in 1971 in part "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating--presently the Secretary of Transportation." *P.L. 92-75, Federal Boat Safety Act of 1971*, S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333. To implement that goal, the Act grants authority to the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302 (West Supp.1995). The Secretary of Transportation has delegated rulemaking authority under the FBSA to the United States Coast Guard. *See* 49 C.F.R. § 1.46(n)(1) (1996).

The FBSA requires the Coast Guard to follow certain guidelines and procedures when promulgating a regulation under 46 U.S.C. § 4302. For instance, the Coast Guard must consider certain available data and "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C.A. § § 4302(c)(1)-(2) (West Supp.1995). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C.A. § 4302(c)(3) (West Supp.1995). Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council ("the Advisory Council") on the need for regulation. 46 U.S.C. § 4302(c)(4).

IV. COAST GUARD CONSIDERATION OF A PROPELLER GUARD REGULATION

In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and safety disadvantages of propeller guards. In response, the Advisory Council appointed a Propeller Guard Subcommittee "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee 1 (1989). The Advisory Council also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." *Id.* at Appendix A.

The Advisory Council Subcommittee held hearings on three occasions and received information from a variety of individuals and groups interested in the topic of propeller guards. *See id.* at 2-4. One of the matters on which the Subcommittee received information was propeller guard litigation, and the Subcommittee devoted a section of its report to the topic. *Id.* at 4. That section states that, at the time of the hearings, propeller guard advocates were petitioning federal and state legislators to mandate propeller guards. According to the Subcommittee Report, a legislative or administrative mandate "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them"; therefore, feasibility was an important question before the Subcommittee. *Id.* at 5. The report also discusses the theories of liability that were being asserted by propeller guard victims and the defenses used by manufacturers. *Id.* at 4-5. Immediately ***1499**

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following that discussion, the report notes that "[m]anufacturers are opposed to mandatory propeller guards." *Id.* at 5.

The Subcommittee also considered the technical issues posed by propeller guards. After reviewing the available scientific data and testimony, the Subcommittee found that propeller guards affect boat operation adversely at speeds greater than 10 miles per hour. *Id.* at 21. Further, the Subcommittee found that propeller guards would not increase overall safety, because they increase the chances of contact between a blunt object and a person in the water. *Id.* at 20-21. The Subcommittee Report states:

> Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counter-productive and can create new hazards of equal or greater consequence.... Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at 23-24. The report also states that:

> boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.
>
> Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should not be mandated. The Subcommittee does not agree....

Id. at 20. In its conclusion, the Advisory Council Subcommittee Report recommends that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24.

The Subcommittee presented its report to the entire Advisory Council, which accepted the report and adopted the recommendations of the Subcommittee. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (Nov. 6-7, 1989). The Advisory Council then forwarded the report and recommendations to the Coast Guard. The Coast Guard adopted each of the Advisory Council's recommendations, giving explanations of the Coast Guard's position on each matter. *See* Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990). The Coast Guard's position on propeller guards, which is set out in that letter, is as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guard devices or other information on the state of the art.

Id. at 1.

V. POSITIONS OF THE PARTIES

The Lewises contend that the FBSA does not expressly or impliedly preempt state law ***1500** tort claims based on the absence of a propeller guard on a boat engine. According to the Lewises, common law claims are expressly saved from preemption by the Act's savings clause. Furthermore, the Lewises argue, the Act does not preempt any state law, regulation, or claims until the Coast Guard issues a formal regulation on the matter. There being no regulation on propeller guards, the Lewises assert they may proceed with their case.

In response, Brunswick argues that the FBSA expressly preempts any state regulation, including regulation through common law claims, that conflicts

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with a Coast Guard regulation or regulatory position. Brunswick contends that the Coast Guard has made a regulatory decision that propeller guards cannot be required. For that reason, Brunswick says, the Lewises' claims are expressly preempted by the Act. Furthermore, even if the Lewises' claims are not expressly preempted, Brunswick argues that the claims conflict with the Coast Guard's position that propeller guards should not be required. For that reason, Brunswick contends, the claims are preempted by implication.

VI. AN OVERVIEW OF PREEMPTION DOCTRINE

[2][3] Any state law that conflicts with federal law is preempted by the federal law and is without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). State regulation established under the historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress. *Id.* Accordingly, the intent of Congress is the touchstone of preemption analysis. *See id.*

[4] Congressional intent to preempt state law may be revealed in several ways: (1) "express preemption," in which Congress defines explicitly the extent to which its enactments preempt state law; (2) "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3) "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996) (citations omitted).

[5] By including an express preemption clause in the FBSA, Congress has demonstrated its intent that the Act preempt at least some state law. *See* 46 U.S.C. § 4306. Therefore, the issue in this case is not whether Congress intended for the FBSA to have any preemptive effect, but the intended scope of preemption--the extent to which the FBSA preempts state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, ----, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996). In areas traditionally regulated by the states through their police powers, we apply a presumption in favor of a narrow interpretation of an express preemption clause. *Id.* at ----, 116 S.Ct. at 2250.

VII. EXPRESS PREEMPTION

Brunswick contends that the Lewises' claims fall within the scope of the FBSA's express preemption clause, which provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or ***1501** circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C.A. § 4306 (West Supp.1995). According to Brunswick, the Lewises' claims, if successful, would result in a regulation imposing a propeller guard requirement. That regulation would not be identical to--in fact, it would be in conflict with--the Coast Guard's position that propeller guards should not be required. In Brunswick's view, the Coast Guard's position is equivalent to a "regulation prescribed under section 4302," which preempts state law. Following this reasoning, Brunswick argues that the Lewises' claims are preempted by the express terms of the FBSA preemption clause.

In response, the Lewises contend that the phrase "law or regulation" does not reach common law claims, because Congress did not mention "common law" specifically in the preemption clause. According to the Lewises, Congress' decision not to specify "common law" in the preemption clause demonstrates congressional intent to save common law claims. As Brunswick points out, however, the omission of the phrase "common law" in the preemption clause is not determinative, because "law" and "regulation" may be read to include state tort actions. *See Cipollone*, 505 U.S. at 520-30, 112 S.Ct. at 2619-25 (1992) (plurality opinion) (holding that the phrase "State law" in the Federal Cigarette Labeling and Advertising Act was intended to include common law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (common law claims

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fall within the scope of the phrases "law, rule, regulation, order, or standard"). In fact, the overwhelming majority of courts have held that common law claims fall within the scope of "law[s]" and "regulation[s]" expressly preempted by the FBSA. *See* Moss v. Outboard Marine Corp., 915 F.Supp. 183, 186 (E.D.Cal.1996); Davis v. Brunswick Corp., 854 F.Supp. 1574, 1580 (N.D.Ga.1993); Shield v. Bayliner Marine Corp., 822 F.Supp. 81, 84 (D.Conn.1993); Shields v. Outboard Marine Corp., 776 F.Supp. 1579, 1581 (M.D.Ga.1991); Mowery v. Mercury Marine, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); Farner v. Brunswick Corp., 239 Ill.App.3d 885, 180 Ill.Dec. 493, 497-98, 607 N.E.2d 562, 566-67 (1992); Ryan v. Brunswick Corp., 454 Mich. 20, 557 N.W.2d 541, 548-49 (1997). *Contra* Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 250 (Tex.), *cert. denied,* 513 U.S. 1057, 115 S.Ct. 664, 130 L.Ed.2d 599 (1994).

We agree that the terms "law" and "regulation" evidence an intent to include common law claims. However, we stop short of concluding that common law claims are expressly preempted by the FBSA, because another provision in the Act pulls us away from that conclusion. As the Lewises point out, Congress included a savings clause in the Act, which seems to save common law claims from preemption. That clause, which is found within the section of the Act entitled "Penalties and Injunctions," provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C.A. § 4311(g) (West Supp.1995).

[6][7] Because the FBSA preempts an area (safety) that historically has been regulated by the states through their police powers, we must construe the Act's preemption clause narrowly. *See* Medtronic, 518 U.S. at ----, 116 S.Ct. at 2250. The preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading. Instead, we must resolve doubts in favor of the narrower interpretation of the preemption clause and conclude that the express preemption clause does not cover common law claims. We hold that those claims are not expressly preempted.

The Lewises urge us to go further and hold that the savings clause demonstrates clear congressional intent to save common law claims from preemption. We find congressional ***1502** intent to be less than clear, given the conflicting language in the preemption and savings clauses. Just as the conflict between those provisions prevents us from concluding that the Lewises' claims are expressly preempted, so also does that conflict prevent us from concluding that those claims are expressly saved. *See* Taylor v. General Motors Corp., 875 F.2d 816, 825 (11th Cir.1989) (interpreting the National Traffic and Motor Vehicle Safety Act). The express terms of the FBSA simply fail to answer the question of whether Congress intended to preempt common law claims. As a result, our decision about preemption depends on whether the Lewises' claims are impliedly preempted by federal law. *See id.* at 827-28.

VIII. IMPLIED CONFLICT PREEMPTION

[8] The Lewises' claims are preempted impliedly by the FBSA to the extent that those claims conflict with the "accomplishment and execution of the full purposes and objectives of Congress." *See* Freightliner Corp. v. Myrick, 514 U.S. 280, ----, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). In other words, the Lewises' claims are preempted if they prevent or hinder the FBSA from operating the way Congress intended it to operate. In deciding whether the Lewises' claims conflict with the purposes of the FBSA, we do not apply a presumption against preemption, even though common law tort claims are a mechanism of the police powers of the state. Taylor, 875 F.2d at 826. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " Felder v. Casey, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988) (citations omitted).

According to Brunswick, the Lewises' claims are preempted by implication because those claims would interfere with the regulatory scheme enacted by Congress in the FBSA. Brunswick argues that the Coast Guard has the last say on whether a safety feature on boats or associated equipment should be required. Where the Coast Guard believes that a safety feature should not be required, Brunswick argues that states may not require the feature, even through common law claims.

[9][10] "[A] federal decision to forgo regulation in a

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given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis in original). Though a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 1355, 99 L.Ed.2d 582 (1988), it does "where [the] failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1978) (citations omitted).

[11] The Lewises argue that the rule of *Atlantic Richfield* does not apply here, because Congress did not intend for a mere decision not to regulate to have preemptive effect under the FBSA. In the Lewises' view, any state regulation on boat and equipment safety standards is permissible, unless the Coast Guard promulgates a regulation that conflicts with the state regulation. As the Lewises understand the FBSA regulatory scheme, a Coast Guard position not to impose a safety standard on a matter leaves room for states to impose safety standards on that matter. There being no regulation on propeller guards, the Lewises argue that their claims are not affected by the Coast Guard's position. For support, they point to ***1503***Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), a case in which the Supreme Court concluded that an absence of regulation on a safety matter did not preempt state common law claims imposing such standards.

In *Freightliner*, the Supreme Court considered whether common law claims based on the failure to install antilock brakes were expressly or impliedly preempted by the Vehicle Safety Act. *See id.* at ----, 115 S.Ct. at 1485. The preemption clause in the Vehicle Safety Act provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C.A. § 1392(d) (West 1982) (repealed 1994). The defendants in *Freightliner* argued that the failure-to-install claims were preempted, because the relevant agency had indicated its intent to regulate braking systems by promulgating a regulation on that matter. That regulation was struck down by an appellate court, but the defendants in *Freightliner* believed it still had preemptive effect, because it demonstrated the agency's intent to forbid state regulation on braking systems. *Id.* at ----, 115 S.Ct. at 1487.

The Supreme Court rejected that argument. First, the Court explained, there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Id.* In fact, the preemption clause in that act clearly implied that states could impose safety standards on auto manufacturers, until the federal government came forward with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect under the *Atlantic Richfield* doctrine; instead, the agency's failure to put into effect a valid regulation left the state common law intact. *Id.* Furthermore, the Court reasoned, *Atlantic Richfield* was inapposite because:

> the lack of federal regulation [on antilock brakes] did not result from an affirmative decision of agency officials to refrain from regulating air brakes. [The agency] did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state.

Id. (footnote omitted).

In contrast to the Vehicle Safety Act, the FBSA was intended to give its regulatory agency--the Coast Guard--exclusive authority to issue safety standards:

> This section [containing the preemption clause] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. At the same time, it was recognized that there may be serious hazards which are unique to a particular locale and which would justify variances at least with regard to the carriage or use of marine safety articles on boats. Therefore, the section does permit individual States to impose requirements with respect to carrying or using

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> marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances. A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity.
>
> The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1341. *See* ***1504***Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990) ("[T]he [FBSA] gives the Coast Guard the exclusive responsibility for establishing safety regulations.") (dicta); *Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1577 & n. 4 (11th Cir.1986) (with the FBSA Congress expressly preempted state regulation regarding performance and safety standards for boats and associated equipment) (dicta). While an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate. *Freightliner* is distinguishable for that reason.

Also in contrast to *Freightliner*, the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards. Unlike the agency in *Freightliner*, the Coast Guard did not try to promulgate a regulation, and then fail, under a statutory scheme that would leave state law intact in the absence of federal regulatory action. Instead, under a statutory scheme that forbids any state standard or regulation "not identical to" a federal regulation, the Coast Guard decided not to issue a regulation. After consulting with the Advisory Council and reviewing the available data, the Coast Guard reached a carefully considered decision that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats."

The Coast Guard decided not only that a federal regulation would be inappropriate, but that the scientific data counseled against any regulation requiring propeller guards. Given that Congress intended for the FBSA to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements. *See Ryan v. Brunswick Corp.*, 454 Mich. 20, 557 N.W.2d 541, 549-50 (1997). *See also Puerto Rico*, 485 U.S. at 503, 108 S.Ct. at 1355 ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn--not from federal inaction alone, but from inaction joined with action.") (emphasis in original). *Freightliner* does not require that we hold otherwise.

But the Lewises contend that even if *Freightliner* is not controlling here, we cannot find an implied conflict between their claims and the Act, because we know from the savings clause that Congress expected some common law claims to be brought in this area. About the savings clause, the Senate report says:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352.

[12] From the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme. In order to decide which claims, we must determine when product liability claims can be brought without upsetting the overall scheme Congress intended. Addressing that question, several courts have held that the only claims which do not present a conflict with the FBSA regulatory scheme are product liability claims based on the defective design or installation of products that are already installed, as opposed to claims based on the failure to install a certain safety device. *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), *cert. denied*, 516 U.S. 866, 116 S.Ct. 182, 133 L.Ed.2d 120 (1995); ***1505***Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 187 (E.D.Cal.1996); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); *Rubin v. Brutus Corp.*, 487 So.2d 360, 363 (Fla.Dist.Ct.App.1986); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 498, 607 N.E.2d 562, 567 (1992); *Ryan v. Brunswick Corp.*, 209 Mich.App. 519, 531 N.W.2d 793, 796 n. 1

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(1995), *aff'd,* 454 Mich. 20, 557 N.W.2d 541 (1997); *Mulhern v. Outboard Marine Corp.,* 146 Wis.2d 604, 432 N.W.2d 130, 134-35 (1988). Permitting product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and to do any additional manufacturing, in a non-negligent and non-defective manner. Permitting such claims is consistent with the FBSA scheme, which is designed to ensure that boats and associated equipment are safe.

By contrast, claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA. Without doubt, the Lewises' product liability claims seek to impose a propeller guard requirement. *See Carstensen,* 49 F.3d at 432. That requirement conflicts with the FBSA's grant of exclusive regulatory authority to the Coast Guard, and for that reason those claims are in conflict with and are therefore preempted by the Act.

[13] The Lewises argue that their fraud claim should be treated differently from their other claims, because it would not create a propeller guard requirement beyond FBSA requirements. We disagree. If the Lewises succeeded with their fraud claim, a jury could impose liability upon Brunswick for attempting to persuade the Coast Guard and others that propeller guards are unsafe. The necessary element of causation in any such claim would be that but for the wrongful conduct of Brunswick, propeller guards would have been required by the Coast Guard. Such a judgment would conflict with the Coast Guard's position that propeller guards should not be required. Thus, the fraud claim is impliedly preempted by the Coast Guard's position and the preemptive effect given that position by the FBSA.

Regulatory fraud claims of this nature are impliedly preempted for fundamental, systemic reasons. Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in the various state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result. Ironically, such circumvention of the regulatory scheme likely would be more pronounced where, as here, Congress mandated more extensive industry input into the regulatory process. *See* 46 U.S.C. § 4302(c). Congress could not have intended for the process it so carefully put in place to be so easily and thoroughly undermined. [FN1]

> FN1. The Lewises' claim may be read to address alleged fraudulent misrepresentations by Brunswick to individuals and groups outside the federal government. To the extent that the Lewises intend to hold Brunswick liable for allegedly dissuading other manufacturers from installing propeller guards, their claim fails on causation grounds, because their daughter was struck by a propeller on a Brunswick motor. To the extent that the Lewises seek to hold Brunswick liable for alleged fraud upon state regulators, their fraud claim is preempted because state regulatory decisions of the propeller guard issue are themselves preempted.

In sum, we conclude that because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed. That position impliedly ***1506** preempts state law requirements of propeller guards, even in the form of common law claims. It also prevents plaintiffs from bringing fraud claims intended to demonstrate that the Coast Guard would have reached a different conclusion on the matter of propeller guards but for alleged industry manipulation or subversion of the federal regulatory process. We hold that each of the Lewises' claims is preempted by implication because it conflicts with the Coast Guard's position on propeller guards and would interfere with the FBSA regulatory process designed by Congress.

IX. CONCLUSION

The district court's grant of summary judgment to Brunswick is AFFIRMED.

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Briefs and Other Related Documents (Back to top)

• 1996 WL 33469334 (Appellate Brief) Reply Brief of Appellants/Plaintiffs (Jun. 04, 1996)

• 1996 WL 33469335 (Appellate Brief) Brief of Defendant/Appellee Brunswick Corporation (May. 20, 1996)

• 1996 WL 33469333 (Appellate Brief) Brief of Appellants (Apr. 10, 1996)

END OF DOCUMENT

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H
Briefs and Other Related Documents

Supreme Court of the United States

Vicky LEWIS, et vir., etc.,
v.
BRUNSWICK CORPORATION.

No. 97-288.

May 15, 1998.

Case below, 11 Cir., 107 F.3d 1494.

The writ of certiorari in the above entitled case was dismissed today pursuant to Rule 46.1 of this Court.

118 S.Ct. 1793 (Mem), 523 U.S. 1113, 140 L.Ed.2d 933

Briefs and Other Related Documents (Back to top)

- 1998 WL 106133, 66 USLW 3618 (Oral Argument) Oral Argument (Mar. 02, 1998)
- 1998 WL 66036 (Appellate Brief) REPLY BRIEF OF PETITIONERS (Feb. 18, 1998)
- 1998 WL 32506 (Appellate Brief) BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT (Jan. 28, 1998)
- 1998 WL 35183 (Appellate Brief) BRIEF FOR THE RESPONDENT (Jan. 28, 1998)
- 1998 WL 35188 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT (Jan. 28, 1998)
- 1998 WL 35189 (Appellate Brief) BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT (Jan. 28, 1998)
- 1997 WL 793078 (Appellate Brief) BRIEF OF PETITIONERS (Dec. 29, 1997)
- 1997 WL 799992 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS (Dec. 29, 1997)
- 1997 WL 800060 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Dec. 29, 1997)
- 1997 WL 800064 (Appellate Brief) BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE. P.C., IN SUPPORT OF PETITIONERS (Dec. 29, 1997)
- 1997 WL 800068 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND US. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Dec. 24, 1997)
- 1997 WL 33557248 (Appellate Filing) Brief for the Respondent in Opposition (Oct. 15, 1997)
- 1997 WL 33549141 (Appellate Filing) Petition for Writ of Certiorari (Aug. 13, 1997)

END OF DOCUMENT

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Brett Kavanaugh – Products Liability

Allegation: In *Geier v. American Honda Motor Company*, Mr. Kavanaugh filed an amicus brief on behalf of the Alliance of Automobile Manufacturers to preclude a woman who received serious injuries in a car accident from recovering damages from the car manufacturer. The car manufacturer had not installed airbags in the car even though Washington, D.C. law required such airbags. 529 U.S. 861 (2000).

Facts:

- **In an opinion written by Justice Breyer, the U.S. Supreme Court agreed with a position taken by Mr. Kavanaugh's client in its brief.**
  - ✓ The Supreme Court held that safety standards promulgated by the Department of Transportation, pursuant to an Act of Congress, preempted the D.C. law requiring airbags, and that therefore the plaintiff could not bring an action under the D.C. law. *Geier v. American Honda Motor Company*, 529 U.S. 861, 875 (2000).
  - ✓ Federal Motor Vehicle Safety Standard (FMVSS) 208 required that auto manufacturers equip some but not all of their 1987 vehicles with passive restraints.
  - ✓ Because a universal airbag requirement like that in place in D.C. would directly conflict with the safety purposes behind enactment of FMVSS 208, the long-standing principle of preemption applied and the D.C. requirement could not be enforced.
  - ✓ The plaintiff's car in this case contained a restraint system explicitly authorized by Standard 208, and thus was in full compliance with the Federal regulation.
- **All of the circuit courts to consider the issue, including the 9th Circuit, agreed with either the implied or express preemption arguments set forth in the brief Mr. Kavanaugh filed on behalf of his client.**
  - ✓ District Judge William Bryant, appointed by President Johnson, granted American Honda summary judgment in this case based on the express preemption argument later set forth in the brief.
  - ✓ The D.C. Court of Appeals affirmed the lower court decision on implied preemption grounds in a unanimous opinion written by Clinton appointee Judge Judith Rogers.
  - ✓ Four other circuits came to the same conclusion as the D.C. Circuit.

- ✓ The 9th Circuit adopted the express preemption argument set forth in the brief submitted by Mr. Kavanaugh, that the Motor Vehicle Safety Act expressly preempted state tort suits brought on the basis of a lack of an airbag.

- ➢ **The Clinton Administration, through the office of Solicitor General, also argued in its brief that the state law claims were impliedly preempted by the federal standards promulgated by the Department of Transportation.**

For opinion see 120 S.Ct. 1913,120 S.Ct. 519,120 S.Ct. 33

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, INC., et al.
No. 98-1811.
November 8, 1999.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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*I QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988), or Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), preempts a state common law tort claim that an automobile manufactured in 1987 was defectively designed because it lacked an airbag.

*III TABLE OF CONTENTS

Interest of the United States ... 1

Statement ... 2

Summary of argument ... 8

Argument:

The Safety Act does not expressly preempt petitioners' tort claims, but the claims are impliedly preempted because a judgement for petitioners would frustrate the

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purposes of Standard 208 ... 10

A. The Safety Act does not expressly preempt petitioners' tort claims ... 11

B. Standard 208 impliedly preempts petitioners' tort claims ... 15

Conclusion ... 30

TABLE OF AUTHORITIES

Cases:

American Tel. & Tel. Co. v. Central Office Tel., 524 U.S. 214 (1998) ... 16, 23

Barnett Bank v. Nelson, 517 U.S. 25 (1996) ... 26

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) ... 12

California Fed. Sa. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) ... 16

Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) ... 16-17, 22, 26

Cipollone v. Liggett Group, 505 U.S. 504 (1992) ... 7, 12

City of Chicago v. Environmenial Defense Fund, 511 U.S. 328 (1994) ... 14

City of New York v. FCC, 486 U.S. 57 (1988) ... 17

*IV English v. General Elec. Co., 496 U.S. 72 (1990) ... 16

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982) ... 26

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) ... 17

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) ... 7, 11, 16, 26

Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992) ... 28

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) ... 13, 14

Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997) ... 10

Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707 (1985) ... 27

Hines v. Davidowitz, 312 U.S. 52 (1941) ... 26

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) ... 16, 25

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) ... 17-18

Jones v. Rath Packing Co., 430 U.S. 519(1977) ... 17

Malone v. White Motor Corp., 435 U.S. 497 (1978) ... 16

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) ... 11, 12, 15, 27

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) ... 3

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989) ... 10

Pacific Legal Found. v. DOT, 593 F.2d 1338 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979) ... 24

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) ... 12, 28

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) ... 15

***V** State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987) ... 3

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) ... 17

Wood v. General Motors Corp.:

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990) ... 10, 11, 20, 21, 26

494 U.S. 1065 (1990) ... 11, 26

Constitution, statutes and regulations:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) ... 9, 17, 27

Act of July 5, 1994, Pub. L. No. 103-272, 198 Stat. 745 (49 U.S.C. 30101 et seq.) ... 1

§ 1(a), 108 Stat. 745 ... 1

§ 1(e), 108 Stat. 941-973 ... 1

Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30101 et seq.:

49 U.S.C. 30103 ... 20

49 U.S.C. 30103(b) ... 20

49 U.S.C. 30103(b)(1) ... 2, 12, 13

49 U.S.C. 30103(e) ... 3, 13, 20

49 U.S.C. 30127 ... 3

49 U.S.C. 30127(f)(2) ... 3

Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (15 U.S.C. 1401(b) (1988)) ... 24

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988):

15 U.S.C. 1381 ... 1, 2, 22

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

15 U.S.C. 1391(2) ... 2, 13, 15, 21

15 U.S.C. 1392 ... 13, 22

15 U.S.C. 1392(a) ... 1, 2, 13

15 U.S.C. 1892(d) (§ 103(d)) ... 2, 8, 10, 12, 13, 14, 20

15 U.S.C. 1397 ... 22

15 U.S.C. 1397(k) (§ 108(c)) ... passim

***VI** 49 C.F.R. (1987):

Section 571.105 ... 21

Section 571.125 ... 21-22

Section 571.208 ... 1, 3

Section 571.208.S4.1.3.1 ... 3

Section 571.208.S4.1.3.2 ... 3

Section 571.208.S4.1.3.3 ... 3

Section 571.208.S4.1.3.4 ... 5

Section 571.208.S4.1.4 ... 3

Section 571.208.S4.1.5.3 ... 3

Section 571.212 ... 23

Miscellaneous:

112 Cong. Rec. (1966):

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

p. 14,230 ... 19

p. 19,663 ... 20

p. 21,487 ... 19, 21

p. 21,490 ... 19

49 Fed. Reg. (1984):

p. 28,972 ... 26

p. 28,987 ... 24

pp. 28,987-28,997 ... 24

p. 28,996 ... 4

p. 28,997 ... 5

pp. 28,999-29,000 ... 6, 30

p. 29,000 ... 5, 25

p. 29,000-29,001 ... 24

pp. 29,000-29,002 ... 4

p. 29,001 ... 4, 24

H.R. Rep. No. 1776, 89th Cong., 2d Sess. (1966) ... 14, 19, 20

S. Rep. No. 1301, 89th Cong., 2d Sess. (1966) ... 12, 19, 25, 29

Webster's Third New International Dictionary (1993) ... 12

***1** INTEREST OF THE UNITED STATES

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The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988), requires the Secretary of Transportation to promulgate motor vehicle safety standards. 15 U.S.C. 1392(a). [FN1] This case concerns the preemptive effect of the Act and one of those standards, Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), which governs occupant crash protection. The Court's decision may affect the manner in which the Secretary exercises his regulatory authority under the Act.

FN1. The Act was recodified, along with other Acts governing transportation, on July 5, 1994, "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745; see § 1(e), 108 Stat. 941-973 (codifying new 49 U.S.C. 30101 et seq.). Like the court of appeals and petitioners, we generally refer to the earlier version of the Act.

*2 STATEMENT

1. Congress enacted the National Traffic and Motor Safety Vehicle Act of 1966 (Safety Act or Act) to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. The Act directs the Secretary of Transportation to "establish by order motor vehicle safety standards," 15 U.S.C. 1392(a), which are defined as "minimum standard[s] for motor vehicle performance or motor vehicle equipment performance," 15 U.S.C. 1391(2). Each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a).

The Safety Act contains a preemption provision, which provides in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. 1392(d). [FN2] The Act also contains a provision, which petitioners refer to as a savings clause, that describes *3 the effect of compliance with federal standards on common law liability. That clause provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k). [FN3]

FN2. As we explain in note 1, supra, the Safety Act was amended and recodified in 1994 without substantive change. Section 1392(d) is now codified at 49 U.S.C. 30103(b)(1) and states in relevant part:

> When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

FN3. Section 1397(k) is now codified at 49 U.S.C. 30103(e), which states: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

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2. Federal Motor Vehicle Safety Standard 208 regulates occupant crash protection. 49 C.F.R. 571.208. The Secretary promulgated the version of Standard 208 at issue in this case in 1984, after nearly 15 years of analysis, rulemaking, and litigation. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-38 (1983); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 477-478 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Beginning with the 1987 model year (in which petitioners' car was manufactured), Standard 208 phased in a requirement that all new passenger cars have some type of passive restraint system, i.e., a device that works automatically, without any action by the occupants, to help protect occupants from injury during a collision. Standard 208 required manufacturers to install some type of passive restraint in at least 10% of their 1987 model year cars. 49 C.F.R. 571.208.S4.1.3.1. [FN4] ***4** The rule did not, however, require installation of any particular type of passive restraint. Instead, it gave manufacturers the option to install automatic seatbelts, airbags, or any other suitable technology that they might develop, provided they met the performance requirements specified in the rule.

FN4. The percentages increased each year until the 1990 model year. Beginning in that model year, all new cars were required to have a passive restraint system. 49 C.F.R. 571.208.S4.1.3.2, 571.208.S4.1.3.3, 571.208.S4.1.4. In response to the Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30127, the Secretary has amended Standard 208 to require that, beginning in the 1998 model year, all new cars have an airbag at the driver's and right front passenger's position. 49 C.F.R. 571.208.S4.1.5.3. Section 30127(f)(2) provides that "[t]his section and the amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without [airbags]."

In adopting that standard, the Secretary expressly considered, and rejected, a proposal to require airbags in all cars. See 49 Fed. Reg. 29,000-29,002 (1984). The Secretary reasoned that some people had serious concerns about airbags, and, if airbags were required in all cars, there could be a public backlash in which some people disabled the airbags, thus eliminating their safety benefit. Id. at 29,001. The Secretary also concluded that, although airbags and seatbelts together may provide greater safety benefits than automatic seatbelts alone, the effectiveness of an airbag system is "substantially diminished" if, as then often occurred, the occupant does not wear the seatbelt. Id. at 28,996. Further, airbags were found "unlikely to be as cost effective" as automatic seatbelts, and, because of the high replacement cost of airbags, some people might not replace them after deployment, leaving no automatic protection for front seat occupants. Id. at 29,001. Finally, little developmental work had been done to install airbags in smaller cars, and the Secretary found that unrestrained occupants, particularly children, could be injured by the deployment of airbags in those cars. Ibid.

In light of those concerns, the Secretary determined that manufacturers should have a choice of ways to ***5** comply with the passive restraint requirement. 49 Fed. Reg. at 28,997. The Secretary anticipated that manufacturers would respond to that choice by using a variety of passive restraints, including airbags and automatic seatbelts. Although airbags were more expensive than automatic seatbelts, the Secretary expected manufacturers to install airbags in some cars because one manufacturer had already begun to offer airbags, others had indicated plans to do so, and the rule provided an incentive to use airbags and other non-belt

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technologies. Ibid. [FN5]

FN5. In determining whether a manufacturer installed passive restraints in the requisite percentage of its fleet during the phase-in period, Standard 208 counted each car with an airbag or other non-belt passive restraint as the equivalent of 1.5 cars with automatic seatbelts. 49 C.F.R. 571.208.S4.1.3.4; 49 Fed. Reg. at 29,000.

The Secretary concluded that installation of a variety of passive restraint systems would have several safety advantages. The latitude provided the industry would enable manufacturers to "develop the most effective systems" and would "not discourag[e] the development of other technologies." 49 Fed. Reg. at 28,997. In addition, the availability of alternative devices would enable the industry to "overcome any concerns about public acceptability by permitting some public choice." Ibid. Customers who did not like airbags could buy a car with automatic seatbelts, and those who did not want the automatic belts could select a car with airbags. Ibid. Finally, widespread use of both airbags and automatic seatbelts was "the only way to develop definitive data" about which alternative is more effective. Ibid. [FN6]

FN6. The Secretary also concluded that a gradual phase-in of the passive restraint requirement would better serve the Act's safety purpose than a uniform implementation on a single future date. One purpose of the phase-in was to achieve the installation of passive restraints in some cars earlier than if a single effective date had been established, since it would have taken longer for all cars to be redesigned to include a passive restraint. The phase-in also increased the likelihood that manufacturers would use airbags, which required a longer lead time for redesign. Finally, the phase-in gave consumers and the agency time to develop more information about the benefits of passive restraints, thus enhancing the opportunity to overcome public resistance. 49 Fed. Reg. at 28,999-29,000.

***6** 3. In January 1992, while driving a 1987 Honda Accord, petitioner Alexis Geier collided with a tree in the District of Columbia. Although she was wearing her seatbelt, she sustained "serious and grievous injuries." J.A. 2-5. Ms. Geier and her parents (also petitioners) sued respondent American Honda Motor Company, Inc., in the United States District Court for the District of Columbia. Pet. App. 2 n.1. Alleging that their car was negligently and defectively designed because it lacked a driver's-side airbag in addition to a manual seatbelt, they sought damages under the common law of the District of Columbia. Pet. Br. 12.

The district court granted respondent's motion for summary judgment. Pet. App. 17-20. The court held that petitioners' tort claims were expressly preempted by the Safety Act because recovery on the claims would be "equivalent to a safety standard promulgated by the state legislature or a state regulatory body." Id. at 19.

4. The court of appeals affirmed, but it employed a different preemption analysis. Pet. App. 1-16. The court acknowledged that the term "standard" in the Safety Act's preemption provision could be read in isolation to encompass requirements imposed by common law tort verdicts, but the court recognized that the preemption clause must be interpreted in light of the entire Safety Act, including the savings clause. Id. at 9-***7** 11. The court ultimately found it unnecessary to resolve the express preemption question, because it concluded that a verdict in petitioners'

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favor "would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives, and consequently, the Act impliedly preempts [the] lawsuit." Id. at 12.

The court of appeals rejected petitioners' claim that this Court's decision in Cipollone v. Liggett Group, 505 U.S. 504 (1992), prevents courts from conducting implied preemption analysis when a statute has an express preemption provision and a savings clause. Pet. App. 12-13. The court of appeals noted that this Court rejected a similar argument in Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), in which the Court engaged in implied preemption analysis after concluding that the Safety Act did not expressly preempt the state tort claim at issue.

Applying implied preemption analysis, the court of appeals determined that "allowing liability for the absence of airbags would 'interfer[e] with the method by which Congress intended to meet its goal of increasing automobile safety.' " Pet. App. 14 (citation omitted). The court explained:

A successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety.

Ibid. (citation omitted). The Secretary had decided that a choice among passive restraint systems would advance public safety by "allowing consumers to adjust to *8 the new technology and by permitting experimentation with designs for even safer systems." Id. at 15. The court therefore concluded that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." Ibid.

SUMMARY OF ARGUMENT

Petitioners' tort claims are not expressly preempted by the Safety Act, but they are impliedly preempted because they conflict with Standard 208. The Safety Act's preemption clause, 15 U.S.C. 1392(d), does not bar the claims, because, particularly when read in conjunction with the Act's savings clause, 15 U.S.C. 1397(k), it expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency. Although the reference in the preemption provision to a state "standard" could, in isolation, be understood to encompass common law tort rules, that reading is not consistent with the remainder of the Act, including the express reference to "common law" in Section 1397(k). Moreover, if Section 1392(d) preempted all common law actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k), which provides that compliance with a federal safety standard does not "exempt" a person from common law liability.

The Secretary of Transportation has therefore long taken the view that, although state legislatures and administrative agencies may not adopt a safety standard that differs from a federal standard governing the same aspect of performance, state courts are not necessarily precluded from entering tort judgments that a *9 vehicle was defectively designed with respect to that aspect of performance. That interpretation could create some tension within the Safety Act, but any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims.

There is no danger that tort liability will undermine the Act, because common law claims still must yield if they conflict with federal safety standards. Section 1397(k) does not preserve those claims because it neither refers to preemption nor

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states that common law liability is preserved even if it conflicts with a federal standard. Congress legislates against the background of the Supremacy Clause, which provides that state law yields if it conflicts with federal law. Thus, absent a solid basis to believe that Congress intended to alter traditional preemption analysis, a statute should not be interpreted to permit state laws to operate in a manner that conflicts with federal law.

Petitioners' claims conflict with Federal Motor Vehicle Safety Standard 208, because a judgment for petitioners would stand as an obstacle to the accomplishment of the full purposes and objectives of the Standard. In promulgating the version of Standard 208 that was in effect when petitioners' car was manufactured, the Secretary rejected a proposal to require airbags in all cars, because she determined that safety would best be served if manufacturers were permitted at that time to install a variety of passive restraints. Petitioners' attempt to hold a manufacturer liable for failing to install a particular type of passive restraint--an airbag--would conflict with that policy of encouraging a diversity of passive restraints. Petitioners' claims are therefore preempted.

***10** ARGUMENT

In cases addressing whether the Safety Act or Standard 208 preempts tort claims that an automobile is defectively or negligently designed because it does not contain an airbag, the parties, and some courts, have tended to take an all-or-nothing view of preemption. Manufacturers have argued, and some courts have held, that Section 1392(d) preempts any common law ruling imposing a standard of care greater than the standard set by federal law. See, e.g., Harris v. Ford Motor Co., 110 F.3d 1410, 1413-1415 (9th Cir. 1997); Wood v. General Motors Corp., 865 F.2d 395, 412-413 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990). In contrast, plaintiffs have argued (as do petitioners in this case) that a federal safety standard can never preempt a tort claim because Section 1397(k) preserves all common law actions.

We agree with neither approach. As this Court has explained, when a federal regulatory scheme preserves a role for state law, "conflict-pre-emption analysis must be applied sensitively *** to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515 (1989).

The Secretary's longstanding view is that, read in the full statutory context, Section 1392(d) prohibits state legislative or administrative bodies from prescribing safety standards different from those prescribed by the Secretary but does not expressly preempt state tort ***11** claims. At the same time, the Secretary's view has been that Section 1397(k) does not preserve tort claims that actually conflict with a federal standard but rather provides that compliance with federal standards does not, in itself, immunize manufacturers from liability. See U.S. Amicus Br. at 16 & n.10, 28-29, Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); U.S. Amicus Br. at 7-16, Wood v. General Motors Corp., 494 U.S 1065 (1990) (No. 89-46). That view is entitled to "substantial weight." Medtronic, Inc., v. Lohr, 518 U.S. 470, 496 (1996); id. at 505-506 (Breyer, J., concurring).

Petitioners' tort claims that their vehicle was defectively and negligently designed because it lacked an airbag are thus not expressly preempted by the Safety Act. Their claims are, however, preempted by implication, because a judgment for petitioners would frustrate Standard 208's policy of encouraging a variety of passive restraints.

A. The Safety Act Does Not Expressly Preempt Petitioners' Tort Claims.

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In 1987, when petitioners' automobile was manufactured, the Safety Act's preemption clause stated:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

***12** 15 U.S.C. 1392(d). [FN7] It is our view that, read in its statutory context, this provision expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency.

FN7. As explained at notes 1-2, supra, that provision has been amended and recodified at 49 U.S.C. 30103(b)(1), but the amendments were not intended to be substantive.

The term "standard," construed in isolation, could be read to encompass duties imposed by tort law. The common law of torts is sometimes described in general terms as articulating "standards of care" to be applied on a case-by-case basis to assess a defendant's conduct and fault. See S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966); cf. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (legal duties imposed by common law fall within scope of "law, rule, regulation, order, or standard relating to railroad safety"); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-247 (1959). However, "standard" may also connote a prescriptive criterion, adopted in advance by responsible authorities, such as legislative or administrative bodies. [FN8] Consideration of the Safety Act as a whole confirms that this is the meaning of "standard" as used in the express preemption provision of Section 1392(d).

FN8. See Webster's Third New International Dictionary 2223 (1993) (def. 3a "something that is established by authority, custom, or general consent as a model or example to be followed: CRITERION, TEST;" def. 4 "something that is set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality").

Unlike the statute in CSX, which preempted any relevant "law, rule, regulation, order or standard" (507 U.S. at 664), and thus reached every method by which a State can impose legal obligations, or the statutes in Cipollone v. Liggett Group, 505 U.S. 504 (1992), and Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), ***13**Section 1392(d) preempts only "safety standard[s]," which is also the term used to describe the administrative requirements promulgated by the Secretary. See 15 U.S.C. 1392(a). Moreover, Section 1392(d) uses the verb "establish" to describe the enactment of the state standards it preempts, just as the Safety Act uses that verb to describe the promulgation of standards by the Secretary. See 15 U.S.C. 1392. [FN9] It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotation marks omitted). Further, Section 1392(d) preempts standards established by a "State or political subdivision of a State," a phrase not normally used to describe a court in a common law damages action. Finally, the Act defines standards as providing "objective criteria," 15 U.S.C. 1391(2); see also 15 U.S.C. 1392(a) ("objective terms"), a description that would appear to exclude tort judgments, which are case-specific

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determinations of liability and damages.

FN9. The recodification uses "prescribe" to describe the enactment of both state and federal standards. See 49 U.S.C. 30103(b)(1); note 2, supra. The use of "prescribe," which was not intended as a substantive change from the use of "establish" in the former 15 U.S.C. 1392(d) (see note 1, supra), confirms that "standards" are limited to positive enactments.

Our interpretation of Section 1392(d) is further buttressed by the specific reference to common law in Section 1397(k), which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." [FN10] The reference to common law liability in that Section suggests that Congress ***14** would have referred to common law expressly in Section 1392(d) if it had wanted to preempt all common law actions involving the same aspect of performance as a federal safety standard. See, e.g., City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994).

FN10. As we have explained in notes 1 & 3, supra, this Section is now codified as amended at 49 U.S.C. 30103(e), but the changes were not intended to alter the substance of the provision.

Finally, if Section 1392(d) preempted all common law tort actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k). That Section provides that compliance with a federal safety standard does not "exempt" a person from, i.e., provide a defense to, common law liability. See 15 U.S.C. 1397(k); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) ("compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law"). There is, however, no need to negate a defense to claims that have already been preempted. And the only claims that would not be preempted under the broad reading of Section 1392(d) are those that involve an aspect of performance not addressed by any federal standard. Yet no court would otherwise have held that compliance with a federal standard provided a defense to such a suit. Congress could not have intended the preemption provision to sweep so broadly that it renders superfluous another provision in the Act. See, e.g., Gustafson, 513 U.S. at 574. [FN11]

FN11. The only remaining role for Section 1397(k) would be to disavow congressional intent to occupy the field and thereby displace all tort actions involving motor vehicle safety. But even that role is unnecessary because the preemption provision itself makes the lack of field preemption clear by permitting States to establish standards identical to the federal standards and standards covering aspects of performance not addressed by the federal standards. See 15 U.S.C. 1892(d).

For those reasons, the Safety Act prohibits state legislatures and administrative agencies from adopting ***15** prescriptive safety standards that differ from a federal standard governing the same aspect of performance. It does not, however, necessarily preclude state courts from entering tort judgments that a vehicle was defectively designed with respect to that aspect of performance.

That interpretation could create some tension within the Safety Act, because

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allowing manufacturers to be held liable for design defects in vehicles that comply with federal standards could run counter to Congress's interest in uniform performance standards. But any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims, embodied both in the savings clause (15 U.S.C. 1397(k)) and in the definition of a federal standard as a "minimum standard" (15 U.S.C. 1391(2)). See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). Moreover, tort suits can sometimes complement federal regulations and the Act's safety purpose by supplying manufacturers with an additional incentive to design a safe product. See Medtronic, 518 U.S. at 495. Finally, there is no danger that tort liability will impair the purpose of the Act, because, as we explain below, common law claims still must yield if they conflict with federal standards. Cf. Silkwood, 464 U.S. at 256 (conflict preemption analysis still applies despite congressional intent generally to preserve state tort actions).

B. Standard 208 Impliedly Preempts Petitioners' Tort Claims.

State law is impliedly preempted if it is "impossible for a private party to comply with both state and federal requirements *** or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [federal law].' " ***16** English v. General Elec. Co., 496 U.S. 72, 79 (1990) (citations omitted). Petitioners' tort claims are preempted under that analysis. Holding respondent liable for not installing airbags in petitioners' car would frustrate Standard 208's policy of encouraging a variety of passive restraints.

1. Contrary to petitioners' contention (Br. 25-41), the Safety Act's savings clause, 15 U.S.C. 1397(k), does not foreclose implied preemption analysis.

a. As an initial matter, any suggestion (see Pet. Br. 37-38) that the presence of a savings clause automatically precludes implied preemption analysis is incorrect. Savings clauses vary significantly in both phraseology and context, and, as with any other statutory provision, a court must ascertain the meaning of the specific clause. Cf. Freightliner, 514 U.S. at 289. [FN12] Thus, this Court frequently conducts implied preemption analysis even though a statute contains a savings clause. Indeed, the Court hesitates to read a savings clause to authorize claims that conflict with federal law. See, e.g., American Telephone & Telegraph Co. (AT&T) v. Central Office Telephone, 524 U.S. 214, 227-228 (1998); International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); ***17**Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328 (1981); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

> FN12. Petitioners' reliance (Br. 38) on Malone v. White Motor Corp., 435 U.S. 497 (1978), and California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), is unpersuasive. In Malone, the issue was essentially field preemption, and the Court held that two savings provisions (more broadly worded than the one at issue here) indicated that the federal labor statutes did not foreclose all state regulation of pension plans. 435 U.S. at 504-505. In Guerra, the plurality examined the savings provisions in the Civil Rights Act of 1964 and found that "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law" (479 U.S. at 281); see also id. at 295-296 (Scalia, J., concurring).

There is good reason for that approach. Conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art. VI, Cl. 2), rather than from a specific intent to displace state law. Thus, "[a] holding of federal

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exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). Similarly, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of intent to supersede state law-making authority. See Jones v. Rath Packing Co., 430 U.S. 519, 540-543 (1977). Those implied preemption principles are equally applicable to conflicts between state laws and federal regulations. Whether or not Congress has addressed preemption, "[t]he statutorily authorized regulations of an agency will pre- empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." City of New York v. FCC, 486 U.S. 57, 64 (1988).

Because Congress enacts laws against the background of the Supremacy Clause, a court should assume that Congress believes that federal law (whether enacted directly by Congress or promulgated by a federal agency pursuant to statutory authorization) will prevail in any collision with state law. Of course, Congress is free to change the general rule and to allow state laws to operate in the place of conflicting federal law. But absent a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis," ***18**John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 99 (1993), a statute should not be interpreted to permit state laws to operate in conflict with federal law. [FN13]

FN13. Petitioners therefore err in suggesting (Br. 38-39) that the presumption that cautions against unduly broad construction of preemption provisions favors their reading of the savings clause. The presumption against preemption of state laws that can coexist harmoniously with federal law is quite different from a presumption in favor of preservation of state laws that conflict with federal law.

The presumption that Congress does not intend to alter traditional principles of conflict preemption is particularly appropriate when Congress enacts a statute such as the Safety Act that takes effect through administrative action. Congress did not itself prescribe motor vehicle safety standards in the Safety Act. Instead, it delegated their promulgation (and revision in light of experience) to the Secretary of Transportation. Thus, Congress could not know what federal standards would be promulgated, and it could not predict whether or how States might adopt conflicting measures.

b. The Act's savings clause, Section 1397(k), provides no sound basis to conclude that Congress intended to alter the general rule that federal law preempts conflicting state law. Nothing in the text of the clause suggests that common law liability is saved from preemption even if it conflicts with a federal safety standard. Indeed, the language of the clause does not directly address preemption at all. It states that "[c]ompliance with any Federal motor vehicle safety standard issued under [the Safety Act] does not exempt any person from any liability under common law." 15 U.S.C. 1397(k). [FN14] As we have explained, the ***19** clause thus preserves common law liability in the sense that a manufacturer cannot invoke its compliance with federal law as an automatic defense against a claim that a car was defectively designed. See p. 14, supra. The clause does not, however, preserve common law liability that conflicts with federal law.

FN14. The recodification substituted the modifier "a" for "any," note 3,

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supra, without intending substantive change, note 1, supra. The fact that Congress perceived no distinction between the use of the words "a" and "any" refutes the suggestion (see Pet. Br. 25) that the use of "any" was intended to signal a broad construction of the clause.

The legislative history supports that interpretation. The provision originated in the House of Representatives, and the House Report expressly states that the clause "establishes[] that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law." See H.R. Rep. No. 1776, supra, at 24 (emphasis added). Other references in the legislative history are consistent with the understanding that Section 1397(k) negates a substantive defense to liability and does not directly address preemption. [FN15] Petitioners have not identified, ***20** and we have not found, any statement in the legislative history that describes Section 1397(k) as preserving from preemption common law claims that conflict with federal law. [FN16]

FN15. See, e.g., S. Rep. No. 1301, supra, at 12 (explaining that federal standards "need not be interpreted as restricting State common law standards of care" so that compliance with federal standards "would thus not necessarily shield any person from product liability at common law") (emphasis added); 112 Cong. Rec. 14,230 (1966) (Sen. Magnuson) (also using qualifier "not necessarily"); id. at 21,487 (Sen. Magnuson) (stating that Senate conferees adopted the House provision, which "makes explicit, in the bill, a principle developed in the Senate report"); ibid. (explaining that the provision does not prevent use of compliance or noncompliance as "evidence"); id. at 21,490 (Sen. Cotton) ("proof of compliance" may be offered "for such relevance and weight as courts and juries may give it"). Petitioners also rely (Br. 29) on the comments of a witness at House hearings who expressed the concern that manufacturers would respond to lawsuits with a claim that "Our product meets Government standards." Comments by members of the public reveal little about congressional intent. In any event, the witness's concern was precisely that manufacturers would use compliance with federal standards as a substantive defense to liability.

FN16. As noted in the text, the House Report states that "compliance with federal standards is not to be a defense or otherwise to affect the rights of parties under common law." H.R. Rep. No. 1776, supra, at 24 (emphasis added). The context suggests that the italicized language refers to substantive changes to common law rules rather than the possibility of preemption. Petitioners also note (Br. 29) that Senator Magnuson stated that "[t]he common law on product liability still remains as it was." That statement too is properly understood as explaining that the Act made no change to the substance of product liability law. Finally, petitioners rely (Br. 30-31) on a statement by Representative Dingell that "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser." 112 Cong. Rec. at 19,663. Mr. Dingell made that statement to explain why he opposed an amendment that would have criminalized willful violations of federal standards. Thus, the statement indicates only that common law actions based on the violation of federal standards are preserved; it does not indicate that actions that would conflict with federal standards are similarly preserved. See Wood, 865 F.2d at 407 n.14.

That interpretation of Section 1397(k) is reinforced by the fact that Congress did

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not include the savings clause in the Section of the Safety Act that addresses preemption (Section 103(d) (codified at 15 U.S.C. 1392(d))) but inserted it five sections later (Section 108(c) (codified at 15 U.S.C. 1397(k))). Thus, the structure of the Act confirms that the savings clause was not intended directly to address preemption. [FN17]

FN17. The recodification included both provisions in 49 U.S.C. 30103 (entitled "Relationship to other laws") but in separate subsections, one entitled "Preemption" (49 U.S.C. 30103(b)) and the other entitled "Common law liability" (49 U.S.C. 30103(e)).

***21** Our interpretation does not render the savings clause meaningless, as petitioners contend (Br. 26-27). Petitioners' argument would have force only if the preemption clause applied to common law claims, a reading that we reject. See ibid.; pp. 11-15, supra. Instead, our interpretation preserves an important role for Section 1397(k): In cases in which tort liability does not conflict with a federal standard, Section 1397(k) makes clear that compliance with the standard does not immunize a manufacturer from liability. Those cases can arise frequently, since state tort law does not conflict with a federal "minimum standard" (15 U.S.C. 1391(2)) merely because state law imposes a more stringent requirement. [FN18] For example, Federal Motor Vehicle Safety Standard 105, 49 C.F.R. 571.105, which establishes requirements for brake performance, does not require anti-lock brakes in addition to airbrakes in all vehicles, but the Secretary has not determined that requiring anti-lock brakes would disserve safety. Section 1397(k) makes clear that compliance with Standard 105 is not a defense to a common law tort claim that a vehicle is defectively designed because it lacks anti-lock brakes. Federal Motor Vehicle Safety Standard 125, ***22**49 C.F.R. 571.125, provides multiple options for the design of reflective devices to warn approaching traffic of the presence of a stopped vehicle, but the Secretary did not determine that the availability of options was necessary to promote safety. Section 1397(k) makes clear that compliance with Standard 125 is not a defense to a common law tort claim that the reflective device is defectively designed unless it uses one rather than another of those options. Thus, under our reading, Section 1397(k) has a sensible and important role. [FN19]

FN18. We therefore agree with petitioners (Br. 46-47) that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose. We disagree, however, with the contention (Br. 44, 46) that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. See Wood, 865 F.2d at 416-417; 112 Cong. Rec. at 21,487 (Sen. Magnuson) (performance standards expected to affect design). As we explain at pages 23-26, infra, the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

FN19. Petitioners contend (Br. 27 n.11) that there was no need for Congress to specify that compliance with federal standards is not a defense to common law liability because every State already provided that compliance with a federal regulation is not a defense to a design defect claim. But even if Congress understood that to be the common law rule, it could not be certain

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that rule would not change. It therefore had ample reason to assure that the Safety Act would not be construed to create a new, automatic federal defense.

c. It is petitioners' reading of the clause as preserving tort claims even if they conflict with federal safety standards that would have anomalous results. The Safety Act's purpose "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and Congress chose to carry out that purpose by empowering the Secretary to issue safety standards, 15 U.S.C. 1392, 1397. In some instances, such as the present case, holding a manufacturer liable for what a jury might find to be a design defect would significantly impair the Secretary's efforts to promote safety. Reading the savings clause to preserve that liability from preemption would impermissibly allow courts to second-guess the Secretary's judgment on matters "entrusted to [his] informed discretion" (Kalo Brick & Tile Co., 450 U.S. at 330) and ***23** lead the Act "to destroy itself" (AT&T, 524 U.S. at 228).

For example, the Secretary has established windshield retention requirements in Federal Motor Vehicle Safety Standard 212, 49 C.F.R. 571.212, in order to prevent occupants from being thrown from their cars in crashes. If manufacturers could be held liable under state tort law on a theory that it is a design defect for windshields in those vehicles to be retained in a crash because passengers could be injured if they struck the windshields, it would be impossible for manufacturers to comply with both the federal standard and the duties imposed by state tort law. Thus, if the tort claims were not preempted, the Secretary would have to rescind the federal standard, or manufacturers would have to continue to produce windshields that do not eject in order to comply with Standard 212, while paying tort judgments based on the theory that the federally mandated failure of the windshields to release in a crash rendered their cars defectively designed. There is no indication that Congress intended that startling result.

2. a. This case does not pose that type of conflict, but it poses a closely related one. In issuing the version of Standard 208 in effect when petitioners' car was manufactured, the Secretary rejected a rule requiring airbags in all cars in favor of a rule encouraging manufacturers to offer a variety of passive restraints. The Secretary determined--based on the history of consumer (and congressional) responses to passive restraint requirements--that diversity would best promote safety by helping to ensure public acceptance of passive protection systems, [FN20] encouraging the development ***24** of new and improved technologies, [FN21] and enabling the agency to acquire more data to make regulatory decisions. See 49 Fed. Reg. at 28,987-28,997, 29,000-29,001. The Secretary also determined that the high replacement costs of airbags could cause some consumers to decline to replace them after they were deployed, which would leave occupants without passive protection. Id. at 29,000-29,001. At the same time, the Secretary took steps that she reasonably determined would prompt manufacturers to install airbags in some ***25** of their cars. See p. 5 & n. 5, supra. Standard 208 thus embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.

FN20. In 1972, the Secretary adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seatbelts were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on the agency's future efforts to require restraints other than seatbelts. Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482

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(codified at 15 U.S.C. 1401(b) (1988)). Given the public's adverse reaction to the interlock system, one factor the Secretary properly considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See Pacific Legal Found. v. DOT, 593 F.2d 1338, 1345-1346 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). "Airbags engendered the largest quantity of, and most vociferously worded, comments" during the rulemaking. 49 Fed. Reg. at 29,001. Commenters expressed concerns that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, and that airbags would not deploy during an accident. Ibid. Given those widespread concerns, the Secretary concluded that "[i]f airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." Ibid.

FN21. The Secretary determined that experience could show that automatic seatbelts would be used more frequently than anticipated, and that manufacturers might develop better and more acceptable automatic seatbelt systems. That development could result in automatic seatbelts that were as effective as airbags but cost less. The Secretary also concluded that requiring airbags in all cars would unnecessarily stifle further innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

That policy of affirmatively encouraging diversity would be frustrated if manufacturers could be held liable for not installing airbags. If, when the Secretary promulgated the rule in 1984, respondent and other manufacturers had known that they could later be held liable for failure to install airbags, the prospect of sizable compensatory and punitive damage awards, combined with the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, supra, at 12, would likely have led them to install airbags in all cars. That outcome would have eliminated the diversity that the Secretary found necessary at that time to promote motor vehicle safety. At the very least, holding manufacturers liable for not installing airbags would have "interfere[d] with the methods by which [Standard 208] was designed to reach [its] goal." Ouellette, 479 U.S. at 494. [FN22] Therefore, tort claims like *26 petitioners', which are based on the theory that a car (subject to the version of Standard 208 in effect in 1987) was defectively designed because it lacked an airbag, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [Standard 208]." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

FN22. Petitioners mistakenly argue (Br. 16, 44) that their tort claims would not interfere with the Secretary's chosen methods because, they assert (Br. 2, 10-11), the Secretary intended tort liability to provide an incentive for manufacturers to install airbags. In support of that assertion, petitioners cite the Secretary's statement that "potential liability for any deficient systems" would discourage manufacturers from "us[ing] the cheapest system to comply with an automatic restraint requirement." 49 Fed. Reg. at 29,000. Petitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed defective passive restraints. The Secretary did not mean that manufacturers could be held liable for choosing one type of passive restraint rather than another. Petitioners' amici (Missouri Br. 6; Ass'n of Trial Lawyers Br. 29) also mistakenly rely on a public comment that the Secretary summarized in the

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description of comments in the preamble. 49 Fed. Reg. at 28,972. An agency does not endorse a comment merely by describing it.

For those reasons, the Secretary has long taken the view that Standard 208 preempts such claims. [FN23] See U.S. Amicus Br. at 28-29, Freightliner Corp. v. Myrick, supra; U.S. Amicus Br. at 11-15, Wood v. General Motors Corp., supra. That view is consistent with this Court's decisions holding that when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted. See, e.g., Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 154-155 (1982); Kalo Brick & Tile Co., 450 U.S. at 326.

FN23. Not all tort claims involving airbags would be preempted. A claim that a manufacturer installed an airbag that deployed improperly would not be preempted because it would not frustrate the purposes of Standard 208. Even a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car (see Nat'l Conf. of State Leg. Br. 12) would not necessarily frustrate Standard 208's purposes.

The Secretary's view is entitled to substantial weight. "Because the [Department of Transportation] is the federal agency to which Congress has delegated its authority to implement the [Safety] Act, the [Secretary] is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to ***27** the accomplishment and execution of the full purposes and objectives of Congress.' " Medtronic, 518 U.S. at 496; id. at 506 (Breyer, J., concurring) (administering agency has "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives"). [FN24]

FN24. Petitioners and their amici contend (Pet Br. 40-41, 49-50; Nat'l Conf. of State Leg. Br. 24-25; Leflar Br. 21-22) that there can be no implied conflict preemption here because, when the Secretary adopted Standard 208, she neither plainly stated her intent to preempt tort liability nor provided notice and comment on the question. That contention rests on a misunderstanding of the basis for conflict preemption. Unlike field preemption, which arises when agencies "intend for their regulations to be exclusive," Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985), conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. See p. 17, supra. Here, because conflict preemption is at issue, neither a statement of preemptive intent nor notice and comment on preemption was required. For the same reasons, the argument that the Secretary lacks authority to give any particular federal standard preemptive force (Nat'l Conf. of State Leg. Br. 24) is wide of the mark. We do not contend that petitioners' claims in this case are preempted because the Secretary decided that Standard 208 should preempt common law liability. We contend that the claims are preempted because they conflict with, and would frustrate implementation of, the policy judgment embodied in the Standard that a choice of passive restraints would best promote safety.

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b. Petitioners mistakenly contend (Br. 16, 47-48) that their claims do not conflict with the Secretary's goal of allowing consumers to adjust to new airbag technology because tort liability would not lead manufacturers to change their conduct. To the contrary, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." ***28** Garmon, 359 U.S. at 247. Indeed, petitioners' amici acknowledge that tort law "has a deterrence function." Nat'l Conf. of State Leg. Br. 14; see Ass'n of Trial Lawyers Br. 10-12; Leflar Br. 12-13, 17; Missouri Br. 6, 13. [FN25]

FN25. That tort law also has other purposes (such as compensation) does not mean tort rules cannot conflict with federal law (Nat'l Conf. of State Leg. Br. 14-15; Leflar Br. 17-19). Conflict preemption flows from the effects of the state law, not its purposes. See Gade v. National Solid Waste Mgmt. Ass'n, 505 U.S. 88, 105-106 (1992).

Petitioners also argue (Br. 16, 47-48) that, if manufacturers had changed their conduct and installed airbags, they would have promoted public acceptance of those devices. That may be true, but the Secretary reasonably determined at that time that experience with a variety of passive restraints would best promote public acceptance. In any event, speculation of the sort advanced by petitioners cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208. [FN26]

FN26. Petitioners suggest (Br. 16, 44) that a tort rule requiring airbags is consistent with Standard 208 because the Secretary determined that airbags were technologically the most effective passive restraint and provided an incentive to encourage manufacturers to install them (see note 5, supra). That contention overlooks the Secretary's conclusion that airbags would not be effective in practice if they were installed in all cars because of the likely public reaction and potential safety dangers in small cars. It also overlooks the Secretary's determination that further research and development could lead to more cost-effective restraints. And it overlooks the Secretary's reason for providing the incentive to install airbags--to ensure a variety of passive restraints, not to maximize the number of cars with airbags.

Petitioners further err in contending (Br. 48-49) that their claims do not conflict with the goal of encouraging innovation and development of more effective restraint ***29** systems. Contrary to petitioners' suggestion, the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would, because of the potential for large damage awards and the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, supra, at 12. This Court should decline petitioners' invitation to second-guess that reasonable determination.

Finally, petitioners argue (Br. 44-45) that their claims do not conflict with Standard 208 because their car was manufactured during the phase-in period (when Standard 208 required the installation of some type of passive restraint system in some, but not all, cars) and their car did not have any passive restraint. Those facts do not, however, alter the preemption analysis, because petitioners do not claim that their car was defectively designed because it lacked any type of passive

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restraint. Rather, they claim that the car was defectively designed because it lacked one particular type of passive restraint--an airbag. See Pet. i; Pet. Br. i. Thus, petitioners cannot prevail without a ruling that a car manufactured in 1987 was defectively designed unless it had an airbag. For the reasons we have described, that ruling would conflict with the Secretary's determination that no particular type of passive restraint should be required in any car because the use of a variety of passive restraints would best promote safety. [FN27]

FN27. This Court therefore need not decide whether Standard 208 would preempt a claim that a car manufactured during the phase-in is defective if it lacks any passive restraint. The Secretary believes that it would preempt such a claim, because the claim would frustrate the safety purposes for which the Secretary adopted the phase-in. See note 6, supra. A tort rule that effectively required passive restraints in all cars during the phase-in would likely have resulted in the nearly exclusive use of automatic seatbelts rather than airbags and impeded the development of data about the benefits of passive restraints that could help prevent a public backlash against them. See 49 Fed. Reg. at 28,999-29,000. Contrary to petitioners' contention (Br. 45), the fact that the claim involved a car manufactured in 1987 or a crash that occurred after the phase-in would not save the claim from preemption. The relevant question is not what manufacturers would do after the jury verdict in question but what they would have done when the relevant version of Standard 208 was promulgated if they had anticipated that they could later be held liable.

*30 CONCLUSION

The judgment of the court of appeals should be affirmed.

U.S.Amicus.Brief,1999.
Geier v. American Honda Motor Co., Inc.
1999 WL 1045115

Briefs and Other Related Documents (Back to top)

- 1999 WL 1140848, 68 USLW 3335 (Oral Argument) Oral Argument (Dec. 07, 1999)
- 1999 WL 1076223 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Nov. 30, 1999)
- 1999 WL 1049890 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT (Nov. 19, 1999)
- 1999 WL 1049891 (Appellate Brief) BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Nov. 19, 1999)
- 1999 WL 1049893 (Appellate Brief) BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE (Nov. 19, 1999)
- 1999 WL 1049895 (Appellate Brief) BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)
- 1999 WL 1049898 (Appellate Brief) BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

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• 1999 WL 1049900 (Appellate Brief) BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049905 (Appellate Brief) BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049906 (Appellate Brief) BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1050049 (Appellate Brief) BRIEF FOR RESPONDENTS (Nov. 19, 1999)

• 1999 WL 966486 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966514 (Appellate Brief) BRIEF AMICUS CURIAE OF ROBERT B LEFLAR, ROBERT S. ADLER, MICHAEL GREEN, AND JOSEPH A. PAGE IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966529 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Oct. 22, 1999)

• 1999 WL 966532 (Appellate Brief) BRIEF FOR PETITIONERS (Oct. 22, 1999)

• 1999 WL 973859 (Appellate Brief) BRIEF AMICI CURIAE OF THE STATES OF MISSOURI, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, IOWA, KANSAS, MONTANA, NEW HAMPSHIRE, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT AND WASHINGTON IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 988261 (Appellate Brief) BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Oct. 20, 1999)

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Briefs and Other Related Documents

Supreme Court of the United States

Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, INC., et al.

No. 98-1811.

Argued Dec. 7, 1999.
Decided May 22, 2000.

Injured motorist brought defective design action against automobile manufacturer under District of Columbia tort law, contending that manufacturer was negligent in failing to equip automobile with driver's side airbag. The United States District Court for the District of Columbia, William B. Bryant, J., entered summary judgment in favor of manufacturer. Motorist appealed. The District of Columbia Court of Appeals, Rogers, Circuit Judge, 166 F.3d 1236, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) action was not pre-empted by express preemption provision of National Traffic and Motor Vehicle Safety Act; but (2) Act's savings clause did not foreclose or limit operation of ordinary preemption principles; and (3) action was preempted since it actually conflicted with Department of Transportation standard requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles, abrogating *Drattel v. Toyota Motor Corp.*; *Minton v. Honda of America Mfg., Inc.*; *Munroe v. Galati*; *Wilson v. Pleasant*; *Tebbetts v. Ford Motor Co.*

Affirmed.

Justice Stevens dissented and filed opinion in which Justices Souter, Thomas, and Ginsburg joined.

West Headnotes

[1] **Products Liability** 35.1
313Ak35.1 Most Cited Cases

[1] **States** 18.65
360k18.65 Most Cited Cases

Express preemption provision of National Traffic and Motor Vehicle Safety Act did not preempt common law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag; finding that action was not preempted gave actual meaning to Act's saving clause while leaving adequate room for state tort law to operate, for example, where federal law created only minimum safety standard. National Traffic and Motor Vehicle Safety Act of 1966, § § 103(d), 108(k), 15 U.S.C.A. § § 1392(d), 1397(k).

[2] **Consumer Protection** 11
92Hk11 Most Cited Cases

[2] **States** 18.65
360k18.65 Most Cited Cases

Savings clause of National Traffic and Motor Vehicle Safety Act did not foreclose or limit operation of ordinary preemption principles insofar as those principles instructed courts to read statutes as preempting state laws that actually conflicted with Act or federal standards promulgated thereunder. National Traffic and Motor Vehicle Safety Act of 1966, § 108(k), 15 U.S.C.A. § 1397(k).

[3] **Products Liability** 35.1
313Ak35.1 Most Cited Cases

[3] **States** 18.65
360k18.65 Most Cited Cases

Express preemption provision of National Traffic and Motor Vehicle Safety Act did not foreclose possibility of implied conflict preemption of state law causes of action. National Traffic and Motor Vehicle Safety Act of 1966, § 103(d), 15 U.S.C.A. § 1392(d).

[4] **States** 18.5
360k18.5 Most Cited Cases

The Supreme Court declines to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

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[5] **Products Liability** 35.1
313Ak35.1 Most Cited Cases

[5] **States** 18.65
360k18.65 Most Cited Cases

Neither the express preemption clause of the National Traffic and Motor Vehicle Safety Act, nor the Act's savings clause, nor both together, created any "special burden" with respect to preemption of state common law tort claims beyond that inherent in ordinary preemption principles. National Traffic and Motor Vehicle Safety Act of 1966, § § 103(d), 108(k), 15 U.S.C.A. § § 1392(d), 1397(k).

[6] **Products Liability** 35.1
313Ak35.1 Most Cited Cases

[6] **States** 18.65
360k18.65 Most Cited Cases

Common law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag was preempted in that it actually conflicted with Department of Transportation standard, promulgated under National Traffic and Motor Vehicle Safety Act, requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles; rule of state law imposing duty to install airbag would have presented obstacle to variety and mix of safety devices and gradual passive restraint phase-in sought by standard; abrogating *Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 677 N.Y.S.2d 17, 699 N.E.2d 376; *Minton v. Honda of America Mfg., Inc.*, 80 Ohio St.3d 62, 684 N.E.2d 648; *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114; *Wilson v. Pleasant*, 660 N.E.2d 327; *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345. National Traffic and Motor Vehicle Safety Act of 1966, § 1 et seq., 15 U.S.C.A. § 1381 et seq.

[7] **States** 18.5
360k18.5 Most Cited Cases

Conflict pre-emption turns on the identification of actual conflict, and not on an express statement of pre-emptive intent.

[8] **States** 18.5
360k18.5 Most Cited Cases

While pre-emption fundamentally is a question of congressional intent, the Supreme Court traditionally distinguishes between express and implied pre-emptive intent, and treats conflict pre-emption as an instance of the latter.

[9] **States** 18.5
360k18.5 Most Cited Cases

A court should not find pre-emption too readily in the absence of clear evidence of a conflict.

[10] **States** 18.9
360k18.9 Most Cited Cases

A specific expression of agency intent to pre-empt, made after notice-and- comment rulemaking, is not required before conflict pre-emption can be found.

****1914** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation (DOT) promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. Petitioner Alexis Geier was injured in an accident ****1915** while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, *inter alia*, that respondents (hereinafter American Honda) were negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court granted American Honda summary judgment. In affirming, the Court of Appeals concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit.

Held: Petitioners' "no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act. Pp. 1918-1928.

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(a) The Act's pre-emption provision, 15 U.S.C. § 1392(d), does not expressly pre-empt this lawsuit. The presence of a saving clause, which says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law," § 1397(k), requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations. The saving clause assumes that there are a significant number of common-law liability cases to save. And reading the express pre-emption provision to exclude common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate where, for example, federal law creates only a minimum safety standard. P. 1918.

(b) However, the saving clause does *not* bar the ordinary working of conflict pre-emption principles. Nothing in that clause suggests an intent to save state tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt" sound as if they simply ***862** bar a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute, or a minimum, requirement. This interpretation does not conflict with the purpose of the saving provision, for it preserves actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. Moreover, this Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law, a concern applicable here. The pre-emption provision and the saving provision, read together, reflect a neutral policy, not a specially favorable or unfavorable one, toward the application of ordinary conflict pre-emption. The pre-emption provision itself favors pre-emption of state tort suits, while the saving clause disfavors pre-emption at least some of the time. However, there is nothing in any natural reading of the two provisions that would favor one policy over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. Pp. 1919-1922.

(c) This lawsuit actually conflicts with FMVSS 208 and the Act itself. DOT saw FMVSS 208 not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance--all of which would promote FMVSS 208's safety objectives. The standard's history helps explain why and how DOT sought these objectives. DOT began instituting passive restraint requirements in 1970, but it always permitted passive restraint options. Public resistance to an ignition interlock device that in effect forced occupants to buckle up their manual belts influenced DOT's subsequent initiatives. The 1984 version of FMVSS 208 ****1916** reflected several significant considerations regarding the effectiveness of manual seatbelts and the likelihood that passengers would leave their manual seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public's resistance to the installation or use of then-available passive restraint devices. Most importantly, it deliberately sought variety, rejecting an "all airbag" standard because perceived or real safety concerns threatened a backlash more easily overcome with a mix of several different devices. A mix would also help develop data on comparative effectiveness, allow the industry time to overcome safety problems and high production costs associated with airbags, and facilitate the development of alternative, cheaper, and safer passive restraint systems, thereby building public confidence necessary to avoid an interlock-type fiasco. The 1984 standard also deliberately sought to gradually phase in passive ***863** restraints, starting with a 10% requirement in 1987 vehicles. The requirement was also conditional and would stay in effect only if two-thirds of the States did not adopt mandatory buckle-up laws. A rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed. It would also have made adoption of state mandatory seatbelt laws less likely. This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related considerations as whether a private party would ignore state legal obligations or how likely it is that state law actually would be enforced. Finally, some weight is placed upon DOT's interpretation of FMVSS 208's objectives and its conclusion that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives. DOT is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements. Because there is no reason to suspect that the Solicitor General's representation of these views

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reflects anything other than the agency's fair and considered judgment on the matter, DOT's failure in promulgating FMVSS 208 to address pre- emption explicitly is not determinative. Nor do the agency's views, as presented here, lack coherence. Pp. 1922-1928.

166 F.3d 1236, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, THOMAS, and GINSBURG, JJ., joined, *post,* p. 1928.

Arthur H. Bryant, Washington, DC, for petitioners.

Malcolm E. Wheeler, Denver, CO, for respondents.

Lawrence G. Wallace, Washington, DC, for United States as amicus curiae, by special leave of this Court.

***864** Justice BREYER delivered the opinion of the Court.

This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.). The standard, FMVSS 208, required auto manufacturers to equip some but not all of their ***865** 1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless ****1917** have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

I

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car's manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag. App. 3. The District Court dismissed the lawsuit. The court noted that FMVSS 208 gave car manufacturers a choice as to whether to install airbags. And the court concluded that petitioners' lawsuit, because it sought to establish a different safety standard--*i.e.,* an airbag requirement--was expressly pre-empted by a provision of the Act which pre-empts "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance, 15 U.S.C. § 1392(d) (1988 ed.); Civ. No. 95-CV-0064 (D.D.C., Dec. 9, 1997), App. 17. (We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion; it has been recodified at 49 U.S.C. § 30101 *et seq.*)

The Court of Appeals agreed with the District Court's conclusion but on somewhat different reasoning. It had doubts, given the existence of the Act's "saving" clause, 15 U.S.C. § 1397(k) (1988 ed.), that petitioners' lawsuit involved the potential ***866** creation of the kind of "safety standard" to which the Safety Act's express pre-emption provision refers. But it declined to resolve that question because it found that petitioners' state- law tort claims posed an obstacle to the accomplishment of FMVSS 208's objectives. For that reason, it found that those claims conflicted with FMVSS 208, and that, under ordinary pre-emption principles, the Act consequently pre- empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F.3d 1236, 1238-1243 (C.A.D.C.1999).

Several state courts have held to the contrary, namely, that neither the Act's express pre-emption nor FMVSS 208 pre-empts a "no airbag" tort suit. See, *e.g., Drattel v. Toyota Motor Corp.,* 92 N.Y.2d 35, 43-53, 677 N.Y.S.2d 17, 699 N.E.2d 376, 379-386 (1998); *Minton v. Honda of America Mfg., Inc.,* 80 Ohio St.3d 62, 70-79, 684 N.E.2d 648, 655-661 (1997); *Munroe v. Galati,* 189 Ariz. 113, 115-119, 938 P.2d 1114, 1116-1120 (1997); *Wilson v. Pleasant,* 660 N.E.2d 327, 330-339 (Ind.1995); *Tebbetts v. Ford Motor Co.,* 140 N.H. 203, 206-207, 665 A.2d 345, 347-348 (1995). All of the Federal Circuit Courts that have considered the question, however, have found pre-emption. One rested its

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conclusion on the Act's express pre-emption provision. See, *e.g.*, *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-1415 (C.A.9 1997). Others, such as the Court of Appeals below, have instead found pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to FMVSS 208's objectives, and thus to the Act itself. See, *e.g.*, *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (C.A.10 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121-1125 (C.A.3 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 825-827 (C.A.11 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 412-414 (C.A.1 1988). We granted certiorari to resolve these differences. We now hold that this kind of "no airbag" lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and is therefore pre-empted by the Act.

***867** In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision ****1918** pre- empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself? We hold that it does.

II

[1] We first ask whether the Safety Act's express pre-emption provision pre-empts this tort action. The provision reads as follows:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (1988 ed.).

American Honda points out that a majority of this Court has said that a somewhat similar statutory provision in a different federal statute--a provision that uses the word "requirements"--may well expressly pre-empt similar tort actions. See, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 502-504, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion); *id.*, at 503-505, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509-512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part). Petitioners reply that this statute speaks of pre-empting a state-law "safety *standard*," not a "requirement," and that a tort action does not involve a safety *standard*. Hence, they conclude, the express pre-emption provision does not apply.

We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the Act contains another provision, which resolves the ***868** disagreement. That provision, a "saving" clause, says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988 ed.). The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate--for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. See, *e.g.*, Brief for United States as *Amicus Curiae* 21 (explaining that common-law claim that a vehicle is defectively designed because it lacks antilock brakes would not be pre-empted by 49 C.F.R. § 571.105 (1999), a safety standard establishing minimum requirements for brake performance). Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.

****1919 *869** III

[2][3] We have just said that the saving clause *at*

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least removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder? *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Petitioners concede, as they must in light of *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) "any possibility of implied [conflict] pre-emption," *id.*, at 288, 115 S.Ct. 1483 (discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-518, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). But they argue that the saving clause has that very effect.

We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. See *Freightliner, supra*, at 287, n. 3, 115 S.Ct. 1483 (declining to address whether the saving clause prevents a manufacturer from "us[ing] a federal safety standard to immunize itself from state common-law liability"). We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. See ***870**Restatement (Third) of Torts: Products Liability § 4(b), Comment *e* (1997) (distinguishing between state-law compliance defense and a federal claim of pre-emption). It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does our interpretation conflict with the purpose of the saving provision, say, by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. See *supra*, at 1917-1918.

[4] Moreover, this Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, *ante*, at 106-107, 120 S.Ct. 1135; see *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) *(AT&T)*; *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907). We find this concern applicable in the present case. And we conclude that the saving clause foresees--it does not foreclose--the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts. We do not understand the dissent to disagree, for it acknowledges ****1920** that ordinary pre-emption principles apply, at least sometimes. *Post*, at 1934- 1936 (opinion of STEVENS, J.).

[5] Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles--which "special burden" would specially disfavor pre-emption here. Cf. *post*, at 1934-1935. The two provisions, read together, reflect a neutral policy, not a specially ***871** favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. See H.R.Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966) ("Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather

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than by a multiplicity of diverse standards"); S.Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966). This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. ***872** See, *e.g.*, 49 C.F.R. § 571.212 (1999). Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to " 'destroy itself.' " *AT&T, supra,* at 228, 118 S.Ct. 1956 (quoting *Abilene Cotton, supra,* at 446, 27 S.Ct. 350). We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. Cf. *post,* at 1935, n. 16. But there is no reason to believe Congress has done so here.

The dissent, as we have said, contends nonetheless that the express pre- emption and saving provisions here, taken together, create a "special burden," which a court must impose "on a party" who claims conflict pre-emption under those principles. *Post,* at 1934-1935. But nothing in the Safety Act's language refers to any "special burden." Nor can one find the basis for a "special burden" in this Court's precedents. ****1921** It is true that, in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), the Court said, in the context of interpreting the Safety Act, that "*[a]t best* " there is an "inference that an express pre-emption clause forecloses implied pre-emption." *Id.,* at 289, 115 S.Ct. 1483 (emphasis added). But the Court made this statement in the course of *rejecting* the more absolute argument that the presence of the express pre-emption provision entirely foreclosed the possibility of conflict pre-emption. *Id.,* at 288, 115 S.Ct. 1483. The statement, headed with the qualifier "[a]t best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see *id.,* at 289-290, 115 S.Ct. 1483, simply preserves a legal possibility. This ***873** Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption provision imposes no unusual, "special burden" against pre-emption. For similar reasons, we do not see the basis for interpreting the saving clause to impose any such burden.

A "special burden" would also promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply. The dissent does not contend that this "special burden" would apply in a case in which state law penalizes what federal law requires--*i.e.,* a case of impossibility. See *post,* at 1931, n. 6, 1935, n. 16. But if it would not apply in such a case, then how, or when, would it apply? This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"--whether that "obstacle" goes by the name of "conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference," or the like. *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); see *Jones v. Rath Packing Co.,* 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). The Court has not previously driven a legal wedge--only a terminological one-- between

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"conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, *De la Cuesta*, 458 U.S., at 152-153, 102 S.Ct. 3014; see *Locke*, *ante*, at 109, 120 S.Ct. 1135; *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), and it has assumed that Congress would not want either kind of conflict. The Court ***874** has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e.g.*, *AT & T*, 524 U.S., at 228, 118 S.Ct. 1956, *and* in "frustration-of-purpose" cases, see, *e.g.*, *Locke*, *ante*, at 103-112, 120 S.Ct. 1135; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987); see also *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of "conflict" (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain ****1922** some form of an express pre-emption provision, a saving provision, or as here, both. Nothing in the statute suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added "special burden." Indeed, the dissent's willingness to impose a "special burden" here stems ultimately from its view that "frustration-of-purpos[e]" conflict pre-emption is a freewheeling, "inadequately considered" doctrine that might well be "eliminate[d]." *Post*, at 1939-1940, and n. 22. In a word, ordinary pre-emption principles, grounded in longstanding precedent, *Hines*, *supra*, at 67, 61 S.Ct. 399, apply. We would not further complicate the law with complex new doctrine.

IV

[6] The basic question, then, is whether a common-law "no airbag" action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners' and the dissent's view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. The Department of ***875** Transportation's (DOT's) comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance--all of which would promote FMVSS 208's safety objectives. See generally 49 Fed.Reg. 28962 (1984).

A

The history of FMVSS 208 helps explain why and how DOT sought these objectives. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install manual seatbelts in all automobiles. 32 Fed.Reg. 2408, 2415. It became apparent, however, that most occupants simply would not buckle up their belts. See 34 Fed.Reg. 11148 (1969). DOT then began to investigate the feasibility of requiring "passive restraints," such as airbags and automatic seatbelts. *Ibid.* In 1970, it amended FMVSS 208 to include some passive protection requirements, 35 Fed.Reg. 16927, while making clear that airbags were one of several "equally acceptable" devices and that it neither " 'favored' [n]or expected the introduction of airbag systems." *Ibid.* In 1971, it added an express provision permitting compliance through the use of nondetachable passive belts, 36 Fed.Reg. 12858, 12859, and in 1972, it mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975, 37 Fed.Reg. 3911. Although the agency's focus was originally on airbags, 34 Fed.Reg. 11148 (1969) (notice of proposed rulemaking); *State Farm*, 463 U.S., at 35, n. 4, 103 S.Ct. 2856; see also *id.*, at 46, n. 11, 103 S.Ct. 2856 (noting view of commentators that, as of 1970, FMVSS ***876** 208 was " 'a de facto airbag mandate' " because of the state of passive restraint technology), at no point did FMVSS 208 formally require the use of airbags. From the start, as in 1984, it permitted passive restraint options.

DOT gave manufacturers a further choice for new

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vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an "ignition interlock" device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. 37 Fed.Reg. 3911 (1972). The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing ****1923** that such systems must include an interlock system *and* a continuous warning buzzer to encourage reattachment of the belt. 39 Fed.Reg. 14593. But the interlock and buzzer devices were most unpopular with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices. Motor Vehicle and School bus Safety Amendments of 1974, § 109, 88 Stat. 1482 (previously codified at 15 U.S.C. § 1410b(b) (1988 ed.)).

That experience influenced DOT's subsequent passive restraint initiatives. In 1976, DOT Secretary William T. Coleman, Jr., fearing continued public resistance, suspended the passive restraint requirements. He sought to win public acceptance for a variety of passive restraint devices through a demonstration project that would involve about half a million new automobiles. *State Farm, supra,* at 37, 103 S.Ct. 2856. But his successor, Brock Adams, canceled the project, instead amending FMVSS 208 to require passive restraints, principally either airbags or passive seatbelts. 42 Fed.Reg. 34289 (1977).

Andrew Lewis, a new DOT Secretary in a new administration, rescinded the Adams requirements, primarily because DOT learned that the industry planned to satisfy those ***877** requirements almost exclusively through the installation of detachable automatic seatbelts. 46 Fed.Reg. 53419-53420 (1981). This Court held the rescission unlawful. *State Farm, supra,* at 34, 46, 103 S.Ct. 2856. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. 49 Fed.Reg. 28962 (1984).

B

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. *Id.,* at 29003; *State Farm, supra,* at 52, 103 S.Ct. 2856 ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries"). Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. 49 Fed.Reg. 28983 (1984) (estimating that only 12.5% of front seat passengers buckled up manual belts). Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. *Id.,* at 28986 (concluding that, although an airbag plus a lap and shoulder belt was the most "effective" system, airbags alone were *less* effective than buckled up manual lap and shoulder belts).

Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. *Id.,* at 28992-28993. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. *Id.,* at 28992, 29001; see also 65 Fed.Reg. 30680, 30681-30682 (2000) (finding 158 confirmed airbag-induced fatalities as of April 2000, and amending rule ***878** to add new requirements, test procedures, and injury criteria to ensure that "future air bags be designed to create less risk of serious airbag-induced injuries than current air bags, particularly for small women and young children"); U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Accident Sampling System Crashworthiness Data System 1991-1993, p. viii (Aug.1995) (finding that airbags caused approximately 54,000 injuries between 1991 and 1993).

****1924** Sixth, airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). 49 Fed.Reg. 28990 (1984). And the agency worried that the high replacement cost--estimated to be $800--could lead car owners to refuse to replace them after deployment. *Id.,* at 28990, 29000-29001; see also *id.,* at 28990 (estimating total investment costs for mandatory airbag requirement at $1.3 billion compared to $500 million for automatic

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seatbelts). Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices, *id.*, at 28987-28989--a particular concern with respect to airbags, *id.*, at 29001 (noting that "[a]irbags engendered the largest quantity of, and most vociferously worded, comments").

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety--a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. *Id.*, at 28996. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. ***879***Id.*, at 28997. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." *Id.*, at 29001. It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. *Id.*, at 29001-29002. And it would thereby build public confidence, *id.*, at 29001-29002, necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a *gradual* phase-in of passive restraints. *Id.*, at 28999-29000. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. *Id.*, at 28999. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. *Ibid.* And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. *Id.*, at 29000-29001.

Of course, as the dissent points out, *post,* at 1937-1938, FMVSS 208 did not guarantee the mix by setting a ceiling for each different passive restraint device. In fact, it provided a form of extra credit for airbag installation (and other nonbelt passive restraint devices) under which each airbag-installed vehicle counted as 1.5 vehicles for purposes of meeting FMVSS 208's passive restraint requirement. 49 C.F.R. § 571.208, S4.1.3.4(a)(1) (1999); 49 Fed.Reg. 29000 (1984). ***880*** But why should DOT have bothered to impose an airbag ceiling when the practical threat to the mix it desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all? After all, only a few years earlier, Secretary Dole's predecessor had discovered that manufacturers intended to meet ****1925*** the then-current passive restraint requirement almost entirely (more than 99%) through the installation of more affordable automatic belt systems. 46 Fed.Reg. 53421 (1981); *State Farm,* 463 U.S., at 38, 103 S.Ct. 2856. The extra credit, as DOT explained, was designed to "encourage manufacturers to equip *at least some* of their cars with airbags." 49 Fed.Reg. 29001 (1984) (emphasis added) (responding to comment that failure to mandate airbags might mean the "end of ... airbag technology"); see also *id.*, at 29000 (explaining that the extra credit for airbags "should promote the development of what may be better alternatives to automatic belts *than would otherwise be developed* " (emphasis added)). The credit provision *reinforces* the point that FMVSS 208 sought a gradually developing mix of passive restraint devices; it does not show the contrary.

Finally, FMVSS 208's passive restraint requirement was conditional. DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower costs--*if only auto occupants would buckle up.* See *id.*, at 28997-28998. Thus, FMVSS 208 provided for rescission of its passive restraint requirement if, by September 1, 1989, two-thirds of the States had laws in place that, like those of many other nations, required auto occupants to buckle up (and which met other requirements specified in the standard). *Id.*, at 28963, 28993-28994, 28997-28999. The Secretary wrote that "coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement." *Id.*, at 28997. ***881*** In the end, two-thirds of the

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States did not enact mandatory buckle-up laws, and the passive restraint requirement remained in effect.

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 "embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." Brief for United States as *Amicus Curiae* 25; see 49 Fed.Reg. 28997 (1984). Petitioners' tort suit claims that the manufacturers of the 1987 Honda Accord "had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags." App. 3 (Complaint, ¶ 11).

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law--*i.e.,* a rule of state tort law imposing such a duty--by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of- Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives that we have just discussed, it is pre-empted. ***882***Hines,* 312 U.S., at 67, 61 S.Ct. 399; see also *Ouellette,* 479 U.S., at 493, 107 S.Ct. 805; *De la Cuesta,* 458 U.S., at 156, 102 S.Ct. 3014 (finding conflict and pre-emption where state law limited the availability of an option ****1926** that the federal agency considered essential to ensure its ultimate objectives).

Petitioners ask this Court to calculate the precise size of the "obstacle," with the aim of minimizing it, by considering the risk of tort liability and a successful tort action's incentive-related or timing-related compliance effects. See Brief for Petitioners 45-50. The dissent agrees. *Post,* at 1936-1938. But this Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations--paying, say, a fine instead--or how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question. The Court has on occasion suggested that tort law may be somewhat different, and that related considerations--for example, the ability to pay damages instead of modifying one's behavior--may be relevant for pre- emption purposes. See *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988); *Cipollone,* 505 U.S., at 536-539, 112 S.Ct. 2608 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); see also *English,* 496 U.S., at 86, 110 S.Ct. 2270; *Silkwood v. Kerr--McGee Corp.,* 464 U.S. 238, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). In other cases, the Court has found tort law to conflict with federal law without engaging in that kind of an analysis. See, *e.g., Ouellette, supra,* at 494-497, 107 S.Ct. 805; *Kalo Brick,* 450 U.S., at 324-332, 101 S.Ct. 1124. We need not try to resolve these differences here, however, for the incentive or compliance considerations upon which the dissent relies cannot, by themselves, change the legal result. Some of those considerations rest on speculation, see, *e.g., post,* at 1936 (predicting risk of "no airbag" liability and manufacturers' likely response to such liability); some rest in critical part upon the dissenters' own view of FMVSS 208's basic purposes--a view ***883** which we reject, see, *e.g., post,* at 1936- 1938 (suggesting that pre-existing risk of "no airbag" liability would have made FMVSS 208 unnecessary); and others, if we understand them correctly, seem less than persuasive, see, *e.g., post,* at 1936-1937 (suggesting that manufacturers could have complied with a mandatory state airbag duty by installing a *different* kind of passive restraint device). And in so concluding, we do not "put the burden" of proving pre-emption on petitioners. *Post,* at 1939. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.

One final point: We place some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would " 'stan[d] as an obstacle to the accomplishment and execution' " of those objectives. Brief for United States as *Amicus Curiae* 25-26 (quoting *Hines, supra,* at 67, 61 S.Ct.

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399). Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. *Medtronic*, 518 U.S., at 496, 116 S.Ct. 2240; see *id.*, at 506, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment). And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time. Brief for United States as *Amicus Curiae* in *Freightliner Corp. v. Myrick*, O.T.1994, No. 94-286, pp. 28-29; Brief for United States as *Amicus Curiae* in *Wood v. General Motors Corp.*, O.T.1989, No. 89-46, pp. 7, 11-16. In these circumstances, the agency's own views should make a difference. See *City of New York v. FCC*, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); ****1927***Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 721, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *de la Cuesta, supra*, at 158, 102 S.Ct. 3014; *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982); *Kalo Brick, supra*, at 321, 101 S.Ct. 1124.

***884** We have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, 461-462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); cf. *Hillsborough County, supra*, at 721, 105 S.Ct. 2371 (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where agency that promulgated the regulation had not, at the time the regulation was promulgated *or subsequently*, concluded that such a conflict existed). The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

[7][8][9][10] The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre- emption. See *post*, at 1940; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); *Hillsborough, supra*, at 718, 105 S.Ct. 2371. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. *English, supra*, at 78-79, 110 S.Ct. 2270; see *Hillsborough, supra*, at 720-721, 105 S.Ct. 2371; *Jones*, 430 U.S., at 540-543, 97 S.Ct. 1305. While "[p]re-emption fundamentally is a question of congressional intent," *English, supra*, at 78, 110 S.Ct. 2270, this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. See, *e.g.*, *Freightliner*, 514 U.S., at 287, 115 S.Ct. 1483; *English, supra*, at 78-79, 110 S.Ct. 2270; see also *Cipollone, supra*, at 545, 547-548, 112 S.Ct. 2608 (SCALIA, J., concurring in judgment in part and dissenting in part). And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area, *Hillsborough, supra*, at 717, 105 S.Ct. 2371; see *post*, at 1940, n. 23--so-called "field pre-emption"--the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. ***885** Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, *English, supra*, at 90, 110 S.Ct. 2270, for the reasons set out above we find such evidence here. To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent, as we have said, apparently welcomes that result, at least where "frustration-of- purpos[e]" pre-emption by agency regulation is at issue. *Post*, at 1939-1940, and n. 22. We do not.

Nor do we agree with the dissent that the agency's views, as presented here, lack coherence. *Post*, at 1938. The dissent points, *ibid.*, to language in the Government's brief stating that

> "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* ... would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23 (emphasis added).

And the dissent says that these words amount to a concession that there is no conflict in this very case. *Post*, at 1938. But that is not what the words say. Rather, ****1928** as the italicized phrase emphasizes, they simply leave open the question whether FMVSS

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208 would pre-empt a different kind of tort case--one *not* at issue here. It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption--say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners ***886** claimed. They have argued generally that, to be safe, a car must have an airbag. See App. 4.

Regardless, the language of FMVSS 208 and the contemporaneous 1984 DOT explanation is clear enough--even without giving DOT's own view special weight. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice STEVENS, with whom Justice SOUTER, Justice THOMAS, and Justice GINSBURG join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition "that, to be safe, a car must have an airbag." *Ante* this page. Indeed, current federal law imposes that requirement on all automobile manufacturers. See 49 U.S.C. § 30127; 49 C.F.R. § 571.208, S4.1.5.3 (1998). The question raised by petitioners' common-law tort action is whether that proposition was sufficiently obvious when Honda's 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate.

***887** "This is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: It is the product of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined. I believe, however, that it is fair to state that if it had been expressly adopted by the Secretary of Transportation, it would have read as follows:

> "No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;
>
> "Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as ****1929** the Secretary may require the installation of airbags in all new cars; and
>
> "Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another."

Perhaps such a rule would be a wise component of a legislative reform of our tort system. I express no opinion about ***888** that possibility. It is, however, quite clear to me that Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the lifesaving advantages of airbags had become sufficiently obvious that their omission might

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constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre- emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as "ordinary experience-proved principles of conflict pre-emption." *Ante,* at 1922.

I

The question presented is whether either the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.), [FN1] or the version of Standard 208 promulgated by the Secretary of Transportation in 1984, 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (1998), pre-empts common-law tort claims that an automobile manufactured in 1987 was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to, airbags." App. 3. In *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), we reviewed the first chapters of the "complex and convoluted history" of Standard 208. It was the "unacceptably high" rate of deaths and injuries caused by automobile accidents that led to the enactment of the Safety Act in 1966. *Id.*, at 33, 103 S.Ct. 2856. The purpose of the Act, as stated by Congress, ***889** was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." § 1392(a). The Act defines the term "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance." § 1391(2).

FN1. In 1994, the Safety Act was recodified at 49 U.S.C. § 30101 *et seq.* Because the changes made to the Act as part of the recodification process were not intended to be substantive, throughout this opinion I shall refer to the pre-1994 version of the statute, as did the Court of Appeals.

Standard 208 covers "[o]ccupant crash protection." Its purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements ... [and] equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S2 (1998). The first version of that standard, issued in 1967, simply required the installation of manual seatbelts in all automobiles. Two years later the Secretary formally proposed a revision that would require the installation of "passive occupant restraint systems," that is to say, devices that do not depend for their effectiveness on any action by the vehicle ****1930** occupant. The airbag is one such system. [FN2] The Secretary's proposal led to a series of amendments to Standard 208 that imposed various passive restraint requirements, culminating in a 1977 regulation that mandated such restraints in all cars by the model year 1984. The two commercially available restraints that could satisfy this mandate ***890** were airbags and automatic seatbelts; the regulation allowed each vehicle manufacturer to choose which restraint to install. In 1981, however, following a change of administration, the new Secretary first extended the deadline for compliance and then rescinded the passive restraint requirement altogether. In *Motor Vehicle Mfrs. Assn.*, we affirmed a decision by the Court of Appeals holding that this rescission was arbitrary. On remand, Secretary Elizabeth Dole promulgated the version of Standard 208 that is at issue in this case.

FN2. "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by [the National Highway Traffic Safety Administration (NHTSA)] that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed.Reg. 34298." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 35, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The 1984 standard provided for a phase-in of passive restraint requirements beginning with the 1987 model

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year. In that year, vehicle manufacturers were required to equip a minimum of 10% of their new passenger cars with such restraints. While the 1987 Honda Accord driven by Ms. Geier was not so equipped, it is undisputed that Honda complied with the 10% minimum by installing passive restraints in certain other 1987 models. This minimum passive restraint requirement increased to 25% of 1988 models and 40% of 1989 models; the standard also mandated that "after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed.Reg. 28999 (1984); see 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (1998). In response to a 1991 amendment to the Safety Act, the Secretary amended the standard to require that, beginning in the 1998 model year, all new cars have an airbag at both the driver's and right front passenger's positions. [FN3]

FN3. See 49 U.S.C. § 30127; 49 C.F.R. § 571.208, S4.1.5.3 (1998). Congress stated that it did not intend its amendment or the Secretary's consequent alteration of Standard 208 to affect the potential liability of vehicle manufacturers under applicable law related to vehicles with or without airbags. 49 U.S.C. § 30127(f)(2).

Given that Secretary Dole promulgated the 1984 standard in response to our opinion invalidating her predecessor's rescission of the 1977 passive restraint requirement, she provided a full explanation for her decision not to require airbags ***891** in all cars and to phase in the new requirements. The initial 3-year delay was designed to give vehicle manufacturers adequate time for compliance. The decision to give manufacturers a choice between airbags and a different form of passive restraint, such as an automatic seatbelt, was motivated in part by safety concerns and in part by a desire not to retard the development of more effective systems. 49 Fed.Reg. 29000-29001 (1984). An important safety concern was the fear of a "public backlash" to an airbag mandate that consumers might not fully understand. The Secretary believed, however, that the use of airbags would avoid possible public objections to automatic seatbelts and that many of the public concerns regarding airbags were unfounded. *Id.*, at 28991.

Although the standard did not require airbags in all cars, it is clear that the Secretary did intend to encourage wider use of airbags. One of her basic conclusions was that "[a]utomatic occupant protection ****1931** systems that do not totally rely upon belts, such as airbags ..., offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives." *Id.*, at 28963; see also *id.*, at 28966, 28986 (noting conclusion of both Secretary and manufacturers that airbags used in conjunction with manual lap and shoulder belts would be "the most effective system of all" for preventing fatalities and injuries). The Secretary therefore included a phase-in period in order to encourage manufacturers to comply with the standard by installing airbags and other (perhaps more effective) nonbelt technologies that they might develop, rather than by installing less expensive automatic seatbelts. [FN4] As a further incentive ***892** for the use of such technologies, the standard provided that a vehicle equipped with an airbag or other nonbelt system would count as 1.5 vehicles for the purpose of determining compliance with the required 10, 25, or 40% minimum passive restraint requirement during the phase- in period. 49 C.F.R. § 571.208, S4.1.3.4(a)(1) (1998). With one oblique exception, [FN5] there is no mention, either in the text of the final standard or in the accompanying comments, of the possibility that the risk of potential tort liability would provide an incentive for manufacturers to install airbags. Nor is there any other specific evidence of an intent to preclude common-law tort actions.

FN4. "If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply through the use of automatic belts. Thus, by phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors." 49 Fed.Reg. 29000 (1984).

FN5. In response to a comment that the manufacturers were likely to use the cheapest system to comply with the new standard, the Secretary stated that she believed "that competition, potential liability for any deficient systems[,] and pride in one's product would prevent this." *Ibid.*

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II

Before discussing the pre-emption issue, it is appropriate to note that there is a vast difference between a rejection of Honda's threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, [FN6] I assume ***893** that such compliance would be admissible evidence tending to negate charges of negligent and defective design. [FN7] In addition, ****1932** if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. *Silkwood v. Kerr- McGee Corp.*, 485 F.Supp. 566, 583-584 (W.D.Okla.1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "[g]ood faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). [FN8]

FN6. *Wood v. General Motors Corp.*, 865 F.2d 395, 417 (C.A.1 1988) (collecting cases). The result would be different, of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum federal standard--*e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208. Restatement (Third) of Torts: General Principles § 14(b), and Comment *g* (Discussion Draft, Apr. 5, 1999) ("If the actor's adoption [or rejection] of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt [or reject] that precaution"); cf. *ante*, at 1920-1921 (discussing problem of basing state tort liability upon compliance with mandatory federal regulatory requirement as question of pre-emption rather than of liability on the merits); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility ...").

FN7. Restatement (Third) of Torts: Products Liability § 4(b), and Comment *e* (1997); *Contini v. Hyundai Motor Co.*, 840 F.Supp. 22, 23-24 (S.D.N.Y.1993). See also Restatement (Second) of Torts § 288C, and Comment *a* (1964) (negligence); *McNeil Pharmaceutical v. Hawkins*, 686 A.2d 567, 577-579 (D.C.1996) (strict liability).

FN8. The subsequent history of *Silkwood* does not cast doubt on this premise. See *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 921-923 (C.A.10 1981) (reversing on ground that federal law pre-empts award of punitive damages), rev'd and remanded, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), on remand, 769 F.2d 1451, 1457-1458 (C.A.10 1985).

The parties have not called our attention to any appellate court opinions discussing the merits of similar no-airbag claims despite the fact that airbag technology was available for many years before the promulgation of the 1984 standard--a standard that is not applicable to any automobiles manufactured before September 1, 1986. Given that an arguable basis for a pre-emption defense did not exist until that standard was promulgated, it is reasonable to infer that the manufacturers' assessment of their potential liability for compensatory and punitive damages on such claims--even ***894** without any pre- emption defense--did not provide them with a sufficient incentive to engage in widespread installation of airbags.

Turning to the subject of pre-emption, Honda contends that the Safety Act's pre-emption provision, 15 U.S.C. § 1392(d), expressly pre-empts petitioners' common-law no-airbag claims. It also argues that the claims are in any event impliedly pre-empted because the imposition of liability in cases such as this would frustrate the purposes of Standard 208. I discuss these alternative arguments in turn.

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III

When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U.S. Const., Art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. [FN9] Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws--particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers--are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 116-117, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (SOUTER, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred").

FN9. Regrettably, the Court has not always honored the latter proposition as scrupulously as the former. See, *e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

***895** When a federal statute contains an express pre-emption provision, "the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). The Safety Act contains both an express pre-emption provision, 15 U.S.C. § 1392(d), and a saving ****1933** clause that expressly preserves common-law claims, § 1397(k). The relevant part of the former provides:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." [FN10]

FN10. This provision is now codified at 49 U.S.C. § 30103(b)(1). Because both federal and state opinions construing this provision have consistently referred to it as " § 1392(d)," I shall follow that practice. Section 1392(d) contains these additional sentences: "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

The latter states:

"Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." [FN11]

FN11. This provision is now codified at 49 U.S.C. § 30103(e). See nn. 1 and 10, *supra*.

***896** Relying on § 1392(d) and legislative history discussing Congress' desire for uniform national safety standards, [FN12] Honda argues that petitioners' common-law no-airbag claims are expressly pre-empted because success on those claims would necessarily establish a state "safety standard" not identical to Standard 208. It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). The two references to a federal safety standard are necessarily describing an

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objective administrative rule. 15 U.S.C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability--unlike most legislative or administrative rulemaking--necessarily performs an important remedial role in compensating accident victims. Cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

FN12. S.Rep. No. 1301, 89th Cong., 2d Sess., 2 (1966); H.R.Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966).

It is true that in three recent cases we concluded that broadly phrased pre- emptive commands encompassed common-law claims. In *Cipollone v. Liggett Group, Inc.*, while we thought it clear that the pre-emption provision in the 1965 Federal Cigarette Labeling and Advertising Act applied only to "rulemaking bodies," 505 U.S., at 518, 112 S.Ct. 2608, we concluded that the broad command in the subsequent 1969 ***897** amendment that "[n]o requirement or prohibition ... shall be imposed under State law" did include certain common- law claims. *Id.*, at 548-549, 112 S.Ct. 2608 (SCALIA, J., concurring in judgment in part and dissenting in part). [FN13] In ****1934***CSX Transp., Inc. v. Easterwood*, where the pre-emption clause of the Federal Railroad Safety Act of 1970 expressly provided that federal railroad safety regulations would pre-empt any incompatible state " 'law, rule, regulation, order, or standard relating to railroad safety,' " [FN14] we held that a federal regulation governing maximum train speed pre-empted a negligence claim that a speed under the federal maximum was excessive. And in *Medtronic, Inc. v. Lohr*, we recognized that the statutory reference to "any requirement" imposed by a State or its political subdivisions may include common-law duties. 518 U.S., at 502-503, 116 S.Ct. 2240 (plurality opinion); *id.*, at 503-505, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509-512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part).

FN13. The full text of the 1969 provision read: " 'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.' " 505 U.S., at 515, 112 S.Ct. 2608 (quoting Public Health Cigarette Smoking Act of 1969, 84 Stat. 88).

FN14. 507 U.S., at 664, 113 S.Ct. 1732 (quoting § 205, 84 Stat. 972, as amended, 45 U.S.C. § 434 (1988 ed. and Supp. II)).

The statutes construed in those cases differed from the Safety Act in two significant respects. First, the language in each of those pre-emption provisions was significantly broader than the text of § 1392(d). Unlike the broader language of those provisions, the ordinary meaning of the term "safety standard" includes positive enactments, but does not include judicial decisions in common-law tort cases.

Second, the statutes at issue in *Cipollone*, *CSX*, and *Medtronic* did not contain a saving clause expressly preserving common-law remedies. The saving clause in the Safety Act ***898** unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability. In light of this reference to common-law liability in the saving clause, Congress surely would have included a similar reference in § 1392(d) if it had intended to pre-empt such liability. *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S.Ct. 1588, 128 L.Ed.2d 302 (1994) (noting presumption that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

The Court does not disagree with this interpretation of the term "safety standard" in § 1392(d). Because the meaning of that term as used by Congress in this statute is clear, the text of § 1392(d) is itself sufficient to establish that the Safety Act does not expressly pre-empt common- law claims. In order to avoid the conclusion that the saving clause is superfluous, therefore, it must follow that it has a

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different purpose: to limit, or possibly to foreclose entirely, the possible pre-emptive effect of safety standards promulgated by the Secretary. The Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether. [FN15]

FN15. The Court surely cannot believe that Congress included that clause in the statute just to avoid the danger that we would otherwise fail to give the term "safety standard" its ordinary meaning.

Given the cumulative force of the fact that § 1392(d) does not expressly pre-empt common-law claims and the fact that § 1397(k) was obviously intended to limit the pre-emptive effect of the Secretary's safety standards, it is quite wrong for the Court to assume that a possible implicit conflict with the purposes to be achieved by such a standard should have the same pre- emptive effect " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ante,* at 1921. Properly construed, the Safety Act imposes a special burden on a party relying on an arguable, implicit conflict ****1935** with a temporary regulatory policy-- ***899** rather than a conflict with congressional policy or with the text of any regulation--to demonstrate that a common-law claim has been pre-empted.

IV

Even though the Safety Act does not expressly pre-empt common-law claims, Honda contends that Standard 208--of its own force--implicitly pre-empts the claims in this case.

"We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' *id.*, at 79, 110 S.Ct. 2270, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

In addition, we have concluded that regulations "intended to pre-empt state law" that are promulgated by an agency acting nonarbitrarily and within its congressionally delegated authority may also have pre-emptive force. *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-154, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). In this case, Honda relies on the last of the implied pre-emption principles stated in *Freightliner*, arguing that the imposition of common-law liability for failure to install an airbag would frustrate the purposes and objectives of Standard 208.

Both the text of the statute and the text of the standard provide persuasive reasons for rejecting this argument. The saving clause of the Safety Act arguably denies the Secretary the authority to promulgate standards that would ***900** pre-empt common-law remedies. [FN16] Moreover, the text of Standard 208 says nothing about pre-emption, and I am not persuaded that Honda has overcome our traditional presumption that it lacks any implicit pre-emptive effect.

FN16. The Court contends, in essence, that a saving clause cannot foreclose *implied* conflict pre-emption. *Ante,* at 1921-1922. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a *regulation* issued pursuant to that statute of any implicit pre-emptive effect. See *United States v. Locke, ante,* at 104-107, 120 S.Ct. 1135; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action"); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328, 331, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). As stated in the text, I believe the language of this particular

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> saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common- law remedies. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). Under that interpretation, there is by definition no frustration of federal purposes--that is, no "tolerat[ion of] actual conflict," *ante,* at 1922--when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

Honda argues, and the Court now agrees, that the risk of liability presented by common-law claims that vehicles without **1936 airbags are negligently and defectively designed would frustrate the policy decision that the Secretary made in promulgating Standard 208. This decision, in their view, was that safety--including a desire to encourage "public acceptance of the airbag technology and experimentation with better passive restraint systems" [FN17]--would best be promoted *901 through gradual implementation of a passive restraint requirement making airbags only one of a variety of systems that a manufacturer could install in order to comply, rather than through a requirement mandating the use of one particular system in every vehicle. In its brief supporting Honda, the United States agreed with this submission. It argued that if the manufacturers had known in 1984 that they might later be held liable for failure to install airbags, that risk "would likely have led them to install airbags in all cars," thereby frustrating the Secretary's safety goals and interfering with the methods designed to achieve them. Brief for United States as *Amicus Curiae* 25.

FN17. 166 F.3d 1236, 1243 (C.A.D.C.1999).

There are at least three flaws in this argument that provide sufficient grounds for rejecting it. First, the entire argument is based on an unrealistic factual predicate. Whatever the risk of liability on a no-airbag claim may have been prior to the promulgation of the 1984 version of Standard 208, that risk did not lead any manufacturer to install airbags in even a substantial portion of its cars. If there had been a realistic likelihood that the risk of tort liability would have that consequence, there would have been no need for Standard 208. The promulgation of that standard certainly did not *increase* the pre-existing risk of liability. Even if the standard did not create a previously unavailable pre-emption defense, it likely *reduced* the manufacturers' risk of liability by enabling them to point to the regulation and their compliance therewith as evidence tending to negate charges of negligent and defective design. See Part II, *supra.* Given that the pre-1984 risk of liability did not lead to widespread airbag installation, this reduced risk of liability was hardly likely to compel manufacturers to install airbags in all cars--or even to compel them to comply with Standard 208 during the phase-in period by installing airbags exclusively.

Second, even if the manufacturers' assessment of their risk of liability ultimately proved to be wrong, the purposes of Standard 208 would not be frustrated. In light of the inevitable *902 time interval between the eventual filing of a tort action alleging that the failure to install an airbag is a design defect and the possible resolution of such a claim against a manufacturer, as well as the additional interval between such a resolution (if any) and manufacturers' "compliance with the state-law duty in question," *ante,* at 1926, by modifying their designs to avoid such liability in the future, it is obvious that the phase-in period would have ended long before its purposes could have been frustrated by the specter of tort liability. Thus, even without pre-emption, the public would have been given the time that the Secretary deemed necessary to gradually adjust to the increasing use of airbag technology and allay their unfounded concerns about it. Moreover, even if any no-airbag suits were ultimately resolved against manufacturers, the resulting incentive to modify their designs would have been quite different from a decision by the Secretary to mandate the use of airbags in every vehicle. For example, if the extra credit provided for the use of nonbelt passive restraint technologies during the phase-in period had (as the Secretary hoped) ultimately encouraged manufacturers to develop a nonbelt system more effective than the airbag, manufacturers held liable for failing to install passive restraints would have been free to respond by modifying their designs to include**1937 such a system *instead of* an airbag.

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[FN18] It seems clear, therefore, that any ***903** potential tort liability would not frustrate the Secretary's desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags.

FN18. The Court's failure to "understand [this point] correctly," *ante,* at 1926, is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing ... a duty [to install an airbag]." *Ante,* at 1925; see also *ante,* at 1920 (referring to verdict in common-law tort suit as a "jury-imposed safety standard"). Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design--"including, but not limited to, airbags," App. 3--could have reduced the foreseeable risks of harm posed by the product. See Restatement (Third) of Torts: Products Liability § 2(b), and Comment *d* (1997); *id.,* § 1, Comment *a* (noting that § 2(b) is rooted in concepts of both negligence and strict liability). Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.

Third, despite its acknowledgment that the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor," *ante,* at 1919, the Court completely ignores the important fact that by definition all of the standards established under the Safety Act--like the British regulations that governed the number and capacity of lifeboats aboard the *Titanic* *[FN19]*--impose minimum, rather than fixed or maximum, requirements. 15 U.S.C. § 1391(2); see *Norfolk Southern R. Co. v. Shanklin, ante,* at 359, 120 S.Ct. 1467 (BREYER, J., concurring) ("[F]ederal *minimum* safety standards should not pre-empt a state tort action"); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 721, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10,25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort liability ***904** might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations. For similar reasons, it is evident that variety was not a matter of independent importance to the Secretary. Although the standard allowed manufacturers to comply with the minimum percentage requirements by installing passive restraint systems other than airbags (such as automatic seatbelts), it encouraged them to install airbags and other nonbelt systems that might be developed in the future. The Secretary did not act to ensure the use of a variety of passive restraints by placing ceilings on the number of airbags that could be used in complying ****1938** with the minimum requirements. [FN20] Moreover, even if variety and gradualism had been independently important to the Secretary, there is nothing in the standard, the accompanying commentary, or the history of airbag regulation to support the notion that the Secretary intended to advance those purposes at all costs, without regard to the detrimental consequences that pre- emption of tort liability could have for the achievement of her avowed purpose of reducing vehicular injuries. See *Silkwood v. Kerr-McGee Corp.,* 464 U.S., at 257, 104 S.Ct. 615.

FN19. Statutory Rules and Orders 1018-1021, 1033 (1908). See Nader & Page, Automobile-Design Liability and Compliance with Federal Standards, 64 Geo. Wash. L.Rev. 415, 459 (1996) (noting that the *Titanic* "complied with British

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governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board"); W. Wade, The *Titanic:* End of a Dream 68 (1986).

FN20. Of course, allowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an "obstacle" to the auto manufacturers' freedom to choose among several different passive restraint device options. Cf. *ante,* at 1923-1924, 1925.

My disagreement with Honda and the Government runs deeper than these flaws, however. In its brief, the Government concedes that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of ***905** passive restraint in a certain model of car because of other design features particular to that car ... would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23. [FN21] Petitioners' claims here are quite similar to the claim described by the Government: their complaint discusses other design features particular to the 1987 Accord (such as the driver's seat) that allegedly rendered it unreasonably dangerous to operate without an airbag. App. 4-5. The only distinction is that in this case, the particular 1987 Accord driven by Ms. Geier included no passive restraint of any kind because Honda chose to comply with Standard 208's 10% minimum requirement by installing passive restraints in other 1987 models. I fail to see how this distinction makes a difference to the purposes of Standard 208, however. If anything, the type of claim favored by the Government--*e.g.,* that a particular model of car should have contained an airbag instead of an automatic seatbelt--would seem to trench even more severely upon the purposes that the Government and Honda contend were behind the promulgation of Standard 208: that having a variety of passive restraints, rather than only airbags, was necessary to promote safety. Thus, I conclude that the Government, on the Secretary's behalf, has failed to articulate a coherent view of the policies behind Standard 208 that would be frustrated by petitioners' claims.

FN21. Compare *ante,* at 1925 (disagreeing with Government's view by concluding that tort-law duty "requir[ing] manufacturers of all similar cars to install airbags rather than other passive restraint systems ... would [present] an obstacle to the variety and mix of devices that the federal regulation sought"), with *ante,* at 1926, 1927-1928 (noting that "the agency's own views should make a difference," but contending that the above-quoted Government view is "*not* at issue here").

V

For these reasons, it is evident that Honda has not crossed the high threshold established by our decisions regarding ***906** pre-emption of state laws that allegedly frustrate federal purposes: it has not demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary set forth with clarity in Standard 208. *Gade v. National Solid Wastes Management Assn.,* 505 U.S., at 110, 112 S.Ct. 2374 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 111, 112 S.Ct. 2374 ("A freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-emp[t] state law"). Furthermore, it is important to note that the text of Standard 208 (which the Court does not even bother ****1939** to quote in its opinion), unlike the regulation we reviewed in *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta,* 458 U.S., at 158, 102 S.Ct. 3014, does not contain any expression of an intent to displace state law. Given our repeated emphasis on the importance of the presumption against pre-emption, see, *e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S., at 663-664, 113 S.Ct. 1732; *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), this silence lends additional support to the conclusion that the continuation of whatever common-law liability may exist in a case like this poses no danger of frustrating any of the Secretary's primary purposes in promulgating Standard 208. See *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S., at 721, 105 S.Ct. 2371; *Silkwood v. Kerr-McGee Corp.,* 464 U.S., at 251, 104 S.Ct. 615 ("It is difficult to believe that [the

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Secretary] would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

The Court apparently views the question of pre-emption in this case as a close one. *Ante,* at 1926-1927 (relying on Secretary's interpretation of Standard 208's objectives to bolster its finding of pre-emption). Under "ordinary experience-proved principles of conflict pre-emption," *ante,* at 1922, therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, ***907** preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes. *Ante,* at 1926 (noting that petitioners' arguments "cannot, by themselves, change the legal result"). In view of the important principles upon which the presumption is founded, however, rejecting it in this manner is profoundly unwise.

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied ... [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S., at 230, 67 S.Ct. 1146; see *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); see *United States v. Morrison,* 529 U.S. 598, 660-663, 120 S.Ct. 1740 (BREYER, J., dissenting); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 93- 94, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (STEVENS, J., dissenting); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 292-293, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (THOMAS, J., dissenting); *Gregory v. Ashcroft,* 501 U.S. 452, 460-464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes--*i.e.,* that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution ***908** of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). [FN22]

FN22. Recently, one commentator has argued that our doctrine of frustration-of-purposes (or "obstacle") pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it. Nelson, Preemption, 86 Va. L.Rev. 225, 231-232 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes"). Obviously, if we were to do so, there would be much less need for the presumption against pre-emption (which the commentator also criticizes). As matters now stand, however, the presumption reduces the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes.

****1940** While the presumption is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some

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specificity." [FN23] *909*California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 717-718, 105 S.Ct. 2371 (noting that too easily implying pre-emption "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence," and stating that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive"); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S., at 154, 102 S.Ct. 3014 (noting that pre-emption inquiry is initiated "[w]hen the administrator promulgates regulations intended to pre- empt state law"). This expectation, which is shared by the Executive Branch, [FN24] serves to ensure **1941 that States will be able to have a dialog *910 with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

FN23. The Court brushes aside our specificity requirement on the ground that the cases in which we relied upon it were not cases of implied conflict pre-emption. *Ante,* at 1926-1927. The Court is quite correct that *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), and *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987), are cases in which field pre-emption, rather than conflict pre- emption, was at issue. This distinction, however, does not take the Court as far as it would like. Our cases firmly establish that conflict and field pre-emption are alike in that both are instances of implied pre-emption that by definition do "not [turn] on an express statement of pre- emptive intent." *Ante,* at 1927; see, *e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (quoted *supra,* at 1935); *English v. General Elec. Co.*, 496 U.S. 72, 79-80, and n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (noting that field pre- emption rests on an inference of congressional intent to exclude state regulation and that it "may be understood as a species of conflict pre- emption"); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Given that our specificity requirement was adopted in cases involving implied pre-emption, the Court cannot persuasively claim that the requirement is incompatible with our implied pre-emption jurisprudence in the federal regulatory context.

FN24. See Exec. Order No. 12612, § 4(e), 3 C.F.R. § 252, 255 (1988) ("When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings"); Exec. Order No. 13132, § 4(e), 64 Fed.Reg. 43255, 43257 (1999) (same); cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (discussing 21 C.F.R. § 808.5 (1995), an FDA regulation allowing a State to request an advisory opinion regarding whether a particular state-law requirement is pre-empted, or exempt from pre-emption, under the Medical Device Amendments of 1976).

When the presumption and its underpinnings are properly understood, it is plain that Honda has not overcome the presumption in this case. Neither Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits. Indeed, the only mention of such suits in the commentary tends to suggest that they would not be pre-empted. See n. 5, *supra.* In the Court's view, however, "[t]he failure of the Federal Register to address pre-emption explicitly is ... not determinative," *ante,* at 1927, because the Secretary's consistent litigating position since 1989, the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by no-airbag suits. Pre-empting on these three bases blatantly contradicts the presumption against pre-emption. When the 1984 version of Standard 208 was under consideration, the States obviously were not afforded any notice that purposes might someday be discerned in the history

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of airbag regulation that would support pre-emption. Nor does the Court claim that the notice of proposed rulemaking that led to Standard 208 provided the States with notice either that the final version of the standard might contain an express pre-emption provision or that the commentary accompanying it might contain a statement of purposes with arguable pre-emptive effect. Finally, the States plainly had no opportunity to comment upon either the commentary accompanying the final version of the standard or the Secretary's *ex post* litigating position that the standard had implicit pre- emptive effect.

Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from ***911** regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of- purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or regulation. In my view, however, "preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." 1 L. Tribe, American Constitutional Law § 6-28, p. 1177 (3d ed.2000).

As to the Secretary's litigating position, it is clear that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,] ... do[es] not warrant *Chevron*-style deference." *Christensen v. Harris County, ante,* at 587, 120 S.Ct. 1655. Moreover, our pre-emption precedents and the APA establish that even if the Secretary's litigating position were coherent, the lesser deference paid to it by the Court today would be inappropriate. Given the Secretary's contention that he has the authority to promulgate safety standards that pre-empt state law and the fact that he could promulgate a standard such as the one quoted *supra,* at 1928-1929, with relative ease, we should be quite reluctant to find pre-emption based only on the Secretary's informal effort to recast the 1984 version of Standard 208 into a pre-emptive mold. [FN25] See ****1942 *912***Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 721, 105 S.Ct. 2371; cf. *Medtronic, Inc. v. Lohr*, 518 U.S., at 512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 743-744, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking-- whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent [FN26]--respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation. 5 U.S.C. § 551(5); *Paralyzed Veterans of America v. D.C. Arena L. P.*, 117 F.3d 579, 586 (C.A.D.C.1997); *National Family Planning & Reproductive Health Assn. v. Sullivan*, 979 F.2d 227, 240 (C.A.D.C.1992).

FN25. The cases cited by the Court, *ante,* at 1927, are not to the contrary. In *City of New York v. FCC*, 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988), for example, we were faced with Federal Communications Commission regulations that explicitly "reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television." *Id.*, at 62, 65, 108 S.Ct. 1637. It was only in determining whether the issuance of such regulations was a proper exercise of the authority delegated to the agency by Congress that we afforded a measure of deference to the agency's interpretation of that authority, as *formally* expressed through its explicitly pre-emptive regulations. *Id.*, at 64, 108 S.Ct. 1637; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-705, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (regulation); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S., at 158-159, 102 S.Ct. 3014 (regulation); *Blum v. Bacon*, 457 U.S. 132, 141-142, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982) (Action Transmittal by Social Security Administration); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S., at 327, 101 S.Ct. 1124 (order of Interstate Commerce Commission); *United States v. Shimer*, 367 U.S. 374, 377, 81 S.Ct. 1554, 6 L.Ed.2d 908

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(1961) (regulation). I express no opinion on whether any deference would be appropriate in any of these situations, but merely observe that such situations are not presented here.

FN26. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 721, 105 S.Ct. 2371 (noting that agency "can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements" and to promulgate regulations pre-empting local law that imperils the goals of that program).

* * *

Because neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt ***913** petitioners' cause of action, and because I cannot agree with the Court's unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption, I am convinced that Honda has not overcome the presumption against pre-emption in this case. I therefore respectfully dissent.

120 S.Ct. 1913, 529 U.S. 861, 146 L.Ed.2d 914, 68 USLW 4425, Prod.Liab.Rep. (CCH) P 19,795, 00 Cal. Daily Op. Serv. 3950, 2000 Daily Journal D.A.R. 5277, 2000 CJ C.A.R. 2826, 13 Fla. L. Weekly Fed. S 344

Briefs and Other Related Documents (Back to top)

• 1999 WL 1140848, 68 USLW 3335 (Oral Argument) Oral Argument (Dec. 07, 1999)

• 1999 WL 1076223 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Nov. 30, 1999)

• 1999 WL 1049890 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT (Nov. 19, 1999)

• 1999 WL 1049891 (Appellate Brief) BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Nov. 19, 1999)

• 1999 WL 1049893 (Appellate Brief) BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE (Nov. 19, 1999)

• 1999 WL 1049895 (Appellate Brief) BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049898 (Appellate Brief) BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049900 (Appellate Brief) BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049905 (Appellate Brief) BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1049906 (Appellate Brief) BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1050049 (Appellate Brief) BRIEF FOR RESPONDENTS (Nov. 19, 1999)

• 1999 WL 1045115 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE (Nov. 08, 1999)

• 1999 WL 966486 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966514 (Appellate Brief) BRIEF AMICUS CURIAE OF ROBERT B LEFLAR, ROBERT S. ADLER, MICHAEL GREEN, AND

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JOSEPH A. PAGE IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 966529 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Oct. 22, 1999)

• 1999 WL 966532 (Appellate Brief) BRIEF FOR PETITIONERS (Oct. 22, 1999)

• 1999 WL 973859 (Appellate Brief) BRIEF AMICI CURIAE OF THE STATES OF MISSOURI, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, IOWA, KANSAS, MONTANA, NEW HAMPSHIRE, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT AND WASHINGTON IN SUPPORT OF PETITIONERS (Oct. 22, 1999)

• 1999 WL 988261 (Appellate Brief) BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Oct. 20, 1999)

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Brett Kavanaugh – Product Liability

Allegation: In *Green v. General Motors Corp.*, Mr. Kavanaugh once again represented big business attempting to overturn a jury verdict in favor of a 24-year-old who became a quadriplegic due to the defective design of the car manufactured by defendant. 310 N.J. Super. 507 (1998).

Facts:

- **Mr. Kavanaugh relied on Third Circuit precedent that supported his client's position on appeal, that the judge had made an improper jury instruction.**
  - ✓ The defendant argued that the jury should have been able to consider the plaintiff's own negligence in speeding, which was conceded by the defendant.
  - ✓ The defense urged the Superior Court of New Jersey to accept a Third Circuit holding that juries had to be allowed to consider factors such as speed and the plaintiff's driving. *Huddell v. Levin*, 537 F.2d 726, 741 (3rd Cir. 1976).
  - ✓ Ultimately, the Superior Court of New Jersey "respectfully disagreed" with the Third Circuit's speed analysis. *Green v. General Motors Corp.*, 310 N.J. Super. 507, 523 (1998).
- **The court ruled in favor of Mr. Kavanaugh's clients, General Motors, on a number of issues that were argued on appeal.**
  - ✓ The appellate court agreed with Mr. Kavanaugh's client's position that the trial court had wrongly awarded prejudgment interest on future medical expenses and lost earnings. This amount had exceeded $8.5 million. *Id.* at 533.
- **As a member of the appellate team, Mr. Kavanaugh had a duty to zealously advance his client's positions. He did so by making reasonable arguments that relied on established precedent.**
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Superior Court of New Jersey,
Appellate Division.

Michael GREEN, Plaintiff-Respondent-Cross-Appellant,
v.
GENERAL MOTORS CORPORATION, Defendant-Appellant-Cross-Respondent,
and
Delores Parmentier, Breza Bus Service, Inc., and Goodyear Tire & Rubber Company, Defendants.

Argued Jan. 27, 1998.
Decided March 18, 1998.

Motorist, who was rendered a quadriplegic as a result of an automobile accident, brought design defect products liability action against automobile manufacturer. The Superior Court, Law Division, Essex County, entered judgment for motorist, with damage award totaling more than $25 million. Manufacturer appealed. The Superior Court, Appellate Division, Dreier, P.J.A.D., held that: (1) accident severity and speed were not factors to consider in determining whether automobile's roof design was defective; (2) motorist presented reasonable alternative roof design, as required to recover in action premised on defective design; (3) trial court's improper placement of burden of proving allocation of injuries between accident and defective design on motorist was harmless error; (4) trial court's improper instruction on manufacturer's duty to inspect and test automobile roof was harmless error; (5) motorist was not entitled to award of prejudgment interest on future damages; (6) prejudgment interest would not be tolled during two-year period in which action was not brought to trial; (7) damages for future medical expenses should have been reduced to present value using some reasonable discount rate; and (8) manufacturer was not entitled to credit for settlement between motorist and other driver involved in accident.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Products Liability 36
313Ak36 Most Cited Cases

Accident severity and speed of vehicle at time of impact were not factors to consider in determining whether automobile's roof design was defective.

[2] Products Liability 11
313Ak11 Most Cited Cases

Design defect does not come into being at time of accident; rather, it occurs when defective product is placed into stream of commerce.

[3] Products Liability 36
313Ak36 Most Cited Cases

In determining whether automobile was defective, jury had to determine the risks and alternatives that should have been known to reasonable manufacturer, and then assess whether manufacturer discharged its duty to provide reasonably fit, suitable, and safe vehicle, employing a risk-utility analysis.

[4] Products Liability 11
313Ak11 Most Cited Cases

In defective design case, issue upon which most claims will turn is proof by plaintiff of reasonable alternative design, the omission of which renders product not reasonably safe.

[5] Products Liability 36
313Ak36 Most Cited Cases

Motorist, who was rendered a quadriplegic as a result of automobile accident, presented reasonable alternative roof design for automobile, as required to recover in action premised on defective design.

[6] Damages 15
115k15 Most Cited Cases

Since automobile driver's injuries were caused totally by defective product, and not by collision with van, injuries could not be apportioned between automobile manufacturer and automobile driver and/or van driver.

[7] Products Liability 40

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313Ak40 Most Cited Cases

Automobile driver's own negligence with respect to his claim of a defective product was limited to whether he unreasonably proceeded in the face of a known danger; furthermore, this "known danger" was not the obviously known consequences of driver's speed, but rather was that posed by automobile's faulty roof design.

[8] Appeal and Error 1064.1(9)
30k1064.1(9) Most Cited Cases

Although trial court, in design defect products liability action, improperly placed on automobile driver the burden of proving allocation of injuries between accident, for which driver and/or driver of van with which he collided were responsible, and design defect, for which automobile manufacturer was responsible, error favored manufacturer and, therefore, was harmless.

[9] Appeal and Error 1064.1(8)
30k1064.1(8) Most Cited Cases

Trial court's improper instruction, in defective design products liability action, on automobile manufacturer's duty to inspect and test automobile roof, to which automobile manufacturer did not object, was harmless error, since it was not clearly capable of producing unjust result.

[10] Products Liability 13
313Ak13 Most Cited Cases

Proof of failure to test or of inadequate testing may be evidential as explanation of why design was defective, but it is not in itself proof of separate basis for liability.

[11] Appeal and Error 181
30k181 Most Cited Cases

Reviewing court will reverse on appeal for errors that lacked an objection only if errors cut mortally into substantive rights of defendant.

[12] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Driver, who was rendered a quadriplegic as a result of design defect in automobile, was not entitled to award of prejudgment interest on future medical expenses and future lost earnings, where prejudgment interest on portions of losses that driver had not yet suffered exceeded $8.5 million. R. 4:42- 11(b).

[13] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Denial or suspension of prejudgment interest in products liability action is left to sound discretion of trial judge, based on considerations of equity, fairness, and justice, viewed in factual context of case at hand. R. 4:42- 11(b).

[14] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Prejudgment interest would not be tolled during two-year period in which design defect action was not brought to trial because injured driver was obtaining new liability expert after his initial expert suffered incapacitating strokes, since manufacturer had use of sums due for that period and could invest them.

[15] Appeal and Error 1178(6)
30k1178(6) Most Cited Cases

[15] Damages 226
115k226 Most Cited Cases

In design defect action, damages for future medical expenses should have been reduced to present value using some reasonable discount rate, and jury's use of total offset method warranted remand and remittitur.

[16] Trial 114
388k114 Most Cited Cases

While expert witness is prohibited from presenting bottom line evidence of future wage losses in design defect products liability action, attorney may include bottom line income loss calculation in summation.

[17] Damages 63
115k63 Most Cited Cases

Since jury in defective design products liability action made no determination of liability of driver of van which collided with plaintiff's automobile, and found only that as between plaintiff and automobile manufacturer, manufacturer was 100% responsible for plaintiff's injuries, manufacturer was not entitled to credit for settlement between van driver and plaintiff.

****206 *511** Brett M. Kavanaugh (Kirkland & Ellis) of the District of Columbia Bar, Washington, DC,

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admitted pro hac vice, for defendant-appellant- cross-respondent (Tansey, Fanning, Haggerty, Kelly, Convery & Tracy attorneys; Thomas F. Tansey, Woodbridge, and James N. Tracy, on the brief).

****207** Maurice J. Donovan, West Orange, for plaintiff-respondent-cross- appellant (Benjamin M. Del Vento, Newark, attorney; Benjamin M. Del Vento, of counsel, Mr. Donovan, on the brief).

Before Judges DREIER, PAUL G. LEVY and WECKER.

The opinion of the court was delivered by

DREIER, P.J.A.D.

Defendant, General Motors Corporation (GM), appeals from a final judgment based upon a jury award in favor of plaintiff, who was driving a GM vehicle when involved in an accident that rendered him a quadriplegic. The jury awarded $13,000,000 for future medical expenses, $149,315 for loss of past income, $305,860.35 for loss of future income, and $4,000,000 for pain and suffering. Plaintiff's past medical expenses of $312,000 have been stipulated. The total damage award was therefore $17,767,175.35, which with prejudgment interest and costs, and a credit for a settlement with other defendants, totaled $25,110,484.90. GM also appeals from the denial of its motions for a judgment n.o.v., a new trial, or a remittitur. Plaintiff cross-appeals from a portion of the judgment granting defendant a $799,000 credit for amounts received from other defendants who settled after an initial trial had ended in a hung jury. The court deducted this amount from the final judgment after computation of the prejudgment interest noted earlier. Considering that the jury returned a verdict for plaintiff, we will examine the facts in a light favorable to plaintiff, except where any alternative facts may bear upon one of the many issues raised by GM.

On the day of the accident, June 9, 1986, plaintiff, then twenty-four years old and five feet, nine inches tall, was employed as a "car jockey" by Sullivan Chevrolet, an automobile dealership in Roselle Park. He was driving one of his employer's automobiles, ***512** a brand new 1986 Chevrolet Camaro IROC (International Race of Champions) Z28 sports coupe, a two-door vehicle designed and manufactured by defendant.

The Camaro was equipped with a "T-roof," a "luxury option" [FN1] provided by GM. In 1986, the Camaro was constructed with both an "A-pillar" and a "B-pillar." The A-pillar consisted actually of two pillars and a header which held the front windshield and supported the door hinges. The B-pillar similarly supported the rear window. In the T-roof Camaro there was a steel "center T-bar" welded into the center of the front windshield header and the rear window header. The roof design is called a "T-roof" or "T-top" because the T-bar is the only connection between the A and B pillars. Removable glass panels were supported by the front and rear headers and the T-bar, and provided a convertible-like feeling and driving experience when they were removed. When installed, they provided greater protection from the weather and more security than a canvas-top convertible.

FN1. A "luxury option" is distinguished from a "performance option" which enhances the ability of the vehicle to proceed from one point to another beyond that of the base car. Therefore, a "T-roof" as opposed to a standard roof was offered solely for its appearance or comfort.

As plaintiff drove the Camaro north on Chandler Avenue with both glass panels inserted and the side windows rolled up, he was accompanied by a friend, Marc Alexander, seated in the front passenger seat. Both plaintiff and Alexander were wearing their seat belts. The legal speed on Chandler Avenue was twenty- five miles per hour; however, plaintiff was apparently greatly exceeding the speed limit. As he came over a slight rise on Chandler Avenue, plaintiff saw a school van proceeding south on Chandler Avenue. According to the driver of the van, her speed was approximately twenty-five miles per hour when she first saw plaintiff's car. The only indication of how much this speed may have actually decreased by the time of the collision, is the van driver's estimate that her speed at contact was five miles per hour.

***513** When plaintiff first observed the school van, it was only one or two car lengths away and was "right in the middle of the road" and "on the center line." We assume, however, that since the driver of the van was more elevated than plaintiff, she may have seen ****208** the Camaro slightly before plaintiff could see her. To avoid a head-on collision, plaintiff applied

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the Camaro's brakes and attempted to steer to the right, however, the left rear side of the Camaro, just behind the driver's-side door, struck the left front corner of the van at a thirty to forty-five degree angle.

The question of the speeds of the van and Camaro were disputed, and the record shows various estimates. Both plaintiff and the passenger estimated the Camaro's speed as between forty and fifty miles per hour. Plaintiff's expert, Donald Phillips, testified that there was insufficient physical evidence to perform a reliable reconstruction of speeds at impact. The van driver estimated plaintiff's speed at seventy-five miles per hour (and testified that plaintiff was on the wrong side of the road and did not decrease his speed). An employee of the Department of Public Works, who was travelling south on Chandler Avenue, 200 feet behind the school van in a dump truck, estimated plaintiff to be proceeding between sixty and seventy miles an hour. Defendant's expert estimated the Camaro's speed at between sixty-seven to seventy-six miles per hour. Therefore, if we accept the van driver's estimate that her vehicle was proceeding at five miles per hour at the time of the impact, and plaintiff's minimum estimate of his speed at forty miles per hour, the lowest closing speed between the two vehicles would have been forty-five miles per hour. If we accept the van driver's estimate of her speed and the maximum speed she and the independent witnesses placed upon the Camaro, the closing speed could have been as high as eighty-one miles per hour.

Plaintiff's medical expert explained that plaintiff had suffered a compression fracture of his spinal cord. Such an injury does not cause instantaneous paralysis, and therefore it "would take a longer time to show all the symptoms of spinal cord injury as ***514** opposed to a sudden disruption of the cord completely through." There was other eyewitness testimony that plaintiff could move his arms and legs immediately after the accident. But, unfortunately, this spinal cord injury quickly and permanently rendered plaintiff a quadriplegic.

Plaintiff's engineering expert's theory of the cause of plaintiff's injury focused on the collapse of the T-bar and "B" frame. When the Camaro hit the school bus to the rear of the driver's door and behind the center of gravity of the car, it spun, causing plaintiff's seat belt to force him back into his seat so that his head was just under the rear portion of the T-bar and B frame which deformed downward onto the back of plaintiff's head. The collapse of the T- bar compressed his spine and caused the compression fracture to his C5, C6, and C7 vertebrae. It was undisputed and is apparent from the photographs that the rear roof of the T-top caved downward in the accident.

Neither plaintiff nor Alexander had any post-accident memory of the accident beyond the instant of impact. Immediately after the accident, however, plaintiff was found outside of the Camaro lying facedown on the ground. [FN2] A neighbor who heard the crash ran to the site, and as she arrived she saw the driver's side door of the Camaro swing out, following which plaintiff "stepped out of the car." She testified that a "dazed" plaintiff took a "couple of steps," and "fell straight on his face." Defendant, through extensive expert testimony, contended that plaintiff was thrown from the car and suffered his injuries when he landed on his head. Plaintiff's expert testified that the lack of injuries that would have been commensurate with plaintiff so landing made such a scenario a virtual impossibility. This conclusion, coupled with the independent ***515** witness who saw plaintiff open the door and walk away from the vehicle, certainly provides a sufficient basis for the jury's implicit factual finding that plaintiff was not ejected from the car.

> FN2. Within seconds of the collision, and apparently after plaintiff left the car, it caught fire while Alexander was still sitting inside. Alexander was pulled out by a witness who observed burns on the back of Alexander's head and ears. Alexander testified that he incurred third- degree burns on his arm, neck and face, but medical personnel observed no burns on plaintiff's body, corroborating plaintiff's testimony that he suffered no burns in the accident.

The verdict was taken by special interrogatories. The jury found specifically that the "collapse of the rear roof of the T-Top Camaro****209** caused it to strike the plaintiff on his head." It also found that the "roof collapse" was caused by a "design defect of the T-Roof Camaro." Finally, it determined that the roof collapse was a proximate cause of plaintiff's injuries, and that 100f his injuries were "solely attributable to the design defect of the T-Roof Camaro." Presumably because of the earlier settlement, the jury was given no interrogatories relating to the responsibility of the driver of the van or her employer, and we have not been informed by the record on appeal whether GM had ever made a

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cross-claim for contribution against these former defendants, and if so, whether this claim was withdrawn when these defendants were released by plaintiff.

The additional facts concerning the trial, including those relating to the testing of the Camaro, the judge's charge and testimony relating to damages will be discussed when these issues are explored.

Defendant has raised five points on this appeal, some with subparts. We have departed somewhat from defendant's organization of the arguments and will address each point accordingly.

I. The Judge's Instruction on Speed

[1] GM first contends that the trial judge mistakenly instructed the jury that it could not consider evidence of accident severity and speed in determining whether the Camaro's T-roof design was defective. Before we proceed to the jury instructions, we must examine the nature of plaintiff's claim. Plaintiff has not contended here that GM or the van driver were responsible for the accident. Plaintiff's cause of action against GM was based upon a crashworthiness theory. He claims that whoever might be responsible for the accident, GM was obliged to design a vehicle that ***516** would maintain the integrity of the passenger compartment sufficiently to prevent additional injury to the occupant. If plaintiff had not suffered the injury from the T-bar and B frame deflection, he would have had no claim against GM for the accident that resulted in large part from his faulty driving. Also, if the van driver were to some extent responsible for the accident, GM could have had that responsibility assessed by a timely request to the court to have the jury fix the van driver's percentage responsibility.

[2] Given this narrow framework, we will focus on plaintiff's claim against GM. A design defect does not come into being at the time of an accident. Rather, it occurs when a defective product is placed into the stream of commerce. *See* Zaza v. Marquess & Nell, Inc., 144 *N.J.* 34, 48-49, 675 *A.*2d 620 (1996), and the cases cited therein. One of the differences between the causes of action for strict liability, negligence, or even some warranty claims is the way each focuses upon this time frame. If we were to look for negligence, we would focus upon the conduct of the manufacturer during the period of design, manufacture and distribution of the Camaro, including its testing and construction. If we were to look at a warranty claim, we would examine the performance of the car and determine whether it was "fit for the ordinary purposes for which" the car was used. *N.J.S.A.* 12A:2-314. A claim for strict liability, however, focuses on the car as it enters the stream of commerce to see whether it was defective. *Zaza, supra,* 144 *N.J.* at 49, 675 *A.*2d 620.

These neat temporal lines have been blurred over the years as we have come to realize that a claim for strict liability is akin to a negligence claim in that the central focus is upon the reasonableness of the manufacturer putting the defective product onto the market. *Id.* at 50, 675 *A.*2d 620. This is different from examining the manufacturer's conduct for negligence before the product was marketed. We do not look to see whether a particular designer acted unreasonably or whether a test engineer failed to perform a particular test, but rather whether a reasonable manufacturer, ***517** knowing the harmful propensities of the product, would have placed it onto the market in its condition. *Ibid.*

Under the New Jersey Products Liability Act, *N.J.S.A.* 2A:58C-1 *et seq.* (PLA or the Act), the causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action, the essence of which is strict liability. ****210***Jurado v. Western Gear Works,* 131 *N.J.* 375, 384-85, 619 *A.*2d 1312 (1993); *Tirrell v. Navistar Int'l, Inc.,* 248 *N.J.Super.* 390, 398-99 n. 5, 591 *A.*2d 643 (App.Div.), *certif. denied,* 126 *N.J.* 390, 599 *A.*2d 166 (1991). The Act, however, was non-exclusive, and the Legislature intended that the existing common law would continue to be applied, except where specifically changed by the Act. Senate Judiciary Committee Statement to Senate Bill No. 2805 (1987), *reprinted following* *N.J.S.A.* 2A:58C-1. The Act incorporated the standard from *Suter v. San Angelo Foundry & Mach. Co.,* 81 *N.J.* 150, 169, 406 *A.*2d 140 (1979), which required: "If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes ... the seller shall be responsible for the ensuing damages." The PLA used a shorthand reference to this standard in *N.J.S.A.* 2A:58C-2, but as is clear from the Senate Judiciary Committee Statement, no change in the law was intended.

[3][4] Thus, in determining whether the Camaro was defective, a jury must determine the risks and alternatives that should have been known to a reasonable manufacturer, and then assess whether the manufacturer discharged its duty to provide a "reasonably fit, suitable and safe" vehicle. [FN3] To

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do this, the jury employs a risk-utility analysis. *Jurado v. Western Gear Works, supra,* 131 *N.J.* at 385, 619 *A.*2d 1312. Although there are seven listed factors in the classical statement of the risk-utility analysis, see ***518** *Cepeda v. Cumberland Eng'g Co.,* 76 *N.J.* 152, 174, 386 *A.*2d 816 (1978) and its progeny, the prevalent view is that, unless one or more of the other factors might be relevant in a particular case, the issue upon which most claims will turn is the proof by plaintiff of a "reasonable alternative design ... the omission ... [of which] renders the product not reasonably safe." *Restatement (Third) of Torts: Products Liability* § 2(b) (Proposed Final Draft, April 1, 1997). [FN4] *See Congiusti v. Ingersoll-Rand Co., Inc.,* 306 *N.J.Super.* 126, 138-39, 703 *A.*2d 340 (App.Div.1997); *Grzanka v. Pfeifer,* 301 *N.J.Super.* 563, 579, 694 *A.*2d 295 (App.Div.), *certif. denied,* 152 *N.J.* 189, 704 *A.*2d 19 (1997); *Smith v. Keller Ladder Co.,* 275 *N.J.Super.* 280, 283-84, 645 *A.*2d 1269 (App.Div.1994).

FN3. *Suter v. San Angelo Foundry & Mach. Co., supra,* also teaches us that "[f]itness and suitability are terms synonymous with safety." 81 *N.J.* at 169, 406 *A.*2d 140. Thus the sole standard in the usual case is reasonable safety.

FN4. The full text of § 2(b) of the *Restatement (Third) of Torts: Products Liability, supra,* is that a product
is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.
In instances where other risk-utility factors need be considered, they are not excluded by this formulation. *See id.* at cmts. b and e.

Plaintiff's premise in this case is that although he was negligent in the operation of the vehicle, his injuries did not flow from this negligence, but rather from the faulty design of the Camaro which should have protected plaintiff under the circumstances of this accident. Defendant counters with a claim that the speed of the vehicle in this case, which may have been over double the legal limit, was a factor that the jury should have considered in determining whether the Camaro was defectively designed. The trial judge rejected defendant's view after a long and contentious argument. The judge charged the jury that the speed of the vehicle, the use of a seat belt, the use of the vehicle, crossing lanes of traffic and the like could be considered by the jury only on the issue of proximate cause, that is, the allocation of the cause of plaintiff's injuries or of damages between those responsible for the accident and the alleged crashworthiness deficit. Speed could not ***519** be considered on the issue of whether the Camaro was defectively designed.

The applicable portions of the charge on this subject read as follows:

> In this case the plaintiff alleges and has the burden of proving that the 1986 T-top Camaro was defectively designed because it was not crashworthy and that this defect was a proximate cause of plaintiff's injuries. The defendant, by way of response, ****211** denies that the vehicle was defectively designed and contends that Michael Green's injuries were caused by his own conduct.
> In this regard, please keep in mind that the conduct of the plaintiff concerning speed, seat belt use, use of the vehicle, crossing the lanes of traffic, etc., can only be considered by you on the issue of proximate cause. It cannot be considered by you as to whether the Camaro was defective.
> ....
> ... [E]ven if you determine that the Camaro roof system was defective, you must go on to consider whether the defect was a proximate cause of plaintiff's injuries. Plaintiff must prove by a preponderance of the evidence that any defect in the Camaro roof system, whatever you may find it to be, was a proximate cause of his injuries.
> By proximate cause I mean that the defect in the Camaro was a substantial factor that singly or in combination with another cause brought about plaintiff's injuries.... You may consider whether the speed of the Camaro at the time that it collided with the bus and the resulting severity of the accident was the proximate cause or the sole proximate cause of plaintiff's injuries.
> ....
> In relation to speed, ... you may take into account that except where otherwise posted it shall be lawful for the driver of a vehicle to drive at a speed not exceeding 25 miles per hour in any business or residential zone. Please remember that speed is only relevant on the subject of proximate cause and not on the question of whether the product was

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defective.

Defendant reiterated its objection at the new trial motion, but the judge again noted that speed was not a factor in this case.

> With respect to the speed of the vehicle, I don't think I ever suggested certainly that the jury could not consider the severity of the impact on the issue of crashworthiness or the design defect, but certainly the issue of speed, how fast the vehicle was going, was not pertinent to the design of this particular car. It was not relevant. Certainly [it was] relevant on the issue of proximate cause, that was my determination then, it is still my determination today.
>
> The speed of this vehicle was not relevant as to how the vehicle was designed, when it was designed and all of the factors that were taken into account by the design people, the design team, the design managers, and the design engineers. They had a number of things to consider, but what Mr. Green did on the date of ***520** this accident is not pertinent, not relevant to whether that design was defective or not.

We agree with the trial judge. When GM placed this vehicle on the market, it certainly knew that it would be driven at lawful speeds up to fifty-five miles per hour and in some states sixty-five miles per hour. It also knew that the vehicle might collide with another vehicle similarly operated. The experts in this case testified to the crash-testing of vehicles with a purpose of maximizing the safety of the occupants. The experts further testified that the only relevant speed factor in an accident between vehicles of the same size and weight [FN5] is the closing speed between the two vehicles, there being no difference between a vehicle hitting a fixed object at eighty miles an hour and two vehicles travelling forty miles per hour in opposite directions hitting each other. The closing speed between plaintiff's vehicle and the school van of between forty-five and eighty-one miles per hour is well within the range reasonably to be expected in the design of the Camaro.

> FN5. There would be a difference in impact depending on the mass of the vehicle that was travelling at the particular speed, since the force exerted is dependent on both the mass and speed of the vehicle. For example, if a car is hit by a freight train going ten miles per hour or an insect flying or being blown at the same speed against the car, the damage to the car is devastating in the first case and non-existent in the second. This aspect of the cause of the damage to the Camaro was not explored at trial.

Plaintiff's expert testified that closing speeds of up to 110 miles per hour must be anticipated and designed for by automobile ****212** manufacturers, and the speed in this case was well within the realm of anticipated accident speeds that a responsible manufacturer would and does consider in designing an automobile that is reasonably crashworthy. While GM's expert did not discuss particular speeds, he testified that all accident circumstances should be considered in evaluating crashworthiness. He acknowledged that two vehicles travelling within the legal limits could have a 110 mile per hour closing speed. GM's estimate of the closing speed in this case was at least thirty miles per hour under the 110 mile per hour speed. We see, therefore, that if GM was required to ***521** design a reasonably safe vehicle for its intended and reasonably foreseeable use, it should, if possible, have designed a vehicle that could reasonably withstand a crash at considerably higher speeds than in this case.

Also, the speed limit and manner of driving were irrelevant to the plaintiff's crashworthiness issue. As stated in *Green v. Sterling Extruder Corp.*, 95 N.J. 263, 471 A.2d 15 (1984), once the defendant has "a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct." *Id.* at 272, 471 A.2d 15 (quoting Patricia Marschall, "*An Obvious Wrong Does Not Make a Right: Manufacturer's Liability for Patently Dangerous Products,*" 48 *N.Y.U. L.Rev.* 1065, 1088 (1973)). *See also Ramos v. Silent Hoist & Crane Co.*, 256 *N.J.Super.* 467, 481, 607 *A.*2d 667 (App.Div.1992) (noting that to appraise contributory negligence against a plaintiff would "excuse the very conduct that gives rise to strict liability on the part of the manufacturer" as well as to the manufacturer's negligence). Thus, the Camaro had to be designed, if feasible, to protect the integrity of the passenger compartment in an accident at a closing speed that could be reasonably anticipated by the manufacturer. If it was not, then the Camaro was defective, regardless of plaintiff's driving speed within such protectable limits. The speed at which plaintiff was driving might theoretically have been greater than that at which plaintiff's reasonable alternative designs would have afforded protection, but such was not the testimony. If the speed was beyond the design

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limits, speed would have been a proper factor to determine proximate cause and a later apportionment of liability. Since the closing speed in this case was recognized to be well within the acknowledged design parameters, and the passenger compartment remained intact, with the exception of the deforming T- bar roof, the trial judge correctly ruled that speed was not a factor in determining whether the vehicle was defective.

As noted in the portions of the charge we quoted earlier, the trial judge did not rule out speed as a factor in the case. ***522** Plaintiff's speed was a definite factor in bringing about the accident, and the jury was told specifically and carefully that it could consider plaintiff's speed. However, speed properly was a factor solely in determining proximate cause, and this was carefully explained to the jury. [FN6] Insofar as plaintiff's injuries were caused solely by the product defect, speed was not relevant.

> FN6. As is explained later in more detail, the limitation of the type of plaintiff's conduct that can be considered to offset responsibility for a design defect precluded the jury from considering any conduct by plaintiff other than that he unreasonably proceeded in the face of the known danger of the defective design. *See Cartel Capital Corp. v. Fireco of New Jersey*, 81 *N.J.* 548, 562-63, 410 *A.*2d 674 (1980); *Suter v. San Angelo Foundry & Machine Co., supra*, 81 *N.J.* at 158, 406 *A.*2d 140.

Defendant urges that the argument against consideration of speed with respect to the defect was overwhelmingly rejected in *Huddell v. Levin*, 537 *F.*2d 726 (3d Cir.1976). The speed issue in *Huddell* was somewhat different from the one before us, but we will analyze it, analogizing the defective seat belt and headrest in *Huddell* with the alleged defective roof design in the case before us. The plaintiff in *Huddell* argued that if a seat belt and headrest design was faulty "it remains faulty whether an accident occurs at 5 m.p.h. or 100 m.p.h." *Id.* at 740. The Third Circuit rejected this argument, stating that the severity of the impact went to the heart of the question of a defect "in terms of the ordinary purposes for which the product, the head restraint, was designed." *Ibid.* The *Huddell* court reasoned that if the seat belt or head restraint failed to protect the wearer in a five mile per hour crash, there would be ****213** an inference of a defect, but that if the seat belt failed in a 100 mile per hour crash, the same argument might lose its validity. "At least in the context of safety design, we see no meaningful way to evaluate the defectiveness *vel non* of a product except in the context of a particular risk." *Id.* at 741.

The problem with the *Huddell* analysis is that it failed to assess the defect and any reasonable alternatives asserted by the plaintiff against the reasonably anticipated use of the product. Although ***523** the manufacturer is not an insurer of the safety of the occupant of a vehicle, the fifty to sixty mile per hour rear-end hit of the 1970 Chevrolet Nova in *Huddell* certainly was a foreseeable accident, and the reasonable alternative design suggested by the plaintiff of a larger and more deformable head restraint correctly persuaded the *Huddell* court that there was sufficient evidence to submit the issue of defect to the jury. *Id.* at 736. We must respectfully disagree, however, with the speed analysis in *Huddell*. The ten versus the hundred mile per hour rear-end collision comparison was appropriate, because a hundred mile per hour hit would be outside of the design parameters. But the anticipatable fifty to sixty mile per hour rear-end hit, with a reasonable alternative design presented, causes us to question whether speed should have been a factor in determining whether there was a defect in the design of the *Huddell* seat belt/headrest assembly. [FN7] Therefore, we depart from *Huddell* and agree with the trial judge's decision in this case to limit the consideration of speed to the issue of proximate cause of plaintiff's injuries.

> FN7. We are not, however, privy to all of the proofs in *Huddell* with respect to the technology available for the construction of the 1970 Chevrolet Nova. If the injury and death of the plaintiff in *Huddell* in a fifty to sixty mile per hour rear-end hit could not reasonably have been avoided by the use of the technology of the time, then the factor of speed would very much be a factor in determining the reasonableness of the design. Available technology, however, is not an issue in the case before us.

II. Reasonable Alternative Design

[5] Plaintiff accepted his duty under the risk-utility formulation (or the alternative *Restatement* formulation) to present a reasonable alternative design to the jury. Plaintiff came forward with two

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such designs, both of which he contended would have prevented the B-pillar and roof deformity. The first alternative challenged the fundamental safety of the T-bar configuration itself and merely claimed that the basic Camaro design with a standard full sheet- metal roof provided sufficient stability to maintain the integrity of the passenger compartment, even in an oblique side ***524** impact such as in the case before us. GM's own tests confirmed this claim. With this design, plaintiff argued that if there were no other design that would have maintained the roof's stability, then the risk of an injury such as this far outweighed any social utility of the T-bar and glass roof. This alternative of not marketing the specific product at all is explored in comment e of the *Restatement (Third) of Torts: Products Liability* § 2(b), *supra.*

Plaintiff's second alternative design posited two stabilizing bars, one connecting the left corners of the A (front) and B (rear) pillars, and the second connecting the right corners of these pillars. The sheet metal roof still would be replaced by two glass panels up to the T-bar, but the roof pillars and T-bar would have been stabilized by the additional side bars.

Defendant's opposition to this configuration was interesting. It asserted that the use of these two additional supports was theoretical at best in that they had never been tested, and that there was no showing that they would have protected the passenger compartment against the roof deformities from the side impact. Note that the redrafted comment f to the *Restatement (Third) of Torts: Products Liability* § 2, after noting that the requirement of an expert depends upon the feasibility and understandability of the alternative design, states:

> Subsection (b) does not, however, require the plaintiff to produce a prototype in order to make out a prima facie case. Thus, qualified expert testimony on the issue suffices, even though an expert has produced no prototype, if it reasonably supports the conclusion that a reasonable alternative design ****214** could have been practically adopted at the time of sale.

Comment f also supports plaintiff's claim that the jury could consider his expert's suggestion that the original roof design without the T-bar construction was an alternative which would have protected plaintiff. The comment notes:

> Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.

Obviously, the jury accepted plaintiff's alternative design evidence and disagreed with defendant.

***525** Moreover, following the verdict in this case and the attendant press coverage, plaintiff's attorneys were contacted by attorneys representing a plaintiff in a similar accident in Tennessee where defendant had apparently been more forthcoming in its discovery. Although plaintiff in this case had requested all testing of alternative designs, defendant did not supply plaintiff with the testing of a design remarkably similar to the one suggested by plaintiff's expert. [FN8]

> FN8. Because defendant was still arguing on this appeal that the alternative of inserting side rails should have been rejected because it had not been tested, plaintiff successfully moved before us to expand the record to include the extensive data the attorneys had received from the Tennessee plaintiff. Defendant first claimed that all of this material had been produced for plaintiff, but then, after searching its own records, withdrew the explanation.

Defendant also claimed that plaintiff's design was different because plaintiff's expert had suggested the two side rails in addition to the T-bar. Defendant's own design had the two side rails suggested by plaintiff's expert, but instead of the welded T-bar in plaintiff's design, defendant's design had the glass panels merely being separated by a simulated T-bar that apparently was not structurally connected to the front and rear pillars. We find this distinction unavailing, since if the sidebars alone protected the passenger compartment, plaintiff's expert's suggestion of the sidebars and a connected T- bar would have provided more protection, not less. The revelation of defendant's own alternative design akin to the one suggested by plaintiff, well supported by defendant's own testing, should put to rest the issue of a reasonable alternative design in this case.

III. Burden of Proving Allocation of Injury

Defendant raises another issue arising from *Huddell v. Levin, supra.* GM contends that plaintiff failed to discharge his burden of allocating the injuries between the accident, for which plaintiff and/or the van driver were responsible, and the design defect for which GM was responsible. Defendant contends

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that although the ***526** judge placed the burden upon plaintiff in accordance with *Huddell v. Levin*, the apportionment proofs were non-existent.

[6][7] We disagree for two reasons. First, between plaintiff and defendant, the jury found that plaintiff's injuries were caused totally by the defective product. Therefore, there was nothing to apportion. This finding has an ample basis in fact. But for the crushing injury to plaintiff's spine, plaintiff was virtually uninjured; he literally walked away from the accident, not even suffering the burns that affected Alexander who had to be helped from the car. Furthermore, plaintiff's own negligence with respect to his claim of a defective product is limited to whether he unreasonably proceeded in the face of a known danger. *Suter v. San Angelo Foundry & Mach. Co., supra*, 81 *N.J.* at 158-60, 406 *A.*2d 140. Such "known danger" was not the obviously known consequences of plaintiff's speed, but rather must be that posed by the faulty roof design. *See Cartel Capital Corp. v. Fireco of New Jersey, supra*, 81 *N.J.* at 562-63, 410 *A.*2d 674. (There, plaintiff's employees would have had to have been aware of the defective fire extinguisher, not merely the obvious danger of placing grease-soaked paper plates in front of an open-hearth fire.)

[8] The second basis for rejecting defendant's claim warrants detailed discussion since it has been left open by ****215***Crispin v. Volkswagenwerk AG*, 248 *N.J.Super.* 540, 569 n. 1, 591 *A.*2d 966 (App.Div.), *certif. denied*, 126 *N.J.* 385, 599 *A.*2d 162 (1991). The uncertainty concerning where New Jersey places the burden of proof for allocating causation of injuries in a crashworthiness case has attracted national attention. The Reporters' Note for the *Restatement (Third) of Torts: Products Liability* discusses two approaches to the burden of proof question. The annotation to comment d of § 16 states the majority view as the "*Fox-Mitchell* [FN9] approach," which places the burden of allocating the harm caused by the accident upon the defendant. The opposing minority view ***527** is the *Huddell* approach under which "[i]f the plaintiff is unable to quantify the increased harm, even if the plaintiff can establish that some increased harm was caused by the defendant, the plaintiff is unable to recover." *Restatement (Third) of Torts: Products Liability* § 16, Reporters' Note, cmt. d (Proposed Final Draft, April 1, 1997) [hereinafter Reporters' Note].

FN9. *Mitchell v. Volkswagenwerk AG*, 669 *F.*2d 1199 (8th Cir.1982); *Fox v. Ford Motor Co.*, 575 *F.*2d 774 (10th Cir.1978).

In a thirteen-page discussion, the Reporters list twenty-three states, including New Jersey, as either adopting the *Fox-Mitchell* approach or likely to do so. Only six states appear to follow the *Huddell* approach. [FN10] The Reporters' Note at comment d of § 16 cites the footnote in *Crispin, supra*, noting the open issue in New Jersey, in which Judge Baime states:

> A rule placing upon the defendant the burden of proof with respect to the apportionment of damages may be more in line with our Supreme Court's recent decision in *Scafidi v. Seiler*, 119 *N.J.* 93, 111-113, 574 *A.*2d 398 (1990). *See also Fosgate v. Corona*, 66 *N.J.* 268, 272-273, 330 *A.*2d 355 (1974). However, this issue is not before us and we need not resolve it.
> [248 *N.J.Super.* at 569 n. 1, 591 *A.*2d 966].

Lastly, the Reporters' Note points out that since *Crispin* the issue has been treated in only two trial court opinions, *McLaughlin v. Nissan Motor Corp., U.S.A.*, 267 *N.J.Super.* 130, 135, 630 *A.*2d 857 (Law Div.1993), and *Thornton v. General Motors Corp.*, 280 *N.J.Super.* 295, 299-303, 655 *A.*2d 107 (Law Div.1994). *McLaughlin* follows the *Huddell* approach; *Thornton* rejects it.

FN10. The Reporters' Note at comment d further states that the *Fox-Mitchell* approach, which is the source of § 16(c) of the new *Restatement*, "reflects the more recent developments." They also explain that much of the authority stems from federal courts, assuming how the courts of the state in which they sit would hold. Of decisions actually rendered by state appellate courts, thirteen favor the *Restatement* rule and only three states (all intermediate appellate court decisions) favor the *Huddell* position.

The Supreme Court in *Waterson v. General Motors Corp.*, 111 *N.J.* 238, 544 *A.*2d 357 (1988), treats a similar but not identical issue of the allocation of injuries between the manufacturer of a defective automobile and a motorist who failed to wear a seat belt. While the basis of liability in *Waterson* may be different from the ***528** case before us, both involve a second injury. In the seat belt case, the Court placed the burden upon "defendant [to] ... demonstrate that nonuse of a seat belt increased the extent or severity

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of plaintiff's injury." *Id.* at 269, 544 *A.*2d 357. See also *Schwarze v. Mulrooney,* 291 *N.J.Super.* 530, 540-41, 677 *A.*2d 1144 (App.Div.1996), where in a second injury case involving a shifting load, Judge Baime determined that the defendant had the burden to present evidence enabling the jury to apportion damages. *Cf. Thorn v. Travel Care, Inc.,* 296 *N.J.Super.* 341, 349, 686 *A.*2d 1234 (App.Div.1997) (another seat belt case placing the burden on defendant). Although the Supreme Court has not yet spoken definitively on this subject, we agree with Judge Baime and the *Restatement* Reporters that the direction indicated by the Supreme Court in such cases as *Scafidi, supra,* and *Fosgate, supra,* is with the majority of state courts that have considered the allocation issue.

It thus appears to us that we should apply subsections 16(b) and (c) of the *Restatement (Third) of Torts: Products Liability.* These sections read:

> (b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited ****216** to the increased harm attributable solely to the product defect.
>
> (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes. [FN11]

> FN11. Note that the *Restatement (Third) of Torts: Products Liability* § 16(c) "does not formally shift any burden of proof to the defendant. Its effect is that, if the plaintiff has established that the product defect increased the harm over and above that which the plaintiff would have suffered had the product been nondefective, and if at the close of the case proof does not support a determination of the harm that would have resulted in the absence of the product defect then the defendant is liable for all the harm suffered by the plaintiff." Reporters' Note, § 16(c), cmt. d.

We therefore reject defendant's claim that plaintiff did not carry his burden of proof, since the court's decision to follow *Huddell v. Levin* and place the burden on plaintiff was in error. However, as this error favored defendant, it was clearly harmless. Placing the ***529** burden on defendant, where it properly belongs, reveals that defendant did not meet its burden, and therefore no allocation evidence was required of plaintiff.

IV. Charge on a Duty to Inspect

[9] Defendant next raises an objection to a portion of the judge's charge relating to defendant's duty to inspect and test the T-roof designed car. Inexplicably, after the judge charged the risk-utility elements for a design defect; GM's obligation to produce a product fit, suitable and safe; and plaintiff's obligation to prove an alternative safer design, the judge added an additional charge. He stated:

> In determining whether the Camaro was defective, you may take into account that a manufacturer is also under a duty to make reasonable inspection and tests of its products for the purpose of locating obvious or hidden but discoverable defects in the product.

The charge continued for nearly two pages in the transcript, discussing GM's duty to exercise reasonable care in the testing of the Camaro and posing the question of what a reasonable manufacturer would or would not have done under the circumstances.

Notwithstanding the court having given this charge, which obviously did not relate to a design defect, but rather to negligence, [FN12] none of the special jury interrogatories dealt with this issue. Furthermore, the record is replete during both the plaintiff's and defendant's cases with reference to GM's extensive testing of the Camaro both with and without the T-bar roof. We are at a loss therefore to understand why the trial judge gave this portion of his charge.

> FN12. The charge itself is taken from a former model charge to be given in a manufacturing defect case where a plaintiff's claim is based upon a negligence theory of failure to inspect.

[10] It is clear that a breach of any duty to test, insofar as it may exist, is relevant to a negligence cause of action, or in a rare case to a manufacturing defect, but not a design defect claim. As defendant correctly notes, a product that is not defective and has ***530** not been tested at all remains free of a defect. Similarly, a defective product that has been extensively tested is still defective. Proof of a failure to test or of inadequate testing may be evidential as an explanation of why a design was defective, but it is not in itself proof of a separate basis for liability.

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[FN13]

FN13. Testing might also have some relevance in the area of a manufacturing defect on the issue of what was a reasonably safe product, or the unavoidably unsafe product defense, *N.J.S.A.* 2A:58C-3a(3). Similarly, in a warning defect case, testing could be relevant if a plaintiff wished to explain that adequate testing would have caused the manufacturer to warn of a particular problem which was discoverable, or if a defendant wished to claim that extensive testing did not reveal a problem and therefore the manufacturer could not reasonably have known of the problem, and there was thus no necessity to warn. (While here plaintiff did claim that defendant performed inadequate side impact testing, the defect in design was not dependent on this testing). It is also possible that if the defendant were relying upon a state-of-the-art defense under *N.J.S.A.* 2A:58C-3a(1), testing might in some way indicate that there was no practical and technically feasible alternative design.

The charge was relevant only to appraise an aspect of the manufacturer's conduct ****217** which was not properly in issue. The Supreme Court has made it clear that the manufacturer's negligence is not an issue in a strict liability case. In *Waterson v. General Motors Corp., supra,* the Court stated:

> The essence of an action in strict liability is that the injured party is relieved of the burden of proving the manufacturer's negligence. The injured party need prove, for the party's prima facie case, only that the injury- causing product was unsafe or unfit for its intended or foreseeable use at the time it left the manufacturer's control and that the injuries sustained arose from the unsafe or unfit condition of the product.
>
> [111 *N.J.* at 267-68, 544 *A.*2d 357].

The Senate Judiciary Committee Statement, *supra,* accompanying the PLA made it clear that the initial sections define the new product liability action as falling within the categories of manufacturing defects, warning defects, and design defects, and "[e]xcept as modified by the provisions of sections 3 and 4, the elements of these causes of action are to be determined according to the existing common law of the State." Negligence had long been subsumed within strict liability prior to the PLA. *See* ***531***Realmuto v. Straub Motors, Inc.*, 65 *N.J.* 336, 322 *A.*2d 440 (1974); *Collins v. Uniroyal, Inc.*, 64 *N.J.* 260, 315 *A.*2d 16 (1974); *Heavner v. Uniroyal, Inc.*, 63 *N.J.* 130, 305 *A.*2d 412 (1973). Thus, if negligence principles were not to have been applied prior to the Act, as stated in *Waterson,* the same rule would apply to a design defect claim under the Act.

We have analyzed this aspect of the charge in detail to see whether it might reasonably have influenced the jury against defendant. The judge informed counsel that he was including this charge as a consideration for the reasonableness of defendant's conduct in designing the car as it did. GM did not specifically object to the charge, although at one point defendant requested the court only to give the model charge as testing was "captured by the risk-utility factors." We read this objection to have told the court that testing was a fair consideration, but that a separate charge was unnecessary. The objection certainly would not put the judge on notice of defendant's opposition to any charge at all related to the subject of testing. Plaintiff's summation referred to a lack of testing of the T-bar roof, not as a separate basis of liability, but only as an attack upon defendant's having permitted the defective vehicle to be placed on the market and defendant having an inadequate basis to certify that the T-roof Camaro complied with federal motor vehicle safety standards.

[11] We have read this section of the charge in the context of the charge conference, the charge as given, the objections and the interrogatories given to the jury which, as we noted, contain no reference to the testing, but looked only to the issues of defect and proximate cause. Pursuant to *R.* 1:7-2, it was defendant's obligation to make a specific objection to this aspect of the charge before the jury retired, and "no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict." *Ibid.* We are, of course, cognizant of our power to notice plain error, but in the context of the jury's findings, the addition of this charge concerning the duty to test has not been shown "to ***532** have been clearly capable of producing an unjust result." *R.* 2:10-2. The charge failed to affect "a substantial right of plaintiff." *Atlas v. Silvan,* 128 *N.J.Super.* 247, 252, 319 *A.*2d 758 (App.Div.1974). We will reverse on appeal for errors that lacked an objection only if the errors " 'cut mortally into the substantive rights of the defendant.' " *State v. Shomo,* 129 *N.J.* 248, 260, 609 *A.*2d 394 (1992) (quoting *State v.*

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Harper, 128 *N.J.Super.* 270, 277, 319 *A.*2d 771 (App.Div.), *certif. denied,* 65 *N.J.* 574, 325 *A.*2d 708 (1974)). We therefore determine this error to be harmless. *R.* 2:10-2.

V. Damages

We now proceed to assess the damage award. Defendant objects to several aspects of this award: first, the award of interest on future damages; second, the award of prejudgment interest for two years during which plaintiff allegedly delayed the trial; and third, the apparent failure of the jury to discount plaintiff's award for future medical expenses to their present value. On cross-****218** appeal, plaintiff objects to the court having granted the $789,000 offset for the former co-defendants' settlement.

a. Interest on Future Damages

[12] With regard to the $13,000,000 award for future care and medical expenses and the $305,860.35 award for future lost income, GM objects to the award of prejudgment interest. In truth, the award of prejudgment interest for amounts that will not be incurred by plaintiff until after judgment is "questionable." *Ruff v. Weintraub,* 105 *N.J.* 233, 245, 519 *A.*2d 1384 (1987). The Court explained away the logical inconsistency. It first recognized the validity of the argument that the damages would not accrue until after judgment, but then stated:

> However, the public interest in encouraging settlements is an adequate independent basis for the application of the prejudgment interest rule in this case. Thus, this is not an "exceptional" case, as that term has been interpreted [under *R.* 4:42-11(b)].
>
> ***533** Since rule 4:42-11(b) allows for the suspension of prejudgment interest only in "exceptional cases," the trial court's assessment of prejudgment interest on the entire award was proper in this case.
>
> [*Id.* at 245, 519 *A.*2d 1384].

Where the awards are modest, we can understand the Supreme Court's policy to encourage settlement. Perhaps an unstated additional reason is to defray plaintiff's attorney's fees attributable to sums that plaintiff will be forced to pay third parties or which would reduce a compensatory stream of lost future income. [FN14] In the case before us, however, of the $17,767,175.35 judgment returned by the jury, $13,305,860.35 represented future medical expenses and future lost earnings. Based upon the proof submitted to the court concerning the interest for the seven-year period commencing six months after the date of the filing of the complaint through the date of judgment, *R.* 4:42-11(b), the prejudgment interest on the portions of the losses that plaintiff *had not yet suffered* exceeded $8,500,000.

FN14. This court has previously also justified the assessment of prejudgment interest for future loss on the theory that the "interest factor simply covers the value of the award for the period during which the defendants had the use of the moneys to which plaintiffs are found to be entitled." *Statham v. Bush,* 253 *N.J.Super.* 607, 617, 602 *A.*2d 779 (App.Div.1992) (quoting *Busik v. Levine,* 63 *N.J.* 351, 360, 307 *A.*2d 571 (1973)). Such reasoning does not apply, at least under the facts of this case. A plaintiff loses nothing when post-judgment losses are paid without interest. This aspect of the justification for such interest was apparently abandoned in *Ruff. See Statham, supra,* 253 *N.J.Super.* at 618, 602 *A.*2d 779 (discussing *Ruff, supra,* 105 *N.J.* at 245, 519 *A.*2d 1384).

This is an exceptional case. It took seven years to reach trial, but the interest on all sums that accrued during this seven-year period is not questioned by defendant. This was a hotly contested case on the issue of liability, and whatever we may think of defendant's position on the merits of the case, an assessment of prejudgment interest of this magnitude amounts to a penalty bordering on confiscation. [FN15] This is especially so when we look at ***534** the fact that the award spans periods of time when the interest rates were seven and one-half, eight or even eight and one-half percent, although the actual post-judgment rates, which will properly affect post-judgment payments due to plaintiff, will be far less.

FN15. *See* Pressler, *Current N.J. Court Rules,* comment 8 on *R.* 4:42-11 (1997) (stating that suspension of prejudgment interest should be cautiously exercised with consideration of the underlying purpose of *R.* 4:42-11, "namely that prejudgment interest is not a penalty but is rather a payment for the use of money"). We take this statement as applying principally to pre-judgment damages because a defendant has not withheld reimbursing a plaintiff for any

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sums that the plaintiff has not yet advanced.

[13] The Supreme Court in *Ruff* recognized this prejudgment interest as a fiction, but determined that a *reasonable* award furthers the interests of speedy trials and calendar control and provides a payment to needy plaintiffs. *See* 105 *N.J.* at 245, 519 *A.*2d 1384. We note that defendant properly did not include within its objections the prejudgment interest on the $4,000,000 payment for plaintiff's future pain and suffering. *See Friedman v. C & S Car Serv.*, 108 *N.J.* 72, 78, 527 *A.*2d 871 (1987). But it appears ****219** reasonable to us that the payment of the prejudgment interest on this $4,000,000 for the seven-year prejudgment period is sufficient to further the goals expressed by the Supreme Court in *Ruff.* The denial or suspension of prejudgment interest is left to the sound discretion of the trial judge, based on considerations of equity, fairness and justice, viewed in the factual context of the case at hand. *Dall'Ava v. H.W. Porter Co.*, 199 *N.J.Super.* 127, 129-31, 488 *A.*2d 1036 (App.Div.1985). In addition, we may exercise our original jurisdiction. *R.* 2:10-5. In this "exceptional case," we therefore vacate the prejudgment interest on the awards for future medical expenses and lost income. [FN16]

FN16. We cannot help but note that in the Punitive Damage Act, *N.J.S.A.* 2A:15-5.14b, the Legislature has placed a $350,000 cap on the award of punitive damages. Since, as we have noted earlier, interest on future medical expenses and earnings has been upheld solely on the basis of an inducement to settle, and constitutes a *quasi*-punishment for not settling, it stands on a similar footing to a punitive damage award. While we realize that this interest is not actually encompassed in the Punitive Damage Act, the prejudgment interest on the post-judgment expenses in the case before us would be over twenty times the maximum limit on punitive damages, an issue stricken from this case. It seems anomalous that if defendant had wantonly designed the car to inflict this injury, the damages, if the Punitive Damage Act applied, would be limited to $350,000. But for trial delays, not all attributable to defendant, it would be punished for over $8,500,000. This argument, of course, could not have been considered by the Supreme Court in *Ruff,* as the case was decided some eight years prior to the enactment of the statute.

535 *b. Tolling of Interest

[14] Defendant also asserts that all prejudgment interest should have been totally tolled for a two-year period, February 1994 through February 1996, where the delay was caused solely by reason of plaintiff's failure to bring the case to trial. Actually, most of this delay was caused by plaintiff being required to obtain a new liability expert after his initial expert suffered incapacitating strokes. The judge found no misconduct or lack of cooperation and a reasonable basis for the various adjournments required by plaintiff. He therefore determined that there was no reason to foreclose interest for this period.

As to sums due for this period, defendant had use of the funds and could invest them; plaintiff lost this income. The prejudgment interest rule provides a sensible adjustment. The judge made a reasoned decision not to suspend prejudgment interest for this two-year period, and we find no fault with the judge's decision.

c. Proof of Future Medical Expenses--Failure to Discount

[15] Defendant next attacks plaintiff's proof of future medical expenses. Plaintiff's medical expert, Dr. Martin, testified concerning both the amount of plaintiff's annual medical costs, and also about how these costs would be projected into the future. He based these latter projections upon his consultation with plaintiff's economist, Dr. Richard Ruth, to compute the difference in the costs of medical treatment from 1989 when the witness examined plaintiff to the 1996 trial. He based his conversion factor on the increase in the medical services component of the consumer price ***536** index. Applying that percentage charge to plaintiff's medical expenses increased the approximate figure of $220,000 per year from 1989 to $369,250 in 1996. [FN17] (In fact, the base figure of $220,000 was initially increased to $250,000 to account for various elements of medical treatment for which the witness had been given no particular figures). [FN18] He recognized that plaintiff's life expectancy because of his injuries would be less than the normal life expectancy for his age, and reasoned that plaintiff had a ****220** projected life expectancy of approximately thirty-five years.

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FN17. Defendant also questioned Dr. Martin's ability to testify as an economist. He stated, however, that he based his cost projections on his conversation with Dr. Ruth, an economist who testified later in the case and provided a sufficient foundation for Dr. Martin's testimony. The judge, therefore, properly ruled that Dr. Martin's testimony on the consumer price index would be received subject to Dr. Ruth's anticipated expert opinion concerning the consumer price index.

FN18. Defendant did not object to the various categories of future expenses that would be necessary in plaintiff's care and treatment. Special cars, chairs, house renovations, as well as medication and therapy all were included without objection.

Dr. Martin was asked to describe "the formula one would use in order to arrive at what his future cost would be." Over defendant's objection, he answered as follows:

> You take the figure of $369,250 and you multiply that by the 35 years of expected life--of life expectancy and you get the final figure.

At the next trial session, plaintiff's attorney returned Dr. Martin to this topic:

> Q: Doctor, could you just tell us one more time how we take that figure $369,250 and predict how much money is necessary to maintain [plaintiff] medically and with the equipment and with the care that you deem is proper for someone with his condition?
>
> A: Well, we multiply that figure by the projected ... life expectancy at this time of about 35 years.

The jury awarded plaintiff $13,000,000 for his future medical expenses. We note that 35 years multiplied by $369,250 equals $12,923,750.

***537** *Tenore v. Nu Car Carriers, Inc.*, 67 *N.J.* 466, 341 *A.*2d 613 (1975), holds that expert economic evidence "purporting to show plaintiff's aggregate damages," there a wage loss claim, was improper, primarily because the projection before the jury of a "gross figure" or "total resulting damage figure" submitted by an expert "tends to exert an undue psychological impact leading to the danger of its uncritical acceptance by the jury in the place of its own function in evaluating the proofs." *Id.* at 482-83, 341 *A.*2d 613. The plaintiff's experts may, however, "provide the jury with their analyses of trends of future wage increases and discount interest rates generally," and the jurors can "use those trends and rates in arriving at their own independent single-figure appraisal of plaintiff's pecuniary loss." *Id.* at 483-84, 341 *A.*2d 613.

In *Genovese v. New Jersey Transit Rail Operations, Inc.*, 234 *N.J.Super.* 375, 560 *A.*2d 1272 (App.Div.), *certif. denied*, 118 *N.J.* 195, 570 *A.*2d 960 (1989), the trial judge himself elicited testimony from the plaintiff's expert economist "announcing 'bottom line' wage loss figures." *Id.* at 378, 560 *A.*2d 1272. On the next day of trial, the judge concluded that he had erred because such expert testimony "clearly violated the prohibition of such testimony announced in *Tenore*," and he twice instructed the jury to "disregard the bottom line figures." *Ibid.* The jury found the defendant liable, and assessed damages of $413,000. *Id.* at 377, 560 *A.*2d 1272. Noting that the jury's damage verdict of $413,000 was "suspiciously near one of the witness's bottom line figures of $425,000," this court reversed the damage verdict and remanded for retrial on that issue. *Id.* at 379, 383, 560 *A.*2d 1272. Referring to the *Tenore* rule, in *Genovese* we concluded that the trial judge's curative instructions were insufficient to overcome the "strong psychological impact on the jury of the court-invited testimony of gross numbers." *Id.* at 379, 560 *A.*2d 1272.

In *Dunn v. Praiss*, 256 *N.J.Super.* 180, 606 *A.*2d 862 (App.Div.), *certif. denied*, 130 *N.J.* 20, 611 *A.*2d 657 (1992), the plaintiff's economic expert wrote his damage assumptions, calculations and conclusions on four charts which, over the defendants' objection, were permitted into evidence, and accompanied the jury into the ***538** jury room as an exhibit (a separate error, not repeated here). *Id.* at 196-99, 606 *A.*2d 862. On the last chart was a summary that, among other things, said "28 x $36,350." *Id.* at 197, 606 *A.*2d 862. On the issue of economic loss, the jury awarded $1,017,800 to the plaintiff. *Id.* at 198, 606 *A.*2d 862. (The 28 years, multiplied by $36,350, equals $1,017,800). As in *Genovese*, in *Dunn* we reversed the damage verdict and remanded for a retrial on that issue. *Id.* at 202, 606 *A.*2d 862.

[16] We recognize that while *Tenore* "bars 'bottom line' evidence of future wage losses," *Tenore* "does not, however, bar an attorney's argument in summation which includes the bottom line income loss calculation which the expert witness is forbidden

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to make." *Lovenguth v. D'Angelo*, 258 *N.J.Super.* 6, 9-10, 609 *A.*2d 47 (App.Div.1992), *appeal dismissed*, 133 *N.J.* 417, 627 *A.*2d 1128 (1993). There, however, we were careful to state "that we deal here only with a future income loss summation argument that ****221** completes the arithmetic prohibited to the expert witness." *Id.* at 10, 609 *A.*2d 47. We see no reason not to apply the *Tenore* principles, as interpreted by the cases, to testimony concerning the cost of future medical and care expenses.

In its post-trial motion, defendant argued that "what Dr. Martin did violates the *Dunn* case." The judge disagreed, pointing out that the plaintiff's expert is "allowed to give the jury a yearly figure and to give the jury either a life expectancy figure or a work life expectancy figure," and concluding that he perceived no prejudice in this case, "as long as the expert does not give a bottom line figure." According to the judge, Dr. Martin did not do so:

> Yes, Dr. Martin, it might have been better had he not said do the math. But the point is that it's there in black and white and there was nothing improper about giving the jury those two figures. I can't--it's very difficult to conclude now that the jury placed too much emphasis on a bottom line figure. Indeed, he--they weren't given the bottom line figure. The true evil, I think, is for the doctor to have multiplied it all out and arrive at a figure of $12,923,000. The jury's seeing that then perhaps might have been swayed too much by the expert's math.

Plaintiff argues that Dr. Martin's testimony did not contravene *Tenore*, because he merely presented a "formula for calculating ***539** future medical costs," but he "did not make the ultimate calculation of the future medical costs," in that he did not do the multiplication and present the jury with the resulting "bottom line number." While defendant acknowledges that "Martin did not actually put pen to paper to write out the number for the jury," defendant, relying on *Dunn*, argues that Dr. Martin's formula was the "equivalent of a 'projection of a gross figure before the jury submitted by an expert,' which *Tenore* holds is improper."

Dr. Martin did not calculate each year's loss, with inflation factors, and discounting, but only calculated the then-current cost of plaintiff's care and life expectancy. Had he stopped there, and left the use of these figures to the economist, there may not have been error. His problem, as will be explained, was his telling the jury to multiply the 1996 figure by plaintiff's life expectancy, in effect testifying to a total-offset recovery theory, discussed *infra*. Hence we find that plaintiff's proof of future medical expenses was admitted in error. This error was compounded by the omission of instructions on applying present value discounting.

Dr. Martin's testimony was not the sole basis for the calculation of future medical expenses and wage loss damages. Plaintiff's economist, Dr. Ruth, testified in detail concerning two ways to compute future damages: the total offset method and the standard method. The total offset method posits that the rate of inflation will cancel the fair return from the amount awarded when it is prudently invested, and therefore a jury may merely multiply the annual amount necessary to make the plaintiff whole by the relevant number of years. Where the issue is one of lost wages, the net wages after taxes would merely be multiplied by the number of remaining years of the plaintiff's working life; and the future medical expense or future pain and suffering would similarly be multiplied by the plaintiff's life expectancy. This was obviously the method testified to by Dr. Martin and was the first of the two methods proposed by Dr. Ruth.

The second method requires the discounting of the stream of income to its present value, using an appropriate discount rate. ***540** In the case before us, taxes would not be a consideration since the amount of the lost wages would be discounted on an after-tax basis. *Caldwell v. Haynes*, 136 *N.J.* 422, 436-40, 643 *A.*2d 564 (1994). The medical expenses would be largely deductible on plaintiff's tax return, [FN19] unless there is a radical amendment of the Internal Revenue Code.

> FN19. The fund would, if accurately awarded and used, generate income to which an appropriate amount of the principal would be added, so that the fund would be exhausted in the last year of plaintiff's life. The income, therefore would be less than the expenses, which would be deductible when they exceed a certain percentage of plaintiff's income.

****222** As this court noted in *Friedman v. C & S Car Serv.*, 211 *N.J.Super.* 657, 670-73, 512 *A.*2d 560 (App.Div.1986), *rev'd*, 108 *N.J.* 72, 527 *A.*2d 871 (1987), the total offset method does not reflect reality. [FN20] The critical determination is the selection of a reasonable discount rate for the

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standard method. As was noted in our opinion in *Friedman,* from the period of 1926 through 1985 the rate of return for common stocks, corporate bonds, and government bonds exceeded the rate of inflation by varying amounts. *Id.* at 671, 512 *A.*2d 560. What was true in the double-digit inflation of past years, is even more true at the current time when inflation apparently is in check and has for the past few years been held to approximate three percent or even less. Investments in quality common stocks have for the past few years exceeded twenty percent, and, while we assume that these rates cannot be duplicated year after year, a balanced portfolio of stocks, corporate and government bonds and certificates of deposit ***541** certainly would yield far in excess of the projected inflation rates, especially for a portfolio of the size of plaintiff's net award. Even if inflation rates should rise, prudent investment returns should keep well ahead of inflation.

FN20. The Supreme Court's reversal was on the basis that a pain, suffering and disability judgment should not be discounted, as plaintiff's was not in this case. The Supreme Court distinguished the pain and suffering damages from the economic damages in *Tenore, supra,* where discounting was ordered. The Court required that such economic damages be discounted to present value because such calculation was "neither artificial nor unrealistic." 108 *N.J.* at 78, 527 *A.*2d 871. Despite the Supreme Court's reversal, our opinion in *Friedman* provides a good discussion of the necessity to discount awards for future economic expenses.

These considerations were totally absent from Dr. Martin's testimony, and Dr. Ruth's charts described in the record (and shown to us at oral argument) listed only two columns, one for the total offset computation, and one for a one percent discount rate. Dr. Ruth did testify, however, that if the jury chose to use a different rate it could do so, but this testimony was not aided by any percentage figures by which the jury could adjust its total award. Dr. Ruth was not cross-examined.

Similarly, the trial judge in his charge did not aid the jury beyond the standard charge that it should take into consideration the factor of inflation and the discounting of its damages award for post-judgment medical expenses and future pecuniary losses to present value. The court did not fill in the gap left by the expert witnesses as to what percentages the jury could apply and how to apply them, even though these percentages are supplied as a table attached to our court rules. *See* Pressler, *Current N.J. Court Rules,* Appendix I. The appropriate line representing plaintiff's future life expectancy, as testified to by Dr. Martin without opposition, showing percentage rates in a reasonable range might have given the jury greater options. The brief comment that the jury could use a different rate, if it wished, was insufficient. [FN21]

FN21. While the judge also noted that the jury should take taxes into consideration, there was no indication that the future medical expenses would constitute a tax deduction which would largely offset the taxes on the income portion of the income and principal which was to be applied to defray the expenses.

We note that defendant offered no evidence on this subject nor even cross-examined Dr. Ruth to bring out the additional figures that could have made the process more understandable to the jury. Here, the array of witnesses called by defendant indicated that this case was prepared with immense resources and with a complete understanding of the issues to be determined. The trial ***542** judge is not expected to try the case for either a plaintiff or defendant. But the judge still has an obligation to make the jury function understandable. Dr. Ruth's testimony explained the application of a one percent discount, and he told the jury that it could also use a two percent, three percent, or four percent discount rate. Dr. Ruth, however, neglected to mention how the jury would perform this function.

While in no way excusing defendant's failure to present evidence on this point, it is apparent to us that the jury's verdict should have been reduced to present value using some reasonable discount rate. We therefore****223** remand the matter to the Law Division on this point for a supplemental hearing. The judge may effect a remittitur after the parties present any necessary proofs concerning a fair market return on a balanced portfolio of prudent investments and a reasonable estimate of medical expense inflationary costs. We recognize this is far from an exact science, but a total disregard of these factors, which in effect applies the total offset method, flies in the face of present reality and demands our

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intervention, to achieve substantial justice between these parties. [FN22] We trust that on remand the court can order payment of all sums not in dispute, if that has not been accomplished by this date.

FN22. We understand that our taking this action will affect the amount of the adjustment for prejudgment interest we have already discussed. We also suggest, but cannot order, that the parties consider structured payments that would provide for the actual medical bills, thus compensating for estimates or predictions of plaintiff's longevity, the costs of future services, medical advances, and the like. The authority to direct rather than merely suggest such a solution, with its attendant lower costs, can only come from a legislative or Supreme Court direction.

VI. Application of Settlement Proceeds

Plaintiff has cross-appealed from the judge's decision to deduct $799,000 from the award. The deduction represents the settlement of plaintiff's claim against the van driver and her employer. Plaintiff claims that the jury's determination that 100% of plaintiff's injuries were caused by the defective design of the Camaro ***543** forecloses any liability that the settling defendants could have had in this case. Defendant argues that the settling former co-defendants' liability was not adjudicated in this case, and that they may have been liable for some percentage. GM reasons further that the former co-defendants' liability would have encompassed not only injuries related solely to the accident, but also injuries relating to plaintiff's second injuries assessed under his crashworthiness claim.

Again, we must view the twin issues of causation of the accident and causation of the injury. Given plaintiff's claim that the van was straddling the center line forcing plaintiff to swerve around it (and putting to one side the independent witness' description of plaintiff having been on the van's side of the road with the van totally within its own lane), it is conceivable that a jury could have allocated some small percentage of negligence assessed against the settling former defendants. We proceed with this assumption to determine whether the jury's determination exonerated the settling defendants.

Huddell v. Levin, supra, provides an answer, namely, that the settling defendants in our case would have been in the position of the defendant Levin in that case. The court stated that "Levin may be held liable for *all* injuries, but General Motors may only be held liable for 'enhanced injuries'." 537 *F.*2d at 738 (emphasis in original). Such injuries would be "for the entire consequences of ... [the] accident which the automobile manufacturer played no part in precipitating." *Id.* at 739. A similar statement can be found in *Waterson v. General Motors Corp., supra,* 111 *N.J.* at 271, 544 *A.*2d 357, "A party responsible for the accident is always also responsible for the injuries incurred as a result of the accident." The 100 [[[[judication by the jury in plaintiff's claim against GM tells us nothing concerning the respective liabilities of the van driver to plaintiff or the van driver to defendant for contribution. Theoretically, the van driver might have been liable for a percentage of all damages occasioned by the accident, unless a court held that the design defect was an independent intervening cause, relieving the van driver of her liability.

***544** As we noted earlier, plaintiff's comparative negligence could have been assessed against the van driver's, but plaintiff's comparative fault as against GM would be limited to plaintiff unreasonably proceeding in the face of a known danger. *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 158-60, 406 *A.*2d 140; *Cartel Capital Corp. v. Fireco of New Jersey, supra,* 81 *N.J.* at 562-63, 410 *A.*2d 674. [FN23] GM, however, may have ****224** been able to hold the van driver for contribution for some percentage of the total fault responsible for plaintiff's injury. Plaintiff settled with the van driver and her employer after the earlier trial ended in a mistrial because of a hung jury, and GM apparently was satisfied not to have made a cross-claim for contribution or to have applied to the court to assess any percentage responsibility to the settling parties.

FN23. The *Restatement (Third) of Torts: Products Liability* notes that New Jersey is in a small minority of states applying this quasi- assumption of risk rule that grew out of comment n to § 402A of the *Restatement (Second) of Torts*. This rule had been an answer to the old total bar of a plaintiff's contributory negligence. At some point the Court may wish to reassess this rule so firmly stated in *Suter, Cartel Capital* and their progeny. If this were done, the assessment in Part I of this opinion might yield a different result. The Reporters for

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the *Restatement (Third) of Torts: Products Liability* note that the courts of the country are "sharply split" on the issue of whether a plaintiff's negligent conduct leading to an accident should be the subject of comparative fault. They conclude that a "majority of the courts allow the introduction of plaintiff's conduct as comparative fault in a crashworthiness context." Reporters' Note, § 16, cmt. f. Our rules of limited comparative fault place us with the minority on this issue.

If the settling former co-defendants had been found to have no liability, the principles announced in *Rogers v. Spady*, 147 *N.J.Super.* 274, 278, 371 *A.*2d 285 (App.Div.1977), and confirmed in *Young v. Latta*, 123 *N.J.* 584, 591, 589 *A.*2d 1020 (1991), would permit plaintiff without question to keep the $799,000 as a windfall, [FN24] in addition to the award in this case. *See also* ***545***Johnson v. American Homestead Mortg. Corp.*, 306 *N.J.Super.* 429, 436- 37, 703 *A.*2d 984 (App.Div.1997). But, the windfall exists only where a jury determines that the settling party was 0% negligent. If a percentage of liability had been assessed against these former co-defendants, that percentage of the verdict would have been deemed satisfied. *Young v. Latta, supra*, 123 *N.J.* at 591, 589 *A.*2d 1020; *Rogers v. Spady, supra*, 147 *N.J.Super.* at 277, 371 *A.*2d 285. Lastly, a settlement may be, as here, accomplished with one who is neither exonerated nor assigned a percentage because the non-settling defendant never requested such a finding. Plaintiff claims that in such a case the non-settling defendant, GM, loses its right to claim a credit.

FN24. In truth, such a settlement is only a windfall by hindsight. Plaintiffs and defendants settle for a variety of reasons, and are guided by enlightened self-interest as it is perceived at the time.

In *Young v. Latta, supra*, the Court assessed the consequences of the usual cross-claim for contribution and a delayed assertion of the claim without a formal cross-claim.

> Although early and diligent pursuit of a non-settling tortfeasor's claim for credit seems to have obvious advantages, there may be tactical reasons, not readily apparent to us, why the non-settler would delay asserting that claim. We emphasize that in this context trial courts should not countenance delay-- that is, the court should not permit the non-settler to wait until the last minute before alerting the court and the plaintiff's lawyer that the settler's conduct will be at issue. Because tactics cannot be allowed to foil discovery, in the context of a claim for credit the court should enforce strictly the Rules setting forth the time prior to trial within which answer to interrogatories may be amended to set forth a settler's fault. *See Rule* 4:17-7.
>
> [123 *N.J.* at 597-98, 589 *A.*2d 1020].

Here, however, the assertion was not just delayed, it was nonexistent. GM never claimed that the jury should assess the van driver's responsibility for plaintiff's injuries; no credit was even suggested until GM requested the $799,000 offset. In such a case, we refer to *Mort v. Besser Co.*, 287 *N.J.Super.* 423, 671 *A.*2d 189 (App.Div.1996), *certif. denied*, 147 *N.J.* 577, 688 *A.*2d 1053 (1997). There, in a slightly different setting (where the settling defendant had no separate liability as a matter of law, *id.* at 433, 671 *A.*2d 189), Judge Keefe commented on the obligations of the non-settling defendant to protect the record.

> Clearly, a non-settling defendant has the right to have a settling defendant's liability apportioned by the jury. ***546***Kiss v. Jacob*, 138 *N.J.* 278, 283-84, 650 *A.*2d 336 1994); *Cartel Capital Corp. v. Fireco of N.J.*, 81 *N.J.* 548, 566-67, 410 *A.*2d 674 (1980); *Rogers v. Spady*, 147 *N.J.Super.* 274, 278, 371 *A.*2d 285 (App.Div.1977). However, that liability must be proven. ****225** The fact of settlement does not prove the settlor's liability. "[I]f no issue of fact is properly presented as to the liability of the settling defendant, the fact finder cannot be asked, under *N.J.S.A.* 2A:15-5.2 or otherwise, to assess any proportionate liability against the settler." *Young v. Latta*, 233 *N.J.Super.* 520, 526, 559 *A.*2d 465 (App.Div.1989), *aff'd*, 123 *N.J.* 584, 589 *A.*2d 1020 (1991).
>
> [*Id.* at 431-32, 671 *A.*2d 189].

This duty on the part of the non-settling defendant to provide percentage of fault applicable to the settling party is also reflected in the proposed *Restatement (Third) of Torts: Apportionment of Liability*, § 27B (Council Draft No. 2, Nov. 13, 1997), which states:

> The plaintiff's recoverable damages are reduced by the comparative share of damages attributable to a settling tortfeasor who otherwise would have been liable to nonsettling defendants for contribution.

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> The settling tortfeasor's comparative share of damages is the percentage of comparative responsibility assigned to the settling tortfeasor multiplied by the total damages of the plaintiff.

Comment f to this section requires the non-settling defendant to prove "that the settling tortfeasor's tortious conduct was a legal cause of plaintiff's injury ..., that the settlement was for the injuries for which the plaintiff is suing, and that defendant would otherwise have a valid contribution claim against the settling tortfeasor." *Id.* at cmt. f. [FN25] Thus, we have before us what appears to be the first case of a procedural bar to the assessment of the settling defendant's liability for the accident. We see no reason to treat the bar any differently from any other assertion of a defendant's factual or legal inability to assert the contribution claim.

> FN25. The Reporters' Note at comment f of § 27B to *Restatement (Third) of Torts: Apportionment of Liability* cites as authority *Spaur v. Owens-Corning Fiberglas Corp.*, 510 *N.W.*2d 854, 863-64 (Iowa 1994). *Cf. Ball v. Johns-Manville Corp.*, 425 *Pa.Super.* 369, 625 *A.*2d 650, 661 (1993). In *Spaur*, there was no legal or factual basis for the non- settling defendant's claim. In *Ball*, the issue turned on factual bases for the claim against the settling defendants.

[17] The jury in our case made no determination of the van defendant's liability. It found only that as between plaintiff and ***547** defendant, defendant was 100% responsible for plaintiff's injuries. This finding would have been the same whether on one hand the school van had completely blocked the road and plaintiff had been operating his vehicle within the legal limit, or on the other, if the van were standing still in its own lane with its flashers activated. Defendant, by failing to have the jury assess the van driver's percentage of fault, gave up its potential claim to contribution. Under the entire controversy doctrine it is now too late to assert the claim. Defendant is not entitled to any credit for the settlement even if it amounts to a windfall to plaintiff.

VII. Application of Pro Tanto Credits

Defendant also claims that if a *pro tanto* credit were to be found proper, the credit should be against the verdict before prejudgment interest is assessed rather than after. Defendant properly notes that applying the credit to the judgment after the prejudgment interest is assessed in effect gives plaintiff the benefit of prejudgment interest on the credit, an amount that itself is subject to no such interest. We have vacated the credit, and therefore the issue is moot.

VIII. Conclusion

We affirm the liability judgment in favor of plaintiff. We vacate the prejudgment interest awarded on post-judgment medical expenses and earnings. We remand that portion of the jury's verdict that awards post-judgment medical expenses and earnings. We direct the judge to enter a remittitur after further argument, with or without proofs, reflecting the present value of these awards as more extensively described in this opinion. We reverse the judge's determination to give defendant a *pro tanto* reduction of the judgment based on plaintiff's settlement with the former defendants, the van driver and bus company. This amount shall be restored to the judgment. Except as stated, we affirm the damage award.

709 A.2d 205, 310 N.J.Super. 507, Prod.Liab.Rep. (CCH) P 15,201

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VII. Judicial Nominations

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the unsuccessful nominations of Miguel Estrada and Priscilla Owen.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

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Report of People For the American Way in Opposition to the Confirmation of Brett M. Kavanaugh to the United States Court of Appeals for the D.C. Circuit

People For the American Way
Ralph G. Neas, President
April 26, 2004

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Report of People For the American Way in Opposition to the Confirmation of Brett M. Kavanaugh to the United States Court of Appeals for the D.C. Circuit

Introduction

President Bush's nomination of Starr Report co-author Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit has created significant controversy. The *New York Times* has termed the nomination part of the Administration's "further effort to remake the federal courts in its own ideological image."[1] The *Washington Post* commented that the nomination would "only inflame further the politics of confirmation to one of the country's highest-quality courts."[2]

In fact, the D.C. Circuit has not only seen many high quality jurists appointed to it, but it is also widely recognized for its uniquely important role in reviewing federal agency action. Congress has given the court exclusive jurisdiction to review some agency conduct, such as important Federal Communications Commission and environmental matters, and the D.C. Circuit is often the last word on federal agency actions, since the Supreme Court reviews so few lower court decisions.

Kavanaugh's relative inexperience and record, however, including his extraordinary dedication to partisan priorities, make him a particularly inappropriate choice for this critically important court. A 1990 graduate of Yale Law School, Mr. Kavanaugh's legal resume is thin at best. When asked in the Senate Judiciary Committee's questionnaire to state the number of cases he has tried to verdict or judgement, he replied "[n]one, as I have not been a trial lawyer."[3] In the same questionnaire, when asked to name his ten most significant litigated matters, Kavanaugh was apparently hard pressed to fill out the list, citing a number of cases in which he made no courtroom appearance at all and only submitted briefs, including two cases in which he authored only the friend-of-the-court brief of someone who was not even a party to the litigation. Kavanaugh is not a prolific legal scholar either, with only two law journal publications to his credit.[4]

This stands in marked contrast to the D.C. Circuit judges previously appointed by presidents of both parties. Of the 22 judges appointed to the D.C. Circuit since the Nixon administration, only one – Kenneth Starr – had less legal experience at the time of his appointment than Kavanaugh. A number had previously been judges, high-ranking

[1] Editorial, More Conservatives for the Courts, *New York Times*, July 29, 2003.
[2] Editorial, Fueling the Fire, *Washington Post*, Aug. 1, 2003.
[3] Answers to Senate Judiciary Committee Question 17(c)(4).
[4] *Id.* at Questions 18, 12. One of his law journal publications is a student note arguing that defendants must be present at, and allowed to offer a rebuttal during, *Batson* hearings (hearings held to determine whether the prosecution improperly removed members from the jury pool because of their race). Brett Kavanaugh, Defense Presence and Participation: A Procedural Minimum for *Batson v. Kentucky* Hearings, 99 Yale L.J. 187, Oct. 1989. The other publication is an article examining the Independent Counsel law. Brett Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133, July 1998. Other than judicial clerkships and work for Kenneth Starr and the Bush White House, Kavanaugh's questionnaire states that his experience consists of one year at the Solicitor General's Office and approximately four years at the law firm of Kirkland & Ellis. Answers to Senate Judiciary Questions 6, 17.

Justice Department attorneys, and distinguished professors. Kavanaugh's resume simply pales by comparison.

Furthermore, most of Kavanaugh's relatively brief legal career has consisted largely of partisan political activities that militate strongly against his confirmation to the D.C. Circuit. In particular, Kavanaugh has spent most of his legal career in Kenneth Starr's Office of the Independent Counsel or in the Office of the White House Counsel in the current Bush Administration where he **helped direct the Administration's effort to pack the courts with extreme right-wing nominees**. Kavanaugh was responsible for **drafting Starr's articles of impeachment** against President Clinton, which were widely criticized as "strain[ing] credulity"[5] and being based on "shaky allegations,"[6] and later **defended even the most questionable conduct by Starr**. In the White House Counsel's Office, Kavanaugh has had **major responsibility for selecting and "marshalling the fleet"**[7] of far-right appellate judicial nominees by the Bush Administration, and for seeking to **expand unilateral presidential privilege and secrecy**, despite his contrary efforts under Kenneth Starr to defeat such claims of privilege. Indeed, a presidential order that reportedly resulted from Kavanaugh's efforts on behalf of the Bush Administration was described by one prominent historian as "a victory for secrecy in government" that was "so total that it would make Nixon jealous in his grave."[8]

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation.[9] Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law" and an "open mind to decision-making," but also a "commitment to protecting the rights of ordinary Americans" and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."[10] Based on these criteria, as discussed below, Kavanaugh's confirmation to a lifetime position on the critical Court of Appeals for the D.C. Circuit should be rejected.

Choosing Judicial Nominees

[5] Glenn R. Simpson, Starr's Report Makes Powerful Case – but for what?, *Wall Street Journal*, Sept. 14, 1998 (hereinafter Simpson).
[6] Stephen Hedges and Ken Armstrong, Starr's Case Unique and Hardly Airtight, *Chicago Tribune*, Sept. 13, 1998 (hereinafter Hedges).
[7] Neil A. Lewis, Bush Selects Two for Bench, Adding Fuel to Senate Fire, *New York Times*, July 26, 2003 (hereinafter Lewis).
[8] Carl M. Cannon, For the Record, *National Journal*, Jan. 12, 2002 (hereinafter Cannon) (quoting Hugh Graham). **Kavanaugh was also a regional coordinator for Lawyers for Bush / Cheney in 2000, went to Florida after the 2000 election for Bush / Cheney "to participate in legal activities related to the recount, "and has been an active member of the Federalist Society."** Answers to Senate Judiciary Committee Questions 116, 6, 9, 10.
[9] *See* Law Professors' Letter of July 13, 2001 (available from People For the American Way).
[10] *Id.*

Kavanaugh has been "deeply involved"[11] in one of the most controversial undertakings of the current Administration: the selection of the president's judicial nominees. This is, in Kavanaugh's words, "one of [the president's] most important responsibilities."[12] As Associate Counsel to the President from 2001 – 2003, Kavanaugh served directly under White House Counsel Alberto Gonzalez as his **"main deputy on the subject" of judicial nominees.**[13] This position earned Kavanaugh membership in the Administration's critical Judicial Selection Committee, a joint enterprise between White House staff and the Justice Department's Office of Legal Policy, chaired by Gonzalez, which has been responsible for the selection of judicial nominees.[14] Kavanaugh has thus played a key role in Administration efforts at "remaking the judiciary" to "place on the bench those who share the president's judicial philosophy."[15]

Kavanaugh has reportedly "been responsible for marshaling the fleet of largely conservative judicial nominees the president has sent to the Senate,"[16] and a look at the candidates Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy and interest in seeing the American judiciary remade in a right-wing "ideological image." According to several accounts, **Kavanaugh personally "coordinated" the Administration's nominations of Priscilla Owen to the Fifth Circuit and Miguel Estrada to the D.C. Circuit.**[17] Priscilla Owen's nomination continues to be blocked because her record as a far right judicial activist is so extreme that even White House Counsel Alberto Gonzalez once accused her and her dissenting colleagues of committing "an unconscionable act of judicial activism."[18] Widely termed a "stealth candidate," Estrada's nomination was withdrawn after an extended filibuster.[19]

One of the most controversial aspects of the Estrada confirmation battle, which directly contributed to the failure of the nomination, was **Estrada's persistent refusal to answer questions concerning his jurisprudential views or philosophy**. Because Estrada had a limited "paper trail" and the Department of Justice refused to release any legal memoranda he wrote while serving in the Department, a particularly important way for Senators to learn important information about his jurisprudential views was by directly

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[11] Sheldon Goldman, W. Bush Remaking the Judiciary: Like Father Like Son?, *Judicature* at p. 284, May-June, 2003 (hereinafter Goldman).
[12] *Id.*
[13] Jeffrey Toobin, Advice and Dissent, *The New Yorker*, May 26, 2003 (Kavanaugh was the "main deputy" to Alberto Gonzalez who "control[s]" the nomination process in the Bush White House). In July 2003, Kavanaugh left the White House Counsel's office and became Assistant to the President and Staff Secretary.
[14] Goldman
[15] *Id.* at 782.
[16] Lewis.
[17] Dana Milbank, Whitewater Lawyer Turns Proponent of Presidential Power, *Washington Post*, Oct. 15, 2002 (hereinafter "Milbank"); Jack Newfield, More Bad Judges, *The Nation*, Jan. 26, 2004 (hereinafter Newfield) (Kavanaugh "coordinated" the Estrada and Owen nominations).
[18] *See* People For the American Way, Why the Senate Judiciary Committee Was Right to Reject the Confirmation of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit, Jan. 23, 2003.
[19] Dana Bash, Judicial Nominee Estrada Withdraws His Name, CNN, Sept. 4, 2003, available at http://www.cnn.com/2003/LAW/09/04/estrada.judgeship/index.html; Jonathan Groner, Estrada – Just One Vote Away?, *Legal Times*, Sept. 30, 2002 (hereinafter Groner).

questioning Estrada during his Senate Judiciary Committee hearing. Estrada's refusal to answer a number of their questions made it impossible for committee members to learn enough about Estrada to responsibly carry out their constitutionally mandated duty to give "advice and consent" to the President's judicial nominees. Disturbingly, one report indicates that **Estrada refused to answer these questions at the direct advice of the Administration,**[20] suggesting a deliberate effort to subvert the Senate's co-equal role in the nomination process. Given Kavanaugh's apparent "coordination" of the Estrada nomination, this issue raises further troubling concerns about Kavanaugh's actions.

Kavanaugh also publicly praised Estrada and Owen, along with the rest of Bush's first eleven picks for the courts of appeals, as being what the President "was looking for. A group of nominees, in terms of their excellence, which they all shared, and their integrity, which they all shared, and support, which is huge, which they all shared. It was a diverse group, a well qualified group, a bi-partisan group. It was an incredibly credentialed group."[21] While the group Kavanaugh described included some of the administration's most controversial nominees to date, such as Priscila Owen, Miguel Estrada, Terrence Boyle, Dennis Shedd, and Jeffrey Sutton, few would argue that many exemplified exactly what the President "was looking for": lawyers or judges with extreme right-wing records who would assist the Administration in seeking to "remake the federal courts in its own ideological image." Owen and Estrada were such troublesome nominees that they earned the distinction of being among the six nominees – out of a total of 179 considered by the Senate thus far – to be blocked on the Senate floor by filibuster. Boyle's record on civil rights and other issues is so troubling that one of his home state senators, John Edwards, has refused to return his "blue slip," which has effectively brought his nomination to a halt for the present.[22] That three of the first eleven candidates were so extreme that they have been unable to be approved by the Senate seems to indeed confirm that they were what the Administration "was looking for."

Of the initial nominees that were approved by the Senate, many received a great deal of opposition during their confirmation process. **Several have already written opinions that seek to limit civil rights and constitutional liberties and implement dangerous "federalist" philosophies.** For example, Dennis Shedd and Michael McConnell have used their positions to seek to overturn National Labor Relations Board rulings against anti-union discrimination and unfair labor practices by employers.[23] **Edith Brown Clement** joined dissents arguing that the Hobbs Act (an important federal criminal law prohibiting robbery and extortion affecting interstate commerce) should be severely limited on "federalism" grounds[24] and supporting the unlawful firing of a public school

[20] Groner.
[21] Goldman at 296.
[22] *See* Letter of Senator John Edwards to Senate Judiciary Chairman Hatch, March 31, 2002; Kevin Begos, Dole, Edwards at Odds Over Judicial Nominee, *Winston-Salem Journal*, May 10, 2003.
[23] National Labor Relations Board v. Transpersonnel, Inc., 349 F.3d 175, 2003 U.S. App. LEXIS 23133 (4th Cir. 2003) (**Shedd** wrote the majority opinion); National Labor Relations Board v. Interstate Builders, Inc., 2003 U.S. App. LEXIS 24153 (10th Cir. 2003) (J., **McConnell**, dissenting in part).
[24] United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (en banc), cert. denied, 124 S.Ct. 1749 (2003).

teacher who was dismissed without the required hearing.[25] Jeffrey **Sutton** authored a dissent that sought to severely cut back federal arson law due to federalism concerns.[26] One John **Roberts** dissent questioned the constitutionality of the Endangered Species Act.[27] Kavanaugh's praise of such nominees, as well as his hand in selecting them, calls into serious question his own legal philosophy.[28]

A number of other Bush Administration nominees selected during Kavanaugh's tenure as Associate Counsel to the President have also come from "the far right of the political spectrum."[29] Many, who like Kavanaugh, Sutton, and Clement, have been Federalist Society members, have had their sights set on limiting federal power, weakening the Commerce Clause, and severely limiting congressional authority, even to the point of literally rolling back the New Deal.[30] These adherents to Federalist Society ideals, such as William Pryor and Carolyn Kuhl, have been among the most right-wing people nominated by the Administration to serve in any capacity.

Just as troubling as the legal and ideological views of Bush Administration candidates is a report that suggests the White House officials involved in judicial selection have **imposed a rigorous anti-reproductive choice litmus test on potential judicial nominees.** Last year, the *Philadelphia Daily News* reported that Republican Senators Arlen Specter and Rick Santorum had requested that the Administration nominate a western Pennsylvania woman to fill a vacancy on the Third Circuit Court of Appeals left by the passing of a female jurist. **They recommended four women they believed were qualified for the job, but all were rejected. The *Daily News* reported that all but one of the women were rejected because they were not "sufficiently conservative or pro-life."**[31] One source was quoted as saying, "[n]o western [Pennsylvania] woman could be found that was acceptable to the White House."[32] Instead, the nomination was given to Pennsylvania Attorney General Mike Fisher, who unsuccessfully ran for

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[25] Coggin v. Longview Independent School District, 337 F.3d 459 (5th Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 579 (2003).

[26] United States v. Laton, 2003 U.S. App. LEXIS 24770 (6th Cir. 2003) (Sutton, J., dissenting).

[27] Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting).

[28] Bush nominees who have written and joined disturbing opinions and dissents are not limited to this first group of eleven. To learn more about the records of the new Bush judges that Kavanaugh helped select, *see* People For the American Way Foundation, Confirmed Judges, Confirmed Fears, Jan. 23, 2004, *available at* www.pfaw.org.

[29] David Margolick, Bush's Court Advantage, *Vanity Fair*, Dec. 2003, at 146 (hereinafter Margolick).

[30] *See e.g.* People For the American Way, Report of People For the American Way In Opposition to the Confirmation of William H. Pryor to the United States Court of Appeals for the Eleventh Circuit, June 10, 2003 at 4 – 11; People For the American Way, Report of People For the American Way in Opposition to the Confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit, March 31, 2003. *See also*, People For the American Way Foundation, The Federalist Society: From Obscurity to Power, Aug. 2001 (updated Jan. 2003), at 17 – 22. *See also, Id.* at 33 (reporting that of the first eleven Bush appellate court nominees, six were Federalist Society members).

[31] Gar Joseph, Ball in Fisher's Court to Replace Judge; PA. Senators Want a Woman After White House Says It Couldn't Find One, *Philadelphia Daily News*, Apr. 11, 2003. The fourth woman was reportedly unacceptable because "the Republicans didn't want to lose her as a candidate for the state Supreme Court [that] year." *Id.*

[32] *Id.*

governor on an anti-choice platform the year before.[33] In fact, one Pennsylvania newspaper specifically criticized the fact that "the abortion issue was put forth by the Bush Administration as the sole litmus test" leading to Fisher's nomination.[34] Such a frightening anti-choice litmus test for judicial nominees recalls the Reagan and Bush I administrations, when potential nominees – and even their colleagues – were vigorously interrogated about their abortion views as a prerequisite for earning a nomination to the federal bench.[35] As one of the top White House officials working on judicial nominations, serious questions are presented about Kavanaugh's role in the reported revival of this deplorable practice.

Another dangerous tactic used by some in seeking to promote the President's judicial nominees was the theft by several Republican staffers of over 4,000 files containing confidential internal memos authored by Democratic Judiciary staff over the last two years in a scandal popularly known as "memogate."[36] Remarkably, many right-wing advocates have been so unapologetic for the unethical, and likely illegal, theft that they have criticized Judiciary Committee Chairman Orrin Hatch for authorizing an investigation of the tampering.[37] The result of that investigation was a report by Senate Sergeant-at-Arms William Pickle that strongly suggested wrongdoing by the Senate aides and was **referred to the Justice Department for possible criminal investigation and prosecution.**[38] It remains unclear how widely the memos were circulated, though it is **certainly possible that Kavanaugh, as one of the top White House officials involved in the nomination process during the period in question, would have been privy to the improperly obtained information.** The Senate Judiciary Committee should fully question Kavanaugh on this subject. In any event, Kavanaugh's key role in the Administration's judicial nominations efforts raises serious concerns about his own nomination.

"A Starr Protégé"

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[33] Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 1); Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 3), both *available at* http://www.pacatholic.org/election%20archive/primary%202002.pdf (visited 3/02/04). Fisher received the nomination despite the fact he had just had a $220,000 civil rights judgement entered against him for violating the civil rights of employees under his control (*Micewski v. Fisher*, No. 3:00-CV-0521 (M.D.Pa. Feb. 12, 2003) (special verdict judgment)).

[34] Editorial, Fisher as an Appeals Judge: Attorney General has done a yeoman job, but selection shouldn't be based mainly on his abortion position, *Harrisburg Patriot News*, April 30, 2003.

[35] Transcript of "All Things Considered" broadcast, National Public Radio report, Aug. 28, 1985 ("One female [prospective Reagan nominee] . . . said she was asked repeatedly how she would rule on an abortion case if it came before her. Another . . . said her fellow judges were called by Justice Department officials and asked for her views on abortion." *See also* People For the American Way, Assault on Liberty, (1992) at p. 6, available from People For the American Way.

[36] Helen Dewar, GOP Aides Implicated in Memo Downloads, *Washington Post*, March 5, 2004. Some memos were also taken from Senator Hatch's computer files.

[37] *Id.*

[38] Dori Meinert, Theft of Democrats' Computer Memos Referred to Justice Department, Copley News Service, March 11, 2004.

One of the most significant chapters in Kavanaugh's brief legal career has been the five years he spent as part of Kenneth Starr's Office of Independent Counsel, participating in several investigations concerning the conduct of President Clinton. Frequently described as a "Starr protégé,"[39] Kavanaugh began his stint in the Special Prosecutor's office by heading up the investigation into White House Deputy Counsel Vince Foster's suicide.[40] As the Whitewater investigation appeared to be winding down, Kavanaugh returned to private practice for a brief period, but then re-joined Starr's office when the Monica Lewinsky scandal broke. Reflecting on why Kavanaugh chose to return to the Special Prosecutor's office at that point, one lawyer close to the case reportedly noted "[t]hat was slime time. He wanted to be there for the kill."[41]

Of course, the Special Prosecutor's investigation culminated with the release of the Starr Report, of which Kavanaugh was a co-author.[42] The report consisted of two parts: the narrative, which offered what journalists called "an exhaustive chronology of Clinton's sexual escapades,"[43] and the grounds for impeachment, which outlined the 11 specific counts that the Special Prosecutor believed justified impeaching the President for "high crimes and misdemeanors." Kavanaugh was one of the two authors of the grounds for impeachment.[44]

The eleven specific counts Kavanaugh outlined against the President included five allegations of perjury, five allegations of obstruction of justice, and one allegation that Clinton's actions were "inconsistent [with his] . . . constitutional duty to faithfully execute the laws."[45] Even conservative commentators and legal scholars were largely unimpressed by Kavanaugh's work. The *Wall Street Journal* noted that a number of former prosecutors and legal scholars found the case against the President to "strain credulity" and to be based on "suppositional reasoning."[46] The *Chicago Tribune* described Kavanaugh's tortured arguments as "[u]nique and [h]ardly [a]irtight" and reported that many experts accused the report of "using explicit descriptions of sexual acts to paper over shaky allegations."[47] For example, Kavanaugh's assertion that Clinton could be convicted of obstruction of justice because he lied to friends who later repeated his stories to the grand jury was "a real stretch," according to Miami lawyer Neal Sonnett, who noted it was a "theory that I've never seen or heard of in the criminal law."[48] Even the strongest parts of Kavanaugh's argument were weaker than many believed would be necessary to win a conviction. Richard Phelan, the Chicago attorney who led the investigation concerning House Speaker Jim Wright in the late 1980s, noted

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[39] *See* Susan Schmidt and Dan Morgan, Starr: Witnessing for the Prosecution, *Washington Post*, Nov. 19, 1998; Michael Lind, All the President's Messes, *New York Times*, July 11, 1999; David W. Chen and Neil A. Lewis, Testing of a President: The Authors, *New York Times*, Sept. 12, 1998 (hereinafter Chen).
[40] Margolick at p. 162.
[41] *Id.*
[42] *Id.*
[43] Ronald Brownstein, For Clinton Foes, Morality Clouds Political Storm Over Starr Report, *Los Angeles Times*, Sept. 14, 1998 (hereinafter Brownstein).
[44] Questionnaire at Question 17(b)(1); Chen.
[45] Hedges.
[46] Simpson.
[47] Hedges.
[48] *Id.*

that while the case that Clinton had lied under oath was relatively strong, perjury was rarely successful as a stand-alone charge, and was usually tacked onto a more weighty fraud or drug indictment. "If you prosecuted every guy who lied in a deposition about something," Phelan noted, "we'd have half the people in this country locked up."[49] Many members of Congress on both sides of the aisle were equally unimpressed. Senator Specter said he believed many senators would vote that the allegations in the report were "not proved" if they were given that option.[50] The fact that Kavanaugh's most significant legal accomplishment to date was a listing of dubious legal charges -- bolstered by evidence many still believe was only brought to light to embarrass the President -- raises serious questions about his work as a lawyer as well as his willingness to twist legal theory to suit his political ends.

While Kavanaugh has taken pains to point out that he did not personally have a hand in authoring the even more controversial narrative section of the Starr Report,[51] he has nonetheless fully defended Starr's conduct as Special Prosecutor. Rarely missing an opportunity to praise Starr, Kavanaugh authored a series of op-eds in the fall and summer of 1999 fiercely defending his mentor and his actions in the face of growing criticism.[52] Kavanaugh wrote that "Starr [] conducted thorough and fair investigations . . .; exercised discretion where appropriate and firmness where necessary; . . . and displayed honor and determination in the face of relentless political attacks."[53] Kavanaugh repeatedly lauded Starr as a man of "extraordinary accomplishment and integrity," even calling him "an American hero."[54] In one instance, Kavanaugh sent a letter to the editor of the *New York Times* specifically to rebut an article that had mistakenly claimed Kavanaugh had found certain of Starr's tactics inappropriate.[55] In another letter, Kavanaugh praised Starr's "honor" and insisted that "Judge Starr has consistently performed with the highest skill and integrity and [I] . . . feel sick about the abuse he has suffered."[56]

Most Americans will recall that Starr's tactics included not only releasing "an exhaustive chronology of Clinton's sexual escapades"[57] despite the fact that most legal experts found it "difficult to see the legal purpose of such disclosures,"[58] but also a wide array of questionable acts which were highly offensive to Clinton supporters and foes alike. Monica Lewinsky was reportedly taken to a hotel room and interrogated for 12

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[49] *Id.*
[50] CNN, Three GOP Moderates Will Vote Against Conviction, Feb. 10, 1999, available at cnn.com.
[51] Questionnaire Answer 17(b)(1) (Kavanaugh notes that the report is "a matter of some continuing controversy" and states that he was only involved in writing the grounds for impeachment).
[52] Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999; Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999; Robert Bittman and Brett M. Kavanaugh, Op-Ed, Indictment of an Ex-President?, *Washington Post*, Aug. 31, 1999; Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.
[53] Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.
[54] *Id.* and Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.
[55] Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.
[56] Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999.
[57] Brownstein.
[58] *Id.*

hours while her requests to call her attorney were denied,[59] and her mother was forced to testify before the grand jury.[60] According to several reports, secret grand jury information was intentionally leaked by Starr's office in an effort to undermine the president.[61] Innumerable public servants were subpoenaed and harassed – from the lowest staffers to the highest government officials – in what 14 Democratic members of the House Judiciary Committee described as "a means of preventing or intimidating them from criticizing [Starr] . . . [a method which is] clearly outrageous and may be prohibited by federal law."[62] Starr's tactics were so extreme as to alienate many, including Republicans. A number of prominent Republicans, including Senators Arlen Specter and John McCain, criticized Starr for being too aggressive in the course of his investigation.[63] Especially in light of such concerns, Kavanaugh's unqualified praise and endorsement of Starr and his tactics raises disturbing concerns about Kavanaugh's own legal judgment.

A Malleable View on Privilege

Kavanaugh's work as one of the architects of the Bush Administration judicial nominations effort and his willingness to align himself with Kenneth Starr are not the only examples of his devotion to right-wing political causes. Rather, his stunning willingness to twist and shift legal theories and philosophies to best serve partisan interests is highly disturbing as well. An examination of the roles Kavanaugh has played in the Clinton and Bush II Administrations demonstrates the point. During the Clinton Administration, as discussed above, Kavanaugh was a key figure in the office of Special Prosecutor Kenneth Starr and, before ascending to the role of Starr Report co-author, worked to gain unprecedented access to the records of the President of the United States. In his role in the Bush administration, however, Kavanaugh seems to have radically changed his views on presidential privilege and has worked diligently to ensure that the current President works with an unprecedented ability to keep presidential actions and records secret from Congress and the public. As summed up in the *Washington Post*, "within a few years, Kavanaugh's work has gone from being described as 'a serious blow to the presidency,' as Clinton lawyer Lloyd Cutter put it, to promoting an 'imperial presidency,' as Rep. Henry A. Waxman (D-Calif.) put it."[64]

As a member of Starr's Whitewater team, Kavanaugh was directly involved in a number of pivotal cases challenging long-held ideas of privilege and presidential privacy. Apparently intent on working to diminish presidential power and privilege, Kavanaugh played a key role in the following controversial cases:

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[59] Michael Grunwald, Hardball at the Ritz Puts Starr on the Spot, *Washington Post*, Sept. 23, 1998.
[60] Dan Balz, Week 4: All Eyes on Grand Jury, Lewinski's Mother, Washington Post, Feb. 15, 1998.
[61] Joe Conason, Starr Springs a Leak, Salon, Oct. 1998, available at http://www.salon.com/news/1998/10/cov_30newsc.html.
[62] CNN, Clinton Aide Appears Before Grand Jury, Feb. 26, 1998, available at www.cnn.com/ALLPOLITICS/1998/02/26/lewinskiscandal/.
[63] Howard Kurtz, Starr Is Urged to Curtail Inquiry, *Washington Post*, Mar. 2, 1998; Dan Carney and Carrol J. Doherty, GOP Struggles to find Strategy to Deal with Starr Fallout, *CNN*, Mar. 14, 1998, available at cnn.com.
[64] Milbank.

- In Swidler v. Berlin,[65] Kavanaugh unsuccessfully argued for access to privileged communications between deceased Deputy White House Counsel Vince Foster and his attorney. **The Supreme Court rejected Kavanaugh's arguments by a 6-3 vote,** holding that attorney-client privilege does survive the death of the client. This disturing challenge to well-established common law proves how far Kavanaugh and Starr were willing to go in pursuit of truly privileged information.

- In In Re: Bruce Lindsey,[66] Kavanaugh successfully argued that that the President does not enjoy attorney-client privileges in his relationship with White House attorneys, despite evidence that White House legal work and Clinton's private attorneys' legal work frequently intersected.[67]

- In Rubin v. U.S.[68], Kavanaugh briefed the Special Prosecutor's position in an appeal of the D.C. Circuit's ruling that Secret Service agents could be forced to testify before grand juries concerning information they learned about the president while on the job. Kavanaugh advanced this point despite the very real danger that the ruling could cause future presidents to separate themselves from their protective detail during private or sensitive conversations – an act that would make the agents' jobs more difficult and put the president's life at risk. The Supreme Court denied certiorari, effectively upholding the appellate court's decision.[69]

Kavanaugh's role in these critically important privilege cases might suggest that Kavanaugh believes strongly in the right to obtain information about the government and government leaders, particularly the president. Since President Bush took office, however, Kavanaugh seems to have had a startling change of heart: **He now uses his position to argue in favor of privilege and presidential secrecy at least as vehemently as he once argued against it.**

In one of his first acts in the Bush White House, Kavanaugh served as a leading force in the development of the controversial **Executive Order #13233, which effectively eviscerated the Presidential Records Act (PRA).**[70] President Carter signed the PRA in the aftermath of Watergate to clarify that presidential records belong to the public and cannot be destroyed or controlled by a president after he has left office. It dictated that most presidential records would be available through Freedom of Information Act requests five years after the end of a president's administration. Other documents, including those

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[65] 524 U.S. 399 (1998).

[66] 158 F.3d 1263 (D.C. Cir. 1998) *cert. denied*, Office of the President v. Office of Independent Counsel, 525 U.S. 996 (1998).

[67] Previously, Kavanaugh had taken a similar position in *In Re: Grand Jury*, when he co-wrote a brief arguing that the First Lady did not enjoy attorney-client privileges in her relationship with White House counsel. 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

[68] 525 U.S. 990 (1998), *denying cert. to* In Re: Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998).

[69] Following Rubin v. U.S., there have been several attempts to use legislation to create a secret service privilege, (including a bi-partisan attempt in 1998), but none have been successful thus far. *See* Herbert L. Abrams, The Contemporary Presidency: Presidential Safety, Prosecutorial Zeal, and Judicial Blunders: The Protective Function Privilege, *Presidential Studies Quarterly*, June 1, 2001. *See also* S. 1360, 106th Cong. (1999); S.22, 108th Cong. (2003).

[70] Milbank.

containing confidential advice a president received from his advisors, known as "P-5" documents, would not be available until 12 years after an administration's end. At that time, the P-5 documents would be released unless the current or former president was able to successfully argue a "constitutionally based privilege" that would justify withholding the materials.[71]

President Ronald Reagan was to be the first president to have his P-5 documents released in January of 2001. Roughly 68,000 documents were to be available to scholars, researchers, and the general public for the first time. The Bush Administration was given 30 days notice to review the P-5 documents for information that could compromise national security before the documents would be released.[72]

However, the Administration took action far beyond merely evaluating the sensitivity of the documents. After receiving a series of 90-day extensions, the White House finally responded in November of 2001 by issuing executive order #13233, reportedly written by Kavanaugh.[73] **The controversial order gave both the sitting president *and* the former president or his designees the right to refuse the release of any P-5 document without cause and apparently in perpetuity.**[74] Many speculated that the motivation behind the order was to protect Bush advisors, many of whom served under President Reagan, from embarrassing revelations about advice they gave the former president. A researcher's only recourse would be to bring a lawsuit against the objecting president or presidents. This would be a daunting task for most academic researchers, who would not only be pitted against one, possibly two presidents, but also forced to retain counsel to file suit, even with limited funding.[75]

Kavanaugh was given the task of defending the order before a group of presidential scholars invited to the White House shortly after the executive order was issued. He attempted to assure the group that the researchers would be "happy with the [new] procedures" once they were in place. On the contrary, the researchers raised serious concerns. Robert Spitzer, president of the Presidency Research Group of the American Political Science Association, noted that "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . [t]he situation continues to be deeply troubling."[76] Hugh Graham, Reagan historian and professor emeritus at Vanderbilt University, was also troubled by Kavanaugh's efforts. He described the executive order as being "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave."[77]

Other examples of Kavanaugh's sudden zeal for presidential secrecy abound. *The Nation* **has reported that Kavanaugh was central to the White House's efforts to keep notes from Vice President Dick Cheney's energy task force meetings, which some**

[71] Cannon.
[72] *Id.*
[73] Milbank.
[74] Cannon.
[75] *Id.*
[76] *Id.*
[77] *Id.*

speculate contain proof that the White House acted to aid Enron prior to its collapse, secret from the Senate Governmental Affairs Committee.[78] The White House cited an interest in preserving "the ability of the president and vice president to receive unvarnished advice" as the reason for concealing the documents.[79] Likewise, Kavanaugh reportedly played a key role in preventing congressional access to documents pertaining to presidential pardons.[80] The *Washington Post* said that the Administration's claim of executive privilege over pardon documents, "represents a hard line the government has never taken" – namely that executive privilege extends beyond communications from presidential advisors in the White House to include "government papers he has never seen and officials he has never talked to, such as the sentencing judge in a particular case."[81] The *Post* noted that "[i]n the past, even pardon recommendations sent directly to the president from the Justice Department have been routinely made public by government archivists after several years."[82] The Bush Administration, by contrast, is even claiming privilege to keep secret pardon documents nearly 80 years old, asserting privilege over documents generated in considering the pardon of back-to-Africa movement leader Marcus Garvey, who was released from prison in 1927 after a fraud conviction.[83]

Such unprecedented claims of executive privilege serve as a sharp contrast to the insatiable appetite for access to presidential records and information exhibited by Kavanaugh during the Clinton administration. They suggest a view of the law that seriously threatens government openness and is of particular concern for a nominee to the D.C. Circuit, which often considers such issues. In addition, Kavanaugh's apparent willingness to shift his legal philosophy and twist legal theory so dramatically shows an enthusiasm for serving partisan political ends over the law that is extremely troubling for a nominee for a lifetime seat on the federal bench.

Religious Liberty and the Public Schools

Although Kavanaugh's legal work (other than for Kenneth Starr and the Bush White House) is scant, the legal position he advocated in one case on religious liberty and church-state separation raises additional concerns. In 1999, Kavanaugh authored an *amicus* brief on behalf of members of Congress that was submitted to the Supreme Court in the case of *Santa Fe Independent School District v. Doe*.[84] In that case, the school district argued that its "student-led" prayers over the school loudspeaker at public school

[78] Newfield. John Nichols, Enron: What Dick Cheney Knew, *The Nation*, March 28, 2002.
[79] CNN, Cheney Defends Refusal to Hand Over Energy Task Force Notes, Jan. 27, 2002, *available at* http://cnn.allpolitics.com. The issue of whether Cheney will be allowed to keep all such documents secret from the public is to be partially addressed by the Supreme Court this spring. *See* Charles Lane, High Court Will Review Ruling on Cheney Task Force Records, *Washington Post*, Dec. 16, 2003. Kavanaugh's Judiciary Committee hearing was scheduled on the same day as the Supreme Court oral argument in that case.
[80] Milbank.
[81] George Lardner, Bush Seeks Secrecy for Pardon Discussions, *Washington Post*, Aug. 27, 2002.
[82] *Id.*
[83] *Id.*
[84] Brief of *amicus curiae* Congressmen Steve Largent and J.C. Watts in *Santa Fe Independent School District v. Doe*, 199 U.S. Briefs 62, Dec. 30, 1999. (hereinafter "Santa Fe Brief")

football games did not infringe on students' rights under the Establishment Clause of the First Amendment.

At issue in the case was a public school's policy of allowing the student body to elect a student representative each school year who would deliver an "invocation and/or message" over the school loudspeaker before football games.[85] In his brief, Kavanaugh argued that because the student body's chosen speaker was not specifically required to pray during the "invocation and/or message," any prayer offered by the speaker was essentially private religious speech, which is not only permissible under, but is also protected by, the First Amendment.[86] Kavanaugh claimed that the "sole question" raised in the case was "whether . . . the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer."[87] He further asserted that ruling against the school district in the case would force schools "to monitor and censor religious words."[88]

In a 6-3 decision, the Court squarely rejected Kavanaugh's claim, finding that prayer was both "explicitly and implicitly"[89] encouraged by the policy which "involve[d] both perceived and actual endorsement of religion."[90] The Court noted that while the speaker was not explicitly required to pray, an "invocation" was the only type of message expressly endorsed by the school and prayer is the most obvious means of "solemnizing the event," one of the purposes of the invocation acknowledged by Kavanaugh's brief.[91] Pointing out that its decision does nothing to inhibit truly voluntary religious practice, as Kavanaugh appeared to argue, the Court explained that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[92]

In sum, the Court wholly rejected Kavanaugh's arguments, finding that an invocation on school property, at school-sponsored events, "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer . . . is not properly characterized as 'private' speech."[93] The Court's clear and unequivocal opinion, and the fact that Kavanaugh failed to even properly frame the question before the Court in his brief, raises serious questions about both his legal philosophy and his skill as a lawyer. If given the opportunity to advocate these same views from the federal bench, the right of schoolchildren to be free from religious coercion and school-sponsored promotion of religion at school could be in jeopardy.

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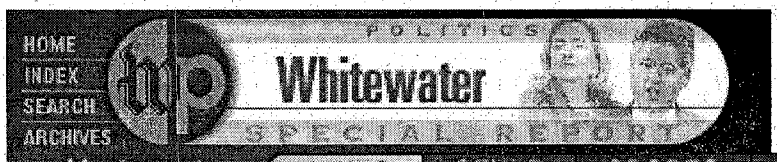
[85] *Id.* at 2.
[86] *Id.* at 3 – 5.
[87] *Id.* at 5.
[88] *Id.* at 4.
[89] *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) at 301.
[90] *Id.* at 305.
[91] *Id.* at 306 – 307.
[92] *Id.* at 313.
[93] *Id.* at 310.

Conclusion

Brett Kavanaugh is an unsuitable candidate for a lifetime appointment to the D.C. Circuit bench, the second highest court in the nation. While Kavanaugh's scant legal resume does not reveal much about his legal skills, the highly charged partisan items that it does contain tell a great deal about his loyalties, ideology, and legal philosophy. Kavanaugh has eagerly allied himself with the highly questionable tactics of former Special Prosecutor Ken Starr. He has proven himself willing to change his view of the law to bend with the political winds. He has recently argued for extensive presidential and governmental secrecy and privilege that would severely undermine the rights of the public and Congress, particularly if implemented from a powerful lifetime position on the D.C. Circuit. Kavanaugh has played a key role in the Bush Administration's judicial nominations policy, and the judicial nominees that Kavanaugh had a hand in selecting and promoting have too often been extremists who would strip Congress of much of its power and remove the American people from much of Congress' protection. Throughout most of his career, Kavanaugh has shown a dedication to extreme right wing ideas that undermine the freedoms and liberties that most Americans cherish. A lifetime appointment to a powerful federal appellate court should not become a political reward for a highly partisan political warrior. The nomination of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit should be rejected.



WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

I. INTRODUCTION

In accordance with 28 U.S.C. § 594(h), the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Association (the OIC) files this summary report on the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr.

On July 20, 1993, police and rescue personnel were called to Fort Marcy Park in suburban Northern Virginia They found Mr. Foster lying dead with a gun in his right hand and gunshot residue-like material on that hand. There were no signs of a struggle. There was a gunshot wound through the back of his head and blood under his head and back. The autopsy determined that Mr. Foster's death was caused by a gunshot through the back of his mouth exiting the back of his head. The autopsy revealed no other wounds on Mr. Foster's body.

The police later learned that Mr. Foster had called a family doctor for antidepressant medication the day before his death. He had told his sister four days before his death that he was depressed, and she had given him the names of three psychiatrists. He had written in the days or weeks before his death that he "was not meant for the job or the spotlight of public life in Washington. Here, ruining people is considered sport."

Two law enforcement investigations – the initial United States Park Police investigation and a subsequent investigation conducted under the direction of regulatory Independent Counsel Robert B. Fiske, Jr. – concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Two inquiries in the Congress of the United States reached the same conclusion. After analysis of the evidence gathered during those investigations, and further investigation including adducing evidence before the federal grand jury in Washington, D.C., the OIC likewise has concluded that Mr. Foster committed

suicide by gunshot in Fort Marcy Park.

The OIC's conclusion is based on analyses and conclusions of a number of experienced experts and criminal investigators retained by the OIC. They include Dr. Brian D. Blackbourne, a forensic pathologist who is the Medical Examiner for San Diego County, California; Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Alan L. Berman, an expert suicidologist who currently is Executive Director of the American Association of Suicidology; and several experienced investigators with extensive service in the Federal Bureau of Investigation (FBI) and other law enforcement agencies. These experts and investigators reviewed the evidence gathered during the prior investigations and conducted further investigation as necessary.

Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand." Dr. Lee reported that "[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide. The location where Mr. Foster's body was found is consistent with the primary scene," that is, the location where he committed suicide. Dr. Berman stated that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion." OIC investigators concurred, based on investigation and analysis of the evidentiary record, that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

Foster Report Table of Contents

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Back to the top

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

II. BACKGROUND

A. 1993 Park Police Investigation

Because Mr. Foster's body was found in Fort Marcy, a park maintained by the National Park Service, the United States Park Police conducted the investigation of his death. On the night of the death (July 20, 1993), Mr. Foster's body was transported to Fairfax County Hospital in Fairfax, Virginia. The next day, Dr. James C. Beyer, Deputy Chief Medical Examiner, Northern Virginia District of the Virginia Office of the Chief Medical Examiner, conducted an autopsy in the presence of an assistant and four Park Police officers.

The FBI assisted the Park Police in certain aspects of the ensuing death investigation, as did other federal and Virginia agencies. Moreover, the FBI, at the direction of the Department of Justice, opened a separate investigation of possible obstruction of justice after a note was reportedly found on Monday, July 26, 1993, in Mr. Foster's briefcase at the White House.

On August 10, 1993, the Department of Justice, FBI, and Park Police jointly announced the results of the death and note investigations. The Park Police concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Robert Langston, Chief of the Park Police, explained:

> The condition of the scene, the medical examiner's findings and the information gathered clearly indicate that Mr. Foster committed suicide. Without an eyewitness, the conclusion of suicide is deducted after a review of the injury, the presence of the weapon, the existence of some indicators of a reason, and the elimination of murder. Our investigation has found no evidence of foul play. The information gathered from

> associates, relatives and friends provide us with enough evidence to conclude that Mr. Foster's ... that Mr. Foster was anxious about his work and he was distressed to the degree that he took his own life.

Based on the evidence the FBI gathered in its investigation, the Department of Justice did not seek criminal charges for obstruction of justice relating to the handling of the note.

B. 1994 Fiske Investigation

In 1992 and 1993, the Resolution Trust Corporation (RTC) examined the operations of Madison Guaranty Savings & Loan, a defunct savings and loan in Little Rock, Arkansas, that had been operated by James and Susan McDougal. The McDougals also had been partners with William Jefferson Clinton and Hillary Rodham Clinton in an Arkansas real estate venture known as the Whitewater Development Company. In October 1993, the RTC sent nine criminal referrals to the United States Attorney's Office in Little Rock concerning the activities of Madison Guaranty.

Also in 1993, the FBI investigated the activities of Capital Management Services, Inc., a small business investment company in Little Rock that had been operated by David L. Hale. Mr. Hale was indicted by a federal grand jury in the Eastern District of Arkansas on September 23, 1993.

Both the Hale prosecution and the Madison investigation were transferred in November 1993 from the United States Attorney's Office in Little Rock to the Fraud Section of the Department of Justice in Washington. On December 20, 1993, the White House confirmed that Whitewater-related documents had been in Mr. Foster's White House office at the time of his death. On January 12, 1994, President Clinton asked Attorney General Reno to appoint an independent counsel, and on January 20, 1994, the Attorney General appointed Robert B. Fiske, Jr., to take over the investigation.

Mr. Fiske's jurisdictional mandate vested him with authority to investigate whether any individuals or entities committed federal crimes "relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services." After his appointment, Mr. Fiske took over both the Hale prosecution and the

continuing Madison investigation.

Mr. Fiske also opened a new investigation of Mr. Foster's death, utilizing FBI resources and a panel of distinguished and experienced pathologists. On June 30, 1994, Mr. Fiske issued a report concluding that "[t]he overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide in Fort Marcy Park on July 20, 1993."

C. Congressional Inquiries

On February 24, 1994, Congressman William F. Clinger, Jr., then the Ranking Republican on the Committee on Government Operations of the United States House of Representatives, initiated a probe into the death of Mr. Foster. Mr. Clinger's staff interviewed emergency rescue personnel, law enforcement officials, and other persons involved in the Park Police investigation of Mr. Foster's death. Mr. Clinger's staff obtained access to the Park Police reports and to photographs taken at the scene and at the autopsy. Mr. Clinger issued a report on August 12, 1994, concluding that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."

The United States Senate Committee on Banking, Housing, and Urban Affairs conducted an inquiry into the Park Police investigation of Mr. Foster's death. The Committee concluded its inquiry with a report issued on January 3, 1995, stating that "[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gun shot wound to the upper palate of his mouth." The additional views of Senators D'Amato, Faircloth, Bond, Hatch, Shelby, Mack, and Domenici stated that "[w]e agree with the majority's conclusion that on July 20, 1993 Vincent Foster took his own life in Fort Marcy Park."

D. Appointment of the Independent Counsel

On August 5, 1994, after enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty

Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr. Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIC, the OIC reviewed and analyzed the evidence gathered during prior investigations of Mr. Foster's death and conducted further investigation.

Foster Report Table of Contents

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Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

HOME
INDEX
SEARCH
ARCHIVES
POLITICS
Whitewater
SPECIAL REPORT

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

III. OVERVIEW

A. Scrutiny

The gunshot death of a high-ranking White House lawyer who had been a law partner of the First Lady of the United States and friend to both the President and the First Lady was bound to be heavily scrutinized -- and it has been. Many persons have publicly identified specific issues regarding Mr. Foster's death that, in their view, might raise broader questions about the ultimate conclusion that Mr. Foster committed suicide in Fort Marcy Park. Those questions have arisen and to some extent persisted for many of the same reasons that numerous suicides are questioned. In this case, as in many suicides, no identified eyewitness saw Mr. Foster commit suicide, and Mr. Foster apparently did not leave a suicide note (that is, a note that specifically refers to or contemplates suicide).

The primary issues that have been raised regarding the cause and manner of Mr. Foster's death can be grouped into several broadly defined categories: (1) forensic issues; (2) apparent differences in statements of private witnesses, Park Police personnel, and Fairfax County Fire and Rescue Department (FCFRD) personnel regarding their activities and observations at Fort Marcy Park on July 20; (3) physical evidence (such as the fatal bullet) that could not be recovered; and (4) the conduct of the Park Police investigation and the autopsy.

B. OIC Personnel

To ensure that these issues were fully considered, carefully examined, and properly assessed in analyzing the cause and manner of Mr. Foster's death, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman.

Dr. Blackbourne has been County Medical Examiner for San Diego County, California, since 1990. He was Chief Medical Examiner for the Commonwealth of Massachusetts from 1983 to 1990; Deputy Chief Medical Examiner in Washington, D.C., from 1972 to 1982; and Assistant Medical Examiner in Metropolitan Dade County, Florida, from 1967 to 1972. He has taught and written widely, and

has testified in court on numerous occasions. He has performed over 5,500 autopsies, over 700 of which have involved gunshot wounds. The autopsies have included over 800 homicides and over 700 suicides. He is a Fellow of the American Academy of Forensic Sciences and a member of the National Association of Medical Examiners.

Dr. Lee has served as Director of the Connecticut State Police Forensic Science Laboratory since 1980. He has numerous professional affiliations and has served as a consultant to a variety of organizations. He has received over 400 awards and commendations, including a 1986 Distinguished Service Award and a 1994 Distinguished Fellow Award from the American Academy of Forensic Sciences. He has been qualified in many state and federal courts as an expert witness or an expert involved in forensic science, forensic serology, bloodspatter analysis, crime scene investigation, crime scene profiling, crime scene reconstruction, fingerprints, imprints, and general physical evidence. He has written or edited many books and articles, including Physical Evidence (1995), Crime Scene Investigation (1994), Physical Evidence and Forensic Science (1985), and Physical Evidence and Crime Scene Investigation (1983).

Since 1995, Dr. Berman has been Executive Director of the American Association of Suicidology. He was President of that Association in 1984-85. From 1991 to 1995, he was Director of the National Center for the Study and Prevention of Suicide. Since 1971, he has engaged in the private practice of psychotherapy and psychological consultation. In 1982, he received the Edwin S. Shneidman Award for outstanding contribution in research by the American Association of Suicidology. He has taught and written extensively on the subject of suicide, and has testified before committees of the United States House of Representatives and the United States Senate. He is a Distinguished Adjunct Professor of Psychology at the American University in Washington, D.C., and was a tenured professor in the Department of Psychology from 1979 to 1991. He was co-editor of Assessment and Prediction of Suicide (1992). He has been a Consulting Editor of the journal Suicide and Life Threatening Behavior since 1981.

OIC investigators who worked with these outside, independent experts included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C. Agents with the Cold Case Squad work with MPD homicide detectives in reviewing and

attempting to solve homicides that have remained unsolved for more than one year. Another OIC investigator has extensive homicide experience as a detective with the MPD in Washington, D.C., for over 20 years. Two other OIC investigators assigned to the Foster death matter have experience as FBI agents investigating homicides of federal officials and others.

C. Methodology

The OIC devoted substantial effort to gathering, examining, and analyzing evidence to render as conclusive a determination as possible of the cause and manner of Mr. Foster's death. In this kind of investigation – a reconstruction based in part on evidence gathered and tested during prior investigations -- the important information in assessing the cause and manner of death includes testimonial, documentary, and photographic evidence relating to the scene and the autopsy; physical and forensic evidence gathered at the scene and the autopsy; a variety of tests and analyses of the evidence; and testimonial and documentary evidence revealing the decedent's activities and state of mind in the days and weeks before his death.

In particular, the OIC obtained information gathered during the prior investigations of Mr. Foster's death, including physical evidence; photographs taken at the scene and the autopsy; and incident reports, interview reports, and other documents produced or gathered by the Park Police, the FCFRD, the FBI, and Mr. Fiske's Office. The OIC questioned the known and identified civilian witnesses who were in Fort Marcy Park in the late afternoon of July 20, the Park Police and FCFRD personnel who responded to Fort Marcy Park, and the medical personnel who were involved in the Foster matter. Many of these persons were questioned before the federal grand jury.

As to forensic information, the OIC attempted to obtain certain physical and forensic evidence in addition to that which had been gathered in prior investigations. Experts retained by the OIC reviewed and examined the evidence. Dr. Lee reviewed and studied scene and autopsy photographs and documentation; studied, re-examined, and tested physical evidence; reviewed FBI Laboratory tests and the autopsy results; met with FBI Laboratory personnel and Dr. Beyer, the medical examiner who conducted the autopsy; and toured and examined the Fort Marcy Park scene. Dr. Lee submitted a report summarizing his work on the physical and forensic evidence and setting forth his analysis.

Dr. Blackbourne reviewed the relevant reports and the scene and

autopsy photographs; reviewed microscopic slides; examined the Fort Marcy Park area; and interviewed Dr. Beyer, Dr. Haut (the medical examiner who responded to the Fort Marcy scene on July 20), and FBI and Virginia laboratory personnel. Dr. Blackbourne prepared a report summarizing his work on the forensic issues and setting forth his analysis.

As to information regarding Mr. Foster's activities and state of mind before his death, the OIC both re-interviewed certain persons who had been interviewed during prior investigations and interviewed persons not previously interviewed. These individuals included a variety of family members, friends, and associates who could potentially shed light on Mr. Foster's activities and state of mind. The OIC reviewed documents gathered in prior investigations, and sought and reviewed new documents.

The OIC provided Dr. Berman with relevant state-of-mind information (the bulk of which consisted of interview reports and transcripts), which he studied and analyzed. Dr. Berman submitted a report to the OIC summarizing his work and providing his analysis.

The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, considering the analyses and conclusions of the OIC experts and investigators, and preparing this report.

D. Report

This report will describe the factual background; the forensic evidence and analyses, including the autopsy findings; the analysis of Dr. Lee; and the analyses and reports prepared by Dr. Blackbourne and the pathologists retained by Mr. Fiske's Office. Above all, the Foster death case is a forensic matter, and the forensic evidence and analyses provide the foundation for the ultimate conclusion. The report then will discuss investigative work conducted with respect to other, specific issues. Finally, the report will summarize Dr. Berman's conclusions regarding Mr. Foster's state of mind.

The OIC has filed this summary report with the Special Division of the United States Court of Appeals. Because of the secrecy restrictions of Federal Rule of Criminal Procedure 6(e), the OIC has not submitted the report to the Congress or released it directly to the public. The Special Division retains discretion to authorize public release of this report, and the OIC has prepared the report with the assumption that the Special Division, consistent with past practice,

would see fit to authorize public release. While some descriptions of forensic evidence are necessarily graphic, the OIC has sought to comply with the 1994 Independent Counsel Reauthorization Act regarding the contents of reports.

Some of the best evidence of the condition of Mr. Foster's body at the time of his death is contained in photographs taken by Park Police officers at Fort Marcy Park and in photographs taken at the autopsy. However, based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious.

Foster Report Table of Contents

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Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

wp yellowpages

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

IV. FACTUAL SUMMARY

A. Mr. Foster's Background and Activities on July 20, 1993

Vincent W. Foster, Jr., was born on January 15, 1945, in Hope, Arkansas, to Alice Mae and Vincent W. Foster. He had two sisters, Sheila and Sharon. He was graduated from Hope High School in 1963 and from Davidson College in 1967. He married Elizabeth (Lisa) Braden in 1968, and they had three children, two boys and a girl. Mr. Foster was graduated first in his class from the University of Arkansas School of Law in 1971, where he was Managing Editor of the Law Review. He joined the Rose Law Firm in Little Rock in 1971 as an associate, and he became a Member of the Firm in 1974. Mr. Foster left the Rose Law Firm and moved to Washington in January 1993 to serve as Deputy White House Counsel. He initially lived in Washington with his sister Sheila Anthony and her husband Beryl Anthony. Mrs. Lisa Foster moved to Washington in early June 1993, and the family lived in a house in the Georgetown section of Washington.

On the morning of Tuesday, July 20, 1993, six months into the Clinton Administration, Mr. Foster drove his gray Honda Accord to the White House from the house in Georgetown where he and his family were living. After dropping off his older son and his daughter on the way to work, Mr. Foster arrived at the suite on the second floor of the White House's West Wing where White House Counsel Bernard Nussbaum and Mr. Foster had offices. Three assistants (Mr. Nussbaum's assistants Betsy Pond and Linda Tripp and Mr. Foster's assistant Deborah Gorham) and an intern (Thomas Castleton) had desks in the outer office of the suite.

According to the testimony of a number of witnesses, Mr. Foster attended the morning Rose Garden ceremony announcing the nomination of Louis J. Freeh to be Director of the FBI. According to

Ms. Tripp and Ms. Pond, at about 12:00 or 12:30 p.m., Mr. Foster asked them for lunch from the White House mess.

After eating lunch in his office, Mr. Foster left the Counsel's suite. He was seen leaving by Ms. Tripp, Ms. Pond, and Mr. Castleton. The OIC, like the other investigative bodies before us, has not learned of or located anyone who definitively saw Mr. Foster from the time he left the White House until near 6:00 p.m., at which time a private citizen found Mr. Foster dead in Fort Marcy Park.

B. Fort Marcy

Fort Marcy was constructed as a Civil War earthwork fortification. It is located between the George Washington Memorial Parkway (GW Parkway) and Chain Bridge Road in the Virginia suburbs of Washington, D.C., approximately 6.5 miles by car from downtown Washington. The GW Parkway, on which there is virtually constant automobile traffic, runs along the Virginia side of the Potomac River from Mount Vernon to the Capital Beltway. Several bridges connect the Parkway (or roads leading to the Parkway) to Washington. A parking lot for the park is adjacent to the outbound side of the GW Parkway. Inside the park, as of July 1993, were two cannons – one closer to the GW Parkway and a second (the one near which Mr. Foster was found) closer to Chain Bridge Road. That second cannon is approximately 200 yards from the parking area.

Thirty-one witnesses, 19 of whom observed Mr. Foster's body, have provided relevant testimony about their activities and observations in and around the Fort Marcy Park area on July 20, 1993. They include:

6 private citizens (one of whom discovered and observed Mr. Foster's body);

13 Park Police personnel (9 of whom observed Mr. Foster's body);

11 Fairfax County Fire and Rescue Department (FCFRD) personnel (8 of whom observed the body); and

Dr. Haut, the doctor representing the Medical Examiner's Office who responded to the scene and examined the body.

Between about 2:45 and 3:05 p.m., a citizen (C1) driving outbound on GW Parkway saw "a dark metallic grey, Japanese sedan" occupied

by a single, white male abruptly enter Fort Marcy Park. C1 said in his initial 1993 statement to the Park Police that the license plate was from Ohio or Arkansas. Months later, on April 18, 1994, during Mr. Fiske's investigation, C1 was shown photographs of Mr. Foster's car. C1 stated that the car in the photographs looked "similar" to the car he recalled, but that the license plate on it differed from that which he recalled.

Another citizen (C2) drove his rental car into the Fort Marcy parking lot at approximately 4:30 p.m. While there, C2 saw one unoccupied car, which he described as a "rust brown colored car with Arkansas license plates." C2 also saw another nearby car; that car was occupied by a man who exited his car as C2 exited his own car. C2 described this man as having "a look like he had a ... an agenda," although "everything I based my observation of this guy, was from my gut, more than anything else." C2 and the man did not speak to one another. C2 went into the park to urinate, and the other man had reentered his car by the time C2 returned to the parking lot. C2 then left the park in his car.

A man (C3) and woman (C4) pulled into the Fort Marcy parking area in C4's white Nissan at about 5:00 p.m. and were still at Fort Marcy when police and rescue personnel arrived shortly after 6:00 p.m. While C3 and C4 were at Fort Marcy, another citizen (C5) drove his white van into the parking lot to urinate. C5 said that he exited his van, and while walking through the park, found Mr. Foster's body near the second cannon, the cannon closer to Chain Bridge Road. C5 then left Fort Marcy and drove approximately 2.75 miles further outbound on the GW Parkway to a parking area near GW Parkway Headquarters; there, C5 reported the dead body to two off-duty Park Service employees who called 911. Numerous Park Police and FCFRD personnel then responded to Fort Marcy Park.

In the initial response, two groups of FCFRD personnel, as well as Park Police Officer Kevin Fornshill, arrived at Fort Marcy Park at approximately the same time – about 6:10 p.m. They then split into teams to search the park. Officer Fornshill and FCFRD personnel George Gonzalez and Todd Hall composed one group; FCFRD personnel Richard Arthur, James Iacone, Jennifer Wacha, and Ralph Pisani formed the other. The Fornshill-Hall Gonzalez group first reached the body of Mr. Foster, and the other group joined them soon thereafter.

Twelve additional Park Police personnel subsequently arrived at Fort

Marcy Park. Officer Franz Ferstl was the responding beat officer and, as such, was responsible for preparing the incident report. He responded to the scene at the same time as Officer Julie Spetz. Sergeant Robert Edwards, the District supervisor, also arrived on the scene. Ferstl, Spetz, and Edwards arrived before approximately 6:15 p.m., according to the report of Officer Christine Hodakievic, who arrived at approximately 6:15 p.m. and recorded the names of those officers already on the scene (Fornshill, Ferstl, Spetz, and Edwards). Lieutenant Patrick Gavin arrived in a supervisory role at roughly 6:30 p.m., according to his recollection.

According to their reports, Investigators Cheryl Braun and John Rolla, the lead Park Police investigators, arrived along with Investigator Renee Abt at about 6:35 p.m. They received investigative assistance from Officer Hodakievic, who was an investigator in training at that time. Peter Simonello, the Park Police identification technician responsible for gathering physical evidence, arrived shortly thereafter.

At the scene, Park Police investigators and the Park Police identification technician conducted interviews, examined the body and Mr. Foster's car, made notes, took photographs, and collected evidence. Later, five of the Park Police personnel prepared typed reports: the responding beat officer (Ferstl), the two lead investigators (Rolla and Braun), Officer Hodakievic, and the identification technician (Simonello). Several evidence receipts were prepared to record physical evidence obtained at the scene.

When the Park Police and rescue personnel found Mr. Foster's body, he was lying on his back on a berm in front of the second cannon, the cannon nearer Chain Bridge Road. He was dead and had a gun in his right hand (with his thumb trapped in the trigger guard). Gunshot residue-like material was observed on his right hand. When the Park Police lifted and turned over the body later that evening, they noted a wound out the back of his head, and blood on the ground underneath his head and back. They observed no signs of a struggle.

Park Police also found a gray, 4-door Honda Accord with Arkansas plates in the parking lot; that car, the police discovered later that evening, was registered to Mr. Foster. The two lead Park Police investigators (Braun and Rolla) photographed and examined the car and, during that examination, found Mr. Foster's White House identification. The car was towed to a Park Police impoundment lot

that night. The next day, the car was further photographed and examined at the impoundment lot.

Dr. Haut, the medical examiner's representative, arrived at Fort Marcy Park at approximately 7:40 p.m. on July 20 and confirmed the death. The body was then transported by FCFRD ambulance personnel to a morgue at Fairfax Hospital in Fairfax, Virginia.

The witnesses' recollections of precise details at Fort Marcy Park vary in some respects (the differences will be explored below). Nonetheless, the evidence from the scene – including the gun, the apparent residue, the nature of the wound, the blood, the lack of any signs of a struggle -- points to the conclusion that death resulted from suicide by gunshot. A final determination of the manner of death depends on a variety of further investigative steps – most importantly, those associated with forensic science.

Foster Report Table of Contents

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Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

V. FORENSIC ANALYSES

The forensic analyses, in conjunction with the evidence from the scene, confirm that Mr. Foster committed suicide in Fort Marcy Park.

A. Autopsy

The autopsy occurred on July 21, 1993, in the presence of six persons. Dr. James Beyer, Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner, conducted the autopsy, aided by an assistant. Park Police Sergeant Robert Rule and Officer James Morrissette observed the autopsy. Park Police Identification Technicians Hill and Johnson took photographs at the autopsy and collected evidence such as clothing, blood samples, and hair samples. Dr. Beyer prepared an autopsy report. He has supplemented the report with testimony on several occasions. Dr. Beyer has performed over 20,000 autopsies. His responsibility is to determine cause of death and, in the case of a gunshot wound, to determine with the police the manner of death – suicide, homicide, accident, or undetermined.

Dr. Beyer said Dr. Haut contacted him early on July 21, 1993, to advise him of Mr. Foster's death. Dr. Beyer recalled that Dr. Haut indicated that there was a perforating gunshot wound (that is, a gunshot wound with an entrance and exit) and that the Park Police was the investigating agency.

Dr. Beyer recalled that when he opened the body bag, there was blood on the right side of the face and on the right shoulder area of the shirt. Dr. Beyer found a large amount of blood in the body bag.

The autopsy report states that Mr. Foster's height was 6 feet and 4 1/2 inches and his weight was 197 pounds. The report indicates no problems or abnormalities with the cardiovascular system, respiratory

system, liver, gall bladder, spleen, pancreas, adrenal and thyroid glands, gastrointestinal tract, genitourinary tract, kidneys, urinary bladder, or genitalia. The report states that the "[s]tomach contains a considerable amount of digested food material whose components cannot be identified."

As to the head, the report indicates:

> Perforating gunshot wound mouth-head; entrance wound is in the posterior oropharynx at a point approximately 7 1/2" from the top of the head; there is also a defect in the tissues of the soft palate and some of these fragments contain probable powder debris. The wound track in the head continues backward and upward with an entrance wound just left of the foremen magnum with tissue damage to the brain stem and left cerebral hemisphere with an irregular exit scalp and skull defect near the midline in the occipital region. No metallic fragments recovered.

The report contains a diagram of the head and brain area that depicts the entrance wound and the fracture line. A separate diagram depicts the fracture lines, exit, and skull damage. A third page of diagrams of the head area states "perforating gunshot wound" and describes the entrance wound as follows: "Entrance – mouth – posterior oropharynx – large defect -- soft palate defect / powder debris identified." It describes the exit wound as a wound of 1 1/4" x 1". The report indicates "backward" and "upward" as the direction of the bullet through the head.

With respect to the wound, Dr. Beyer stated: "The entrance wound was in the back of the mouth, what we call the posterior oropharynx, where a large defect was present. There was also a soft palate tissue defect, and powder debris could be identified in the area of the soft palate and the back of the mouth. The exit wound is depicted [in the autopsy report] as being present three inches from the top of the head, approximately in the midline, and there is an irregular wound measuring one and one quarter inch by one inch. " There was "good alignment" between the entrance and exit wounds, and there was "no reason to think that this was not an entrance and exit defect configuration." As the report indicates, Dr. Beyer did not recover any bullets or bullet fragments from the body.

The report states that "[s]ections of soft palate" were "positive for powder debris," and Dr. Beyer said that the gunpowder debris in the mouth was "grossly present,'" meaning that it could be seen with the

naked eye, and was present in a "large amount." Thus, Dr. Beyer stated that "the obvious finding was that the muzzle of the weapon had to be in his mouth, close to the back of his throat, back of his mouth."

Dr. Beyer said that he performed "an external examination of the body, with photography of the body. We then examine the body for any identifying marks, such as scars, tatoos or wounds." Dr. Beyer stated that he recalls observing powder debris on the right hand. He recalled gunpowder debris on the left hand to a much lesser degree. (The diagrams in the autopsy report indicate "black material" on both the right hand and the left hand.) Dr. Beyer also recalled a "tannish brown indentation" across the back of the right thumb (the thumb which had been in the trigger guard).

Dr. Beyer said that observation of Mr. Foster's body revealed no wounds on the neck, hands, buttocks, shoulder, back, or any portion of the body other than the head; he said, moreover, that any such wounds would have been registered on the anatomic diagram. Dr. Beyer stated that "[t]here was no evidence of any trauma to the individual other than the gunshot wound."

Dr. Beyer concluded that this was a self-inflicted wound based upon the fact that there was no evidence of any trauma other than the gunshot wound, and "no evidence of any central nervous system depression or diseased state that would have permitted, in my estimation, somebody to walk up and put a gun in his mouth and pull the trigger."

Dr. Beyer's conclusions were reviewed by two sets of experts, one set retained by the OIC and the other by Mr. Fiske's Office. Their analyses of Dr. Beyer's findings and of the relevant laboratory analyses are outlined below. They confirm the conclusions reached at the autopsy.

B. Laboratory Analyses

A number of photographs were taken at Fort Marcy Park and at the autopsy. In addition, at both the scene and the autopsy, the Park Police obtained physical evidence. Evidence receipts show that, at the Fort Marcy scene, the Park Police obtained physical evidence and clothing, including the following:

* Colt Army Special .38 caliber revolver, 4", 6-shot (obtained

from "right hand victim")

* round .38 caliber RP 38 SPL HV (from "revolver")

* casing .38 caliber RP 38 SPL HV (from "revolver")

* eyeglasses (from berm)

* Seiko quartz wrist watch (from "Deceased left wrist")

* pager (from "Deceased right side waist area")

* silver colored ring (from "Deceased right ring finger")

* gold colored band type ring (from "Deceased left ring finger")

* black suit jacket (from "front passenger seat of gray Honda")

* blue silk tie with swans (on "top of coat on front passenger seat")

* White House Identification (from "under coat on front passenger seat")

* brown leather wallet (from "inside suit jacket pocket of suit jacket from front passenger seat")

At the autopsy, the Park Police obtained physical evidence and clothing, including the following:

* one vial of blood

* lock seal envelope containing pulled head hairs

* white colored long sleeve button down shirt with blood stain

* white colored short sleeve t-shirt with blood stain

* pair white colored boxer shorts

* pair blue gray colored pants with black colored belt

* pair black colored socks

* pair black colored dress shoes, size 11M

The Park Police and Medical Examiner's Office caused several laboratory tests of the evidence to be performed during the initial 1993 investigation. In addition, Mr. Fiske's Office and the OIC submitted physical evidence collected during the investigation of Mr. Foster's death to the FBI Laboratory, which has produced reports analyzing physical evidence. The OIC also submitted physical evidence to Dr. Lee, and he, too, produced a report based on his laboratory analyses. The following summarizes the relevant laboratory analyses.

1. Gun

a. Operation

The .38 caliber revolver recovered from Mr. Foster's hand at Fort Marcy Park had a four-inch barrel and a capacity of six shots. It had one live round and one spent casing. Had the trigger been pulled again, the next shot would have fired the remaining round.

In August 1993, at the request of the Park Police, the Bureau of Alcohol, Tobacco and Firearms (ATF) Laboratory examined the revolver and found that it functioned. The ATF Laboratory determined that the cartridge case found in the cylinder under the hammer was fired in that gun. The FBI Laboratory also test-fired the gun and determined that it "functioned normally" and that the trigger pulls were normal. The .38 caliber cartridge case "was identified as having been fired in the . . . revolver. " Like the expended cartridge, the unexpended cartridge was .38 caliber manufactured by Remington. They bore similar headstamps. Dr. Lee also test-fired the revolver and found that it was operable.

b. Serial Numbers

An ATF report on the gun's two serial numbers revealed a purchase at the Seattle Hardware Company in Seattle, Washington, on September 14, 1913, and at the Gus Habich Company in Indianapolis, Indiana, on December 29, 1913. The gun could not be further traced. Laboratory examination of the gun

> found no indication of any alteration of the serial number of the weapon. . . . The additional serial number on the crane of the firearm most likely occurred at some time when the eighty year-old weapon was repaired. There is no realistic way to determine when such a repair occurred. The exchange of the two numbers between the frame and the crane is a condition

noted on many similar firearms in the Laboratory's Reference Firearms Collection and is not considered significant.

c. Ammunition

Dr. Lee noted that the ammunition found in this weapon was type "RP .38 SPL HV," manufactured by Remington Peters. Dr. Lee stated that information from the manufacturer indicated that this ammunition was discontinued in 1975, and that the cartridge therefore would have been manufactured prior to that time.

d. DNA

DNA consistent with Mr. Foster's DNA was detected on the muzzle portion of the barrel of the revolver. In particular, DNA type DQ alpha 2, 4 was detected on the gun and in Mr. Foster's blood.

e. Blood

The gun was recovered at the scene by Park Police Technician Simonello and subsequently packaged in brown paper for storage in an evidence locker. While the Park Police's subsequent examinations for fingerprints and other evidence could have removed some trace evidence that might have existed on the gun, Dr. Lee examined the gun and reported that "[s]mall specks of brownish-colored deposits were noted." Dr. Lee found that "[s]ome of these deposits gave positive results with a chemical test for blood" although the "quantity of sample present was insufficient for further analysis."

Dr. Lee also reported that "[m]acroscopic and microscopic examination of [the] piece of paper" originally wrapped around the barrel of the revolver for evidence storage "revealed the presence of reddish-colored particles. These stains also gave positive results with a chemical test for blood." Dr. Lee stated that "[t]his fact suggests that the barrel of the weapon was in contact or at close range to a source of liquid blood."

Dr. Lee further stated that "[b]lood spatters and tissuelike materials were noted on the fingerprint lift tape from the weapon." Dr. Lee concluded that "[t]he presence of blood and tissue-like materials on the lifts is another strong indication that this weapon was fired while in contact with or close to a blood source."

f. Fingerprints

Identification Technician E.J. Smith of the Park Police examined the gun for latent fingerprints on July 23, 1993. The results were negative. The FBI Laboratory later examined the gun and similarly detected no latent prints on the exterior surface of the weapon.

In his report to the OIC, Dr. Lee explained that "[t]he handle grip area of [the .38 Colt revolver] is textured and is not typical of the type of surface which commonly results in the development of identifiable latent fingerprints." He also noted that the fingerprint powder method was used when the Park Police initially tested the gun; "[a]lthough the fingerprint powder method is one of the most common techniques used in the latent print field, there are also newer technologies, such as cyanoacrylate fuming, laser, and forensic lighting techniques which could have been used in this case. It is unknown at this time whether these techniques would have provided additional information" had they initially been employed.

The FBI Laboratory also noted that a lack of fingerprints is not extraordinary and that "[g]enerally, the determining factors in leaving latent prints are having a transferable substance, i.e., sweat, sebaceous oil or other substance on the fingers, and having a surface that is receptive to receiving the substance that forms the latent prints. A clean, smooth, flat surface is most receptive for transfer of any substance from the fingers," and the surface of the grip handle at issue here was textured, not smooth.

g. Marks on Body from Gunshot and Gun

(1) Gunshot Residue on Hands

The photographs of Mr. Foster's right hand taken at Fort Marcy Park and during the autopsy depict black gunshot residuelike material on the right forefinger and the area between the thumb and forefinger. The autopsy report also noted material on the forefinger area of the left hand.

During the Park Police investigation, the ATF Laboratory found that gunshot residue patterns reproduced in the laboratory were consistent with those seen in the photographs taken by the Park Police at the scene. The FBI Laboratory similarly stated that gunshot residue on the right forefinger area of the right hand is "consistent with the disposition of smoke from muzzle blast or cylinder blast when the . . . revolver is fired using ammunition like that represented by" the cartridge and casing recovered from the gun "when this area of the

right hand is positioned near the front of the cylinder or to the side of and near the muzzle."

Dr. Lee conducted test firings using a laboratory standard weapon and the same kind of ammunition that was found in the revolver recovered from Mr. Foster's hand. With the standard weapon, little or no observable gunpowder particles were released from the cylinder area or onto the shooter's hand. However, Dr. Lee reported that each test-fired shot of the revolver found in Mr. Foster's hand at Fort Marcy Park produced a significant amount of unburned and partially burned gunpowder. Relatedly, Dr. Lee reported that the gun had an "extraordinary front cylinder gap" (the space between the cylinder and the barrel) of .01 inch through which gunpowder residue is expelled when the gun is fired. Dr. Lee stated that the gap was one "possible cause[] of the deposit of a large amount of gunshot residue particles on Mr. Foster's body and clothing."

(2) Indentation on Thumb

The revolver was recovered from Mr. Foster's right hand at the scene at Fort Marcy Park by Park Police Technician Simonello. Technician Simonello reported that Mr. Foster's thumb was trapped in the trigger guard of the gun. Consistent with Technician Simonello's observation, the autopsy photographs depict an indentation mark on the inside of the right thumb.

> The mark on the inside of the right thumb which is visible in the [autopsy] photograph is consistent with a mark produced by the trigger of the . . . revolver when this portion of the right thumb is wedged between the front of the trigger and the inside of the front of the trigger guard of the . . . revolver when the trigger rebounds (moves forward). The trigger of the . . . revolver automatically rebounds when released after firing (single or double action) or whenever the trigger is released after it is moved to the rear. This mark is consistent with the position of the right thumb of the victim in the trigger guard of the revolver in [three Polaroid] photographs.

Part V Continues

Foster Report Table of Contents

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Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

(Part V Continued)

h. Summary: Gun

Dr. Lee concluded, "[b]ased on laboratory observations and the examination of the scene photographs," that "the revolver . . . is consistent with the weapon which resulted in the death of Mr. Vincent Foster. The barrel of this weapon was likely in Mr. Foster's mouth at the time the weapon was discharged. Gunshot residue noted on Mr. Foster's right hand and the lesser amount of deposits on his left hand indicated that Mr. Foster held the weapon when it was fired."

2. Clothing

At the autopsy, clothing was removed from Mr. Foster's body and placed on a table in the autopsy room. Park Police Officer Johnson took this clothing and placed it in a single bag for return to the Park Police offices. There, brown wrapping paper was laid on the floor of a photography room and the clothes placed on that paper. The clothes were left to dry in the photography room until Monday, July 26, when Technician Simonello packaged the clothing and put it into an evidence locker.

The FBI Laboratory and Dr. Lee independently examined the clothing, examined debris collected from the clothing by the FBI Laboratory during the 1994 investigation conducted by Mr. Fiske's Office, studied photographs taken at the scene and autopsy, and reported a number of findings related to the clothing.

a. Gunshot Residue

Dr. Lee, in his examinations, reported "[s]mall deposits of gunpowder residue and partially burned gunpowder particles" on the

shirt. Earlier FBI Laboratory examination of the shirt resulted in a positive reaction for vaporized lead and very fine particulate lead on the front of the shirt. "This type of reaction is consistent with the type of reaction expected when a firearm is discharged in close proximity to this portion of the shirt. It is consistent with muzzle blast or cylinder blast from a revolver like the [submitted] revolver using ammunition like" the cartridge and cartridge case submitted with the gun. The FBI Laboratory further stated that

> [s]ubsequent chemical processing of the . . . shirt in the Laboratory revealed lead residues in a small area near the sixth button from the collar on the front of the . . . shirt. This reaction could have been caused by contact with a source of lead residues. Lead residues were also detected on the underside of the edge of the collar on the left side of the . . . shirt. This small area of lead residues could have been caused by the discharge of a firearm consistent with the positive reaction noted above when the [submitted] shirt was received in the Laboratory.

The FBI Laboratory reported that these gunshot residues "are consistent with the cylinder blast or the muzzle blasts" which would be produced if the revolver was fired "in close proximity to the front of th[is] shirt."

Similarly, when the ATF Laboratory, at the request of the Park Police, tested Mr. Foster's shirt, it found "a positive reaction consistent with the discharge of a revolver in close proximity to the upper front of the shirt."

b. Bloodstain Patterns as Depicted in Photographs From Scene

The FBI Laboratory examined the bloodstain patterns depicted in the Polaroids taken at the scene. The Laboratory Report stated:

> Photographs of the victim at the incident scene depict apparent blood stains on his face and the right shoulder of his dress shirt. The staining on the shirt covers the top of the shoulder from the neck to the top of the arm and consists of saturating stains typical of having been caused by a flow of blood onto or soaking into the fabric. The stains on his face take the form of two drain tracks and one larger contact stain. . . .
>
> The contact stain on the right cheek and jaw of the victim is typical of having been caused by a blotting action, such as

> would happen if a blood-soaked object was brought in contact with the side of his face and taken away, leaving the observed pattern behind. The closest blood-bearing object which could have caused this staining is the right shoulder of the victim's shirt. The quantity, configuration and distribution of the blood on the shirt and the right cheek and jaw of the victim are consistent with the jaw being in contact with the shoulder of the shirt at some time.

Dr. Lee also examined the photographs taken at Fort Marcy Park. He noted that the photographs of the shirt show several areas of bloodstains, including "saturated-type bloodstains" on the "shoulder and collar region."

On a separate bloodstain issue, Dr. Lee examined the photographs and reported that "[h]igh velocity impact type blood spatters were observed on Mr. Foster's face, hands, and shirt." Dr. Lee stated that "[t]his type of blood spatter typically is produced at the time when a weapon is discharged and the spatters result from the backspatter of the gunshot wound." Dr. Lee reported that "[t]hese blood spatters are intact and no signs of alteration or smudging were observed." This finding is in conflict with any theory that the fatal shot was fired elsewhere and the head wrapped during movement or cleaned upon arrival -- because those actions likely would have altered, smudged, or eliminated the blood spatters, contrary to what Dr. Lee found.

c. Blood Drainage After Movement From Fort Marcy Park and Bloodstains on Clothing at Autopsy

Dr. Lee noted that Dr. Beyer had "observed a large amount of liquid blood in the body bag and in Mr. Foster's body," which "further indicates that the location where the body was found is consistent with the primary scene [and that it] is, therefore, unlikely that Mr. Foster's body was moved to the Fort Marcy Park scene from another location."

The shirt itself, which was removed at the autopsy after movement of the body to the morgue, contains bloodstains on areas where blood does not appear in the photographs of the body at the scene. Dr. Lee stated that these stains on the shirt "most likely occurred when the body was placed into the body bag and moved from the scene and/or when in the body bag, prior to the collection of the decedent's clothing." As noted below, the experts concluded that the shirt likely would have been more extensively stained when the body was found at the second cannon area at Fort Marcy Park had the body been

moved from another location.

d. Mineral/Vegetative Material

Dr. Lee reported that examination of a photograph of Mr. Foster's shoes taken by the FBI Laboratory at the time of its initial examination revealed brownish smears on the left heel. Dr. Lee further stated that his own macroscopic and microscopic examinations of the shoes revealed the presence of soil-like debris. (The FBI Laboratory photo of the shoes, taken in 1994 at the time of the Laboratory's examination of the clothing, shows traces of soil visible to the naked eye.) Dr. Lee found that "[t]race materials were located embedded in the grooves of the sole patterns at the heel of [the left shoe]. A portion of this material subsequently was removed. Microscopic and macroscopic examination showed this material to contain mineral particles, including mica, other soil materials, and vegetative matter." Dr. Lee stated that this fact "indicates the sole of the shoe had direct contact with a soil surface containing these materials."

e. Lack of Rips, Tears, or Scraping on Clothing

Dr. Lee found a small amount of vegetative material on Mr. Foster's shirt that could have resulted from contact with the ground in the park. Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt. Dr. Lee stated that this fact "suggests that no prolonged moving contact with a soil surface occurred which would cause the type of damage commonly resulting from dragging or similar action."

Dr. Lee reported that soil and grasslike materials were similarly present on the pants in the area of the rear pocket, which indicates that the pants had direct contact with a soil surface. Dr. Lee reported that "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants."

f. Bone Chip

Dr. Lee examined debris collected from Mr. Foster's clothing and reported that the debris was "found to contain a bone chip." Dr. Lee stated that DNA was extracted from this bone fragment and amplified, and the DNA profile generated for this bone sample was consistent with the DNA types of Mr. Foster. Based on his analysis of the evidence, Dr. Lee concluded that "[t]his bone chip originated from Mr. Foster and separated from his skull at the time the projectile

exited Mr. Foster's head."

g. Pants Pocket and Oven Mitt

William Kennedy, Associate White House Counsel, eventually took possession of Mr. Foster's car on behalf of the Foster family after the Park Police released it on July 28, 1993. Mr. Kennedy maintained contents of the car that had not been taken into evidence by the Park Police, and he produced those contents to investigators from Mr. Fiske's Office. The contents included a kitchen oven mitt that had been in the glove compartment in Mr. Foster's car (the mitt is depicted in the glove compartment in the Park Police photographs of the car taken at the impoundment lot on July 21).

Dr. Lee's examinations of this oven mitt and of Mr. Foster's pants (taken into evidence by the Park Police at the autopsy on July 21) produced circumstantial evidence relevant to the investigation.

Dr. Lee reported that "[m]acroscopic and microscopic examination of the inside of the front pants pockets revealed the presence of fibers and other materials, including a portion of a sunflower seed husk in the front left pocket. Instrumental analysis of particles removed from the pocket surface revealed the presence of lead. These materials were also found inside the oven mitt located in the glove compartment of Mr. Foster's vehicle. . . . The presence of these trace materials could indicate that they share a common origin. These materials in the pants pocket clearly resulted from the transfer by an intermediate object, such as the Colt weapon."

As noted, Dr. Lee also examined the oven mitt recovered from Mr. Foster's car. He reported: "Dark particle residues were located inside of the oven mitt. Instrumental analysis revealed the presence of the elements lead and antimony in these particles; this finding could indicate that an item which had gunshot residue on it, such as the revolver . . ., came in contact with the interior of [the oven mitt]."

Dr. Lee further stated that "[s]unflower-type seed husks were located on the inner surfaces of this oven mitt. These sunflower seed particles were similar to the sunflower seed husks found in Mr. Foster's front, left pants pocket." Dr. Lee stated that "[t]his finding suggests that the sunflower seed husk found inside the pants pocket could have been transferred from the oven mitt through an intermediate object, such as the revolver."

Virtually all theories that the manner of death was not suicide assume

that Mr. Foster did not previously possess the gun recovered from his hand at Fort Marcy Park. Apart from a variety of other compelling circumstantial and testimonial evidence (discussed below) that the gun belonged to Mr. Foster, the evidence regarding the pants pocket and oven mitt also tends to link Mr. Foster to the gun. Mr. Foster was found by police and rescue personnel with the gun that fired the fatal shot in his hand, and the oven mitt was found in the glove compartment in his car. There is no evidence, moreover, that anyone other than Mr. Foster did place or would have placed this or any other gun into Mr. Foster's pants pocket and into the oven mitt. Those pieces of evidence, when considered together and with all of the other evidence, tend to link Mr. Foster to the gun and thus tend to refute a theory that the manner of death was not suicide. The evidence regarding the pants pocket and oven mitt does not itself compel a finding as to location of death, but it is consistent with a scenario in which Mr. Foster transported the gun from the Foster home in the oven mitt, and carried the gun in his pants pocket as he walked from his car in Fort Marcy Park to the berm near the second cannon.

h. Hairs and Fibers

In debris collected from Mr. Foster's clothing, the FBI Laboratory reported finding two blond to light brown head hairs of Caucasian origin that were suitable for comparison purposes and dissimilar to those of Mr. Foster. The hairs did not appear to have been forcibly removed. Hair evidence can become important or relevant in a criminal investigation when there is a known suspect and a significant evidentiary question whether the suspect can be forensically linked to another person (a rape or murder victim, for example) or to a particular location. If the suspect is a stranger to the victim or the scene, the presence of the suspect's hair is relevant in assessing whether he or she had contact with the victim or scene. In this case, however, the only known individuals who reasonably might have been compelled to provide hair samples were persons already known to have had contact with Mr. Foster.

The FBI Laboratory reported 35 definitive carpet-type fibers in the debris collected from the clothing. Of those fibers, 23 were white fibers. OIC investigators sought to determine a possible source for the fibers – for the white fibers in particular, in light of the number of white fibers in comparison to the limited number of fibers of other colors. The logical known sources for possible comparison were carpets from locations with which Mr. Foster was known to heave

been in contact – his car, home, and workplace. OIC investigators obtained carpet samples from those sources, including from a white carpet located in 1993 in the house in Washington where Mr. Foster lived with his family. The FBI Laboratory determined that the white fibers obtained from Mr. Foster's clothing were consistent with the samples obtained from that carpet.

In sum, therefore, the carpet fiber evidence – the determination that the white fibers were consistent with a carpet from the Fosters' house and the variety and insignificant number of other fibers – does not support speculation that Mr. Foster was wrapped and moved in a carpet on July 20. Indeed, the fiber evidence, when considered together with the entirety of the evidence, is inconsistent with such speculation.

3. Eyeglasses

When found, Mr. Foster's body was located on a steep berm with his head higher than his feet and his feet pointed essentially straight down the berm. Mr. Foster's eyeglasses were recovered by Park Police Technician Simonello approximately 13 feet below Mr. Foster's feet.

a. Blood

Dr. Lee stated that "[b]loodstains were found on both sides of the lenses" of Mr. Foster's eyeglasses. These bloodstains "were less than or equal to 1 mm in size. In addition, bloodlike and tissue-like materials were identified on the [fingerprint] lifts of the eyeglasses. "

b. Gunpowder

The FBI Laboratory found one piece of ball smokeless powder on the eyeglasses, and it was "physically and chemically similar" to the gunpowder identified in the cartridge case.

c. Summary: Eyeglasses

Dr. Lee stated that the above facts "support the interpretation that Mr. Foster was wearing his eyeglasses at the time the gun was discharged." The analyses and conclusions of the experts and investigators in this and prior investigations reveal that the location where the glasses were found is consistent with the conclusion that Mr. Foster was wearing the glasses at the time the shot was fired.

4. Surrounding Area

a. Gunshot Residue in Soil

As part of his examination, Dr. Lee went to Fort Marcy Park with OIC investigators and obtained soil and other materials from the berm on which Mr. Foster's body was found. Dr. Lee examined the soil samples; he reported that "[a] few unburned and partially deformed gunpowder-like particles were recovered from the soil in the area where Vincent Foster's body was found." It cannot be determined "[w]hether these particles were deposited on the ground at the time of Mr. Foster's death or at any other period of time."

b. Possible Bloodstains on Vegetation at Scene

Dr. Lee stated that one photograph of the scene "shows a view of the vegetation in the areas where Mr. Foster's body was found. Reddish-brown, blood-like stains can be seen on several leaves of the vegetation in this area." He also noted that "[a] close-up view of some of these blood-like stains can be seen in [a separate] photograph."

Part V Continues

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Back to the top | Foster Report Table of Contents

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

HOME
INDEX
SEARCH
ARCHIVES
POLITICS
Whitewater
SPECIAL REPORT

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

(Part V Continued)

5. **Contents of Bodily Fluid**

During the 1993 investigation, the Laboratory of the Virginia Division of Forensic Science found that the blood, vitreous humor, and urine were negative for alcohols and ketones. The Laboratory did not detect "phencyclidine, morphine, cocaine, [or] benzoylecgonine"; "other alkaline extractable drugs"; or "acidic [or] neutral drugs."

The FBI Laboratory later conducted more sensitive testing and determined that the blood sample from Mr. Foster contained trazodone. Trazodone was an antidepressant medication prescribed as Desyrel by Mr. Foster's physician on July 19, 1993, and Mr. Foster took one tablet that night, according to his wife.

C. Review by Pathologists

Because of the importance of the forensic evidence to the conclusion about cause and manner of death, the OIC retained Dr. Brian Blackbourne as an expert pathologist to assist the investigation. Dr. Blackbourne reviewed the relevant reports, photographs, and microscopic slides; toured Fort Marcy Park; and interviewed Dr. Beyer, Dr. Haut, and FBI and Virginia laboratory personnel. He provided a report to the OIC summarizing his work on the forensic issues and setting forth his analysis.

Dr. Blackbourne concluded that Mr. Foster "died of a contact gunshot wound of the mouth, perforating his skull and brain." Dr. Blackbourne based that conclusion "upon the autopsy report, diagrams and photographs and my examination of the microscopic slides of the entrance wound in the soft palate and posterior oropharynx which demonstrated extensive soot."

Dr. Blackbourne concluded that Mr. Foster was alive at the time the shot was fired. Dr. Blackbourne based this conclusion

> upon the autopsy report and photographic evidence that there was bleeding beneath the scalp about the gunshot exit wound and beneath the fractures of the back of the skull. Such

> bleeding requires the heart to be beating at the time these injuries occurred. The autopsy report and my microscopic observation that blood was aspirated into the lungs requires that the person be breathing in order to suck the blood into the small air sacks of the lung.

Dr. Blackbourne concluded that Mr. Foster "fired the gun with the muzzle in his mouth, his right thumb pulling the trigger and supporting the gun with both hands and with both index fingers relatively close to the cylinder gap (the space between the cylinder and the barrel)." Dr. Blackbourne reasoned that "the dense deposit of soot on the soft palate and oropharynx indicated that the gun was discharged in close proximity to the soft palate." In addition, the DNA from the muzzle of the gun was consistent with that of Mr. Foster. Furthermore, "[t]he right thumb was entrapped within the trigger guard by the forward motion of the trigger after the revolver was fired." Finally, Dr. Blackbourne stated that "[w]hen a revolver is fired, smoke issues out of the space between the cylinder and the barrel. This smoke will be deposited on skin, clothing or other objects close to the cylinder gap. The autopsy report documents that smoke deposits were noted on the radial aspect of both right and left index fingers. Dr. Beyer told me that there was more deposit on the right as compared to the left index fingers."

Dr. Blackbourne concluded that "[a]t the time of his death Vincent Foster was not under the influence of alcohol, narcotics, [or] cocaine." Dr. Blackbourne based this conclusion upon the toxicology reports of the Virginia Division of Forensic Science Toxicology Laboratory and the FBI Laboratory; a meeting with the personnel of the FBI Laboratory; and a discussion with the toxicologist for the Virginia Division of Forensic Science who performed work on the Foster case in 1993.

Dr. Blackbourne concluded that the gunshot wound that caused Mr. Foster's death occurred in Fort Marcy Park at the location where his body was discovered. Dr. Blackbourne based this conclusion

> upon the fact that he would be immediately unconscious following the gunshot wound through the brain. Movement of the body, after the gunshot, by another person(s) would have produced a trail of dripping blood and displaced some of his clothing. If he had been transported from another location, such movement would have resulted in much greater blood soilage of his clothing (as was seen when he later was placed

> in a body bag and transported to Fairfax Hospital and later to the Medical Examiner's Office). No trail of dripping blood was observed about the body on the scene. His clothing was neat and not displaced. The blood beneath the head and on the face and shoulder is consistent with coming from the entrance and exit wounds.

Dr. Blackbourne concluded that the blood draining from the right nostril and right side of the mouth, as documented by Polaroid scene photographs, suggests that an early observer may have caused movement of the head. Dr. Blackbourne based this conclusion

> upon the fact that blood will pool in the mouth and nasopharynx while the heart is still beating following a gunshot wound of the back of the mouth. This blood may drain toward the dependent side of the head if the volume of blood exceeds the capacity of the mouth. There will be a thin trickle. The broad area of blood covering the right lower face, chin and right side of his neck and extending over the right shoulder and right collar of his shirt would result from the sudden drainage of all of the blood in his mouth. . . . This event occurred prior to taking the Polaroid scene photographs.

Based on all of the above evidence, analyses, and conclusions, Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."

Foster Report Table of Contents

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Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

VI. ISSUES RELATING TO EVIDENCE AT SCENE

Evidence from the scene and regarding the activities and observations of persons in and around Fort Marcy Park on July 20, 1993, raised certain issues requiring further investigative work.

A. Blood Transfer Stain

The Polaroids of the body at the scene depict, and many witnesses who observed the body at the scene describe, the position of the head as facing virtually straight, not tilting noticeably to one side or the other. The Polaroids depict a blood transfer stain in the area of the right side of the face. As explained in previous sections, the expert pathologists and Dr. Lee analyzed this blood evidence and the Polaroid photographs. They concluded, based on the blood transfer stain, that the head made contact with the right shoulder at some point before the Polaroids were taken. The testimony and contemporaneous reports point to the conclusion that rescue personnel at the scene handled the decedent's head to check for vital signs and open an airway.

B. Quantity of Blood

Many who saw the body at Fort Marcy Park after it was lifted and rolled over at the scene described a quantity of blood behind Mr. Foster's head, under his body, and on the back of his shirt. A reporter and Park Police officers separately visited the scene on July 21 and 22, 1993, and stated that they could identify the spot where the body had been located by the blood soaked into the ground. A reporter placed a stick into the ground where the blood spot was located and estimated the blood depth at one-eighth inch.

In addition, as Dr. Lee stated regarding the quantity of blood, the photographs at the autopsy reveal blood staining on the clothes that

was not depicted at the scene. Moreover, Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. These facts indicate that still more blood drained from the body during movement from the Fort Marcy scene to the autopsy.

There has been occasional public suggestion, premised on the supposedly low amount of blood observed at the Fort Marcy scene, that blood must already have drained from the body elsewhere and that the fatal shot therefore must have been fired elsewhere. As revealed by the foregoing descriptions of the evidence, the underlying premise of this theory is erroneous: A quantity of blood was observed at the park under the body and on the back of the head and shirt. Moreover, the suggestion fails to account for the blood that subsequently drained from Mr. Foster's body during movement to the autopsy. The blood-quantity evidence, even when considered in isolation from other evidence, does not support (and indeed contravenes) a suggestion that the fatal shot was fired at a place other than where Mr. Foster was found at Fort Marcy Park.

C. Unidentified Persons and Cars

The evidence establishes that at least three cars belonging to civilians were in and around the Fort Marcy parking lot area when the first Park Police and FCFRD personnel arrived: (1) Mr. Foster's gray Honda Accord with Arkansas tags; (2) the white Nissan with Maryland tags driven by C4; and (3) the broken- down blue Mercedes driven by C6. The three cars belonging to Mr. Foster, C4, and C6 are the only cars positively identified and known to law enforcement and the OIC that were in the Fort Marcy Park parking lot area in the 6:00- 8:30 p.m. time frame and that belong to persons other than FCFRD personnel, Park Police personnel, towing personnel, and Dr. Haut.

During the afternoon, before Park Police and FCFRD personnel were called to the scene at Fort Marcy Park, C2 saw a man in a car next to him; C3 and C4's statements suggest the presence of at least one man in the parking lot and perhaps a jogger; and C6, after her car broke down, saw a man on the entrance ramp to the parking lot who asked her if she needed a ride. Law enforcement and the OIC are not aware of the identities of the persons (other than C5) described by C2, C3, C4, and C6. There is no evidence that any of those unidentified persons (or any identified persons, for that matter) had any connection to Mr. Foster's death; and the totality of the forensic, circumstantial, testimonial, and state-of-mind evidence contrasts with

any such speculation.

D. Car Locks

The Park Police investigators (Braun and Rolla) who entered and searched Mr. Foster's car at Fort Marcy Park said that they were able to enter the car without keys because the car was not locked. James Iacone of the FCFRD stated that he had tried at least one of the doors and that it was locked. That statement contrasts with that of Ralph Pisani of the FCFRD, who said that he, Jennifer Wacha, and Iacone looked into the Honda, but that no one tried the doors. In any event, even were Iacone's recollection more accurate than the others, the statement would be of uncertain significance, inasmuch as it is, of course, possible that one or more of the four doors was locked and one or more unlocked.

E. Neighborhood

OIC investigators canvassed the area surrounding Fort Marcy Park to determine whether anyone observed, heard, or had knowledge of relevant activity on July 20. That effort did not yield relevant information.

F. Pager

A Park Police evidence control receipt indicates that at the scene, Investigator Rolla took possession of Mr. Foster's pager from his right waist area. The receipt reveals that the pager, along with other personal property such as Mr. Foster's wallet, rings, and watch, were released to the White House on the evening of July 21 to be returned to the Foster family. Investigator Rolla said that Mr. Foster's pager was off when he recovered it. White House records of pager messages do not indicate messages sent to or from Mr. Foster on July 20.

Foster Report Table of Contents

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Back to the top

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

VII. ISSUES RELATING TO CONDUCT OF INITIAL INVESTIGATION

Certain issues related to the conduct of the initial 1993 investigation into Mr. Foster's death warrant discussion in this report.

A. Photographs

Park Police Identification Technician Simonello took 35 millimeter photographs of Mr. Foster's body and of the scene. Park Police investigators also took a number of Polaroids of Mr. Foster's body and of the scene. Polaroids taken at a crime or death scene develop immediately, and thus are useful in the event that problems subsequently occur in developing other film (as occurred here).

Thirteen of the Polaroids provided to Mr. Fiske's Office and the OIC are of the body scene, and five are of the parking lot scene. Of the 13 Polaroids of the body scene, eight are initialed by Investigator Rolla. The backs of the other five say "from C202 Sgt. Edwards 7-20-93 on scene." Officer Ferstl said that he took Polaroids and, without initialing or marking them, gave them to Sergeant Edwards, who gave them to the investigators. Sergeant Edwards does not recall taking Polaroids himself.

B. Keys

Investigator Rolla said he felt into Mr. Foster's pants pockets at the scene in looking for personal effects. Later, when it became apparent to Investigators Rolla and Braun that they did not have the keys to the car, they went to the hospital to check more thoroughly for keys. The hospital logs indicate that Investigators Rolla and Braun were at the morgue at 9:12 p.m. Investigator Braun thoroughly searched the pants pockets by pulling the pockets inside out, and she found two sets of keys. She prepared an evidence receipt indicating that the

keys were taken from the right pants pocket, and she subsequently placed the keys in an evidence locker.

C. X-Rays

Although no x-rays were produced from the autopsy, the gunshot wound chart in the autopsy report has a mark next to "x-rays made." Dr. Beyer has stated that either he did not take x-rays because the machine was not functioning properly at the time, or that if he attempted to take x-rays, they did not turn out. He stated:

> I had intended to take x-rays, but our x-ray machine was not functioning properly that day. And if we took any all we got was a totally black, unreadable x-ray, so I have no x-rays in the file. . . . I could very well have tried to use it on the Foster autopsy and got an unreadable x-ray. If his wound had been a penetrating wound, where there was only a wound of entrance, and the missile was retained within the body, then there would have been a requirement that I have an x-ray. Since this was a perforating wound, where there was a wound of entrance and a wound of exit, and I was going to examine the tissue through which the missile path had taken, I concluded we could proceed without the x-ray, rather than delay it six to eight hours.

Dr. Beyer's assistant recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly. The assistant stated that the machine sometimes would expose the film and sometimes would not. In this case, the assistant recalled moving the machine over Mr. Foster's body in the usual procedure and taking the x-ray. He said that he did not know until near the end of the autopsy that the machine did not expose the film. In addition, like Dr. Beyer and the assistant, the administrative manager of the Medical Examiner's Office recalled "numerous problems" with the x-ray machine in 1993 (which, according to records, had been delivered in June 1993).

With respect to the check of the x-ray box on the report, Dr. Beyer stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized.

Foster Report Table of Contents

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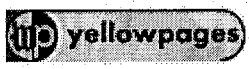
Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER



WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

VIII. OTHER ISSUES

Several other issues have arisen and been examined by the OIC.

A. Gun Observations and Ownership

The OIC conducted investigation and analysis with respect to the gun, both as to observations of the gun at the scene and ownership of the gun.

1. Observations of Gun at Scene

According to the testimony of the first three official personnel to find the body (Park Police Officer Fornshill and FCFRD personnel Hall and Gonzalez), the gun was in Mr. Foster's hand when they found the body (although Officer Fornshill himself did not see or look for it, but rather was told of it by the others). Those statements contrast with the testimony of C5, the individual who first saw Mr. Foster's body and did not see a gun. Careful evaluation of all of the circumstances and evidence leads to the conclusion that C5 simply did not see the gun that was in Mr. Foster's hand.

First, when questioned by the OIC, C5 agreed with a statement attributed to him in an interview report that "there was extreme dense and heavy foliage in the area and in close proximity to the body, and the possibility does exist that there was a gun on rear of hand that he might not have seen." That is supported, moreover, by the testimony of several witnesses establishing that the gun was difficult to see in Mr. Foster's hand when standing in a position above the head on the top of the berm. That is further confirmed by Polaroids taken from above the head that reveal the difficulty of seeing the gun from that angle.

The forensic evidence and analyses outlined above also support the

conclusion that the gun was in Mr. Foster's hand when C5 saw him. As explained by the pathologists and Dr. Lee, Mr. Foster's DNA was consistent with that on the muzzle of the gun, traces of blood evidence were derived from the gun, residue was on his hand, and residues were on his shirt. In addition, an indentation mark on his thumb suggests that the gun was in the hand for some period of time. The totality of the evidence leads to the conclusion that the gun recovered from Fort Marcy Park was in fact in Mr. Foster's hand when C5 happened upon the body, but that C5 simply did not see it.

There are discrepancies in the descriptions of the color and kind of gun seen in Mr. Foster's hand. However, the descriptions provided by the first two persons to observe the gun, as well as of numerous others, are consistent with the gun retrieved from the scene and depicted in the on-the-scene Polaroids. That gun was taken into evidence by Technician Simonello on July 20, and has been maintained by law enforcement since then.

2. Ownership of Gun

One follow-up investigative issue concerning the gun relates to its ownership. Virtually all theories that the manner of death was not suicide rest on an assumption that the gun did not belong to Mr. Foster. But testimony, circumstantial evidence, and forensic evidence support the conclusion that the gun did in fact belong to Mr. Foster.

Mrs. Alice Mae Foster, Mr. Foster's mother, stated that Mr. Foster, Sr., died in 1991. He had kept a revolver in a drawer of his bedside table, in addition to other guns in the house. In 1991, when Mr. Foster, Sr., had been ill and bedridden for a period of time, Mrs. Alice Mae Foster had all the handguns in the house placed in a box and put into a closet. Subsequent to the death of Mr. Foster, Sr., in 1991, Mrs. Alice Mae Foster gave Mr. Foster, Jr., the box of handguns.

Mrs. Lisa Foster similarly recalls that her husband took possession of several handguns from his parents' house near the time of his father's death. She recalled that, after they moved to Washington in 1993, some guns were kept in a bedroom closet. She recalled what she described as a silver-colored gun (she also has referred to it as a "cowboy gun"), which had been packed in Little Rock and unpacked in Washington. She also recalled a .45 caliber semi-automatic pistol. She said she found one gun in its usual location on July 20, 1993, the .45 caliber semi-automatic pistol. She did not find the other gun on or after July 20, 1993.

On July 29, 1993, Mrs. Foster was shown a photograph of the gun retrieved from the scene and, according to the Park Police interview report, was unable to identify it from the photograph. On May 9, 1994, she was shown the actual gun that was recovered and said, according to the interview report, that the gun "may be a gun which she formerly saw in her residence in Little Rock, Arkansas" and that "she may have seen the handgun . . . at her residence in Washington." She stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found, although she said she seemed to remember the front of the gun looking lighter in color when she saw it during the move to Washington.

Webster Hubbell stated that, on the night of Mr. Foster's death, Lisa Foster went upstairs in the Foster house with him. While there, she looked into the top of a closet, pulled out a "squared-off" gun, and said, according to Hubbell, that one of the guns was missing. To Hubbell's knowledge, the "other gun" was never found at the Foster house.

Sharon Bowman, one of Mr. Foster's sisters, recalled that her father kept a black revolver in a drawer of his bedside table. She said that she had retrieved various handguns from her parents' house, placed them in a shoebox, and put them in her mother's closet (and Ms. Bowman said they later were given to Mr. Foster, Jr.) During the 1993 Park Police investigation, John Sloan, a family friend of the Fosters, wrote a letter to Captain Hume of the Park Police, stating that he had shown Sharon Bowman a photograph of the gun. According to the letter, Ms. Bowman stated that it "looked like a gun she had seen in her father's collection," and particularly pointed out the "'wavelike' detailing at the base of the grip." Ms. Bowman was later shown the revolver recovered from Fort Marcy Park. She indicated that it looked like one that her father kept in the house in Hope, but she could not positively identify it.

Mr. Foster's other sister, Sheila Anthony, said she had no personal knowledge about the gun found in Mr. Foster's hand at Fort Marcy Park. She recalled, however, that her sister, Sharon Bowman, and her brother had removed guns from their father's house near the father's death.

Mr. Foster's older son said he knew his father had an old .38 caliber revolver. He saw it being unpacked at their house in Washington when they moved there. Mr. Foster told his son that he had received

this gun from his father (Vincent Foster, Sr.). The older son did not know where the gun was kept in Washington. The son was unable to conclusively identify the gun recovered on July 20, 1993, from Mr. Foster's hand as the one he had previously seen.

Mr. Foster's younger son stated that he saw one or two handguns in a shoebox along with a number of loose bullets while unpacking in Washington. The younger son stated that these items came from his grandfather's house. He described his grandfather's guns as a small, pearl-handled gun, and one or two revolvers. He believes his father placed the guns in a closet in Washington.

Mr. Foster's daughter stated she recalled someone unpacking a handgun at the house when they initially moved to Washington, although she never saw any other guns in their Washington house.

To sum up, the testimony establishes that, near the time of his father's death, Mr. Foster took possession of some handguns that had belonged to his father. The testimony also establishes that guns, including (according to the older son) a .38 caliber revolver, were taken to Washington by the Foster family in 1993. Mrs. Lisa Foster said that she recalls two guns in a bedroom closet in Washington, one of which was missing when she looked in the closet after Mr. Foster's death, and that the missing gun was the one found at the scene. Ms. Bowman has said the gun found at the scene looks like a gun previously kept by her father.

In addition, forensic examinations of Mr. Foster's pants pocket and the oven mitt support the conclusion that Mr. Foster carried, and thus possessed, a gun at a time close to his death. As explained above, that evidence tends to link Mr. Foster to the gun recovered from his hand.

This combination of testimonial, circumstantial, and forensic evidence supports the conclusion that the gun found in Mr. Foster's hand belonged to Mr. Foster.

B. Briefcase

There are some discrepancies in statements regarding whether a briefcase was in Mr. Foster's car at Fort Marcy Park.

Mr. Foster's black briefcase was in his office on July 22 when documents in the office were reviewed by Mr. Nussbaum in the presence of law enforcement officials. Four days later, a torn note was reportedly found in that briefcase by an Associate White House

Counsel. To determine whether a briefcase (and perhaps that black briefcase) was in Mr. Foster's car at Fort Marcy Park, five related questions must be considered:

1. Did those who saw Mr. Foster leave the White House on July 20 see him with a briefcase?

2. Was a briefcase observed in Mr. Foster's car at Fort Marcy Park?

3. Did the Park Police return a briefcase to the Secret Service that evening?

4. Was a briefcase in Mr. Foster's office at the White House after his death?

5. How many briefcases did Mr. Foster use?

1. Mr. Foster's Departure From the White House

Linda Tripp, Betsy Pond, and Tom Castleton – all of whom worked in the Counsel's suite of offices – said they saw Mr. Foster leave the Counsel's suite on July 20. They were interviewed separately by the Park Police on July 22, 1993.

The Park Police report of the interview with Ms. Tripp states:

> Ms. Tripp makes it a habit to notice what the staff members are taking with them when they leave the office in order to determine for herself how long she may expect them to be away from the office. Ms. Tripp was absolutely certain that Mr. Foster did not carry anything in the way of a briefcase, bag, umbrella, etc. out of the office.

Ms. Tripp confirmed to the OIC that this report accurately reflected her recollection.

The relevant portion of the Park Police report of Ms. Pond's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. In a later interview, Ms. Pond stated that "I think I remember his jacket swung over his shoulder" and said "[n]ot that I recall" to the question whether Mr. Foster was carrying a briefcase.

The Park Police report of Mr. Castleton's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. When questioned over eight months later, Mr. Castleton recalled Mr.

Foster carrying a briefcase, and Mr. Castleton has said that it "looked very much like the one" that was in Mr. Foster's office on July 22.

The testimony of Ms. Tripp, Ms. Pond, and Mr. Castleton thus conflicts as to whether Foster carried a briefcase when he left the Counsel's suite -- two saying that he did not and one saying that he did.

2. Mr. Foster's Car at Fort Marcy

The Park Police officers who searched Mr. Foster's car at Fort Marcy Park (Braun and Rolla) stated there was no briefcase in the car. The Park Police technician who inventoried the car on July 21, E.J. Smith, stated that no briefcase was found. The Polaroids of the interior of Mr. Foster's car taken at Fort Marcy Park, and the photographs taken the next day at the impoundment lot, do not show a briefcase in the car. (The photos from Fort Marcy show a white canvas bag in front of the rear seat on the driver's side of the car.)

In addition, four other persons at Fort Marcy Park specifically recall looking into Mr. Foster's car but do not recall a briefcase. Officer Fornshill of the Park Police stated that he looked into the car (although not closely) but did not see a briefcase. Wacha, Iacone, and Pisani of the FCFRD also said that they did not recall seeing a briefcase.

Four other persons have varying, but imprecise, degrees of recollection of a briefcase in somecar at Fort Marcy Park.

Todd Hall of the FCFRD stated in a March 18, 1994, interview and in a January 5, 1995, statement to the OIC, that he recalled a briefcase of uncertain color in the car with Arkansas plates. However, in a July 20, 1994, Senate deposition, he stated "We saw a suit coat and I think his briefcase, something like that. . . . All I know for sure I saw was his suit coat. And I thought I may have seen, he may have had a briefcase or something in there."

George Gonzalez of the FCFRD said in one statement that he saw a black briefcase/attache case in the car with Arkansas plates. In a later statement, however, Gonzalez stated, "I can't say if I saw a briefcase or papers. I can't correctly say whether I saw it or not. . . . I think the tie was in there and the jacket was in there. That's what I remember. That's all I can really remember." He also said that what he recalled could have been a canvas bag that was found in Mr. Foster's car. Gonzalez was not present when the Park Police entered the Honda.

C5 testified that he "would just about bet" that a "brown briefcase" was in the car, although he "wouldn't bet [his] life on it." C5's statements and a reenactment conducted with C5 at the scene by investigators reveal, however, that C5 was describing the car of C4, not Mr. Foster's car, when he referred to the briefcase.

C2 testified that he saw a briefcase – as well as wine coolers – in a car with Arkansas plates that was parked in the parking lot. He stated: "I looked and I saw the briefcase and saw the jacket, saw the wine coolers, it was two of them. I remember exactly how they were laying in the back seat of the car." (There is no other evidence that wine coolers were in Mr. Foster's car.)

3. Park Police Communications With Secret Service

An official Secret Service report prepared at 10:01 p.m. on July 20 states in relevant part:

> SA Tom Canavit, WFO PI squad, advised that he has been in contact with US Park Police and was assured that if any materials of a sensitive nature (schedules of the POTUS, etc.) were recovered, they would immediately be turned over to the USSS. (At the time of this writing, no such materials were located).

4. Mr. Foster's Office at the White House

White House employee Patsy Thomasson testified that she saw Mr. Foster's briefcase by the desk in Foster's office on the night of July 20 and indeed looked into the top of that briefcase for a note. As noted above, the testimony of White House, Department of Justice, FBI, and Park Police personnel confirms that Mr. Foster's black briefcase was in his White House office on July 22, two days after his death, during the review of documents in Mr. Foster's office.

5. Mr. Foster's Briefcase

The OIC is aware of only one briefcase used in Washington by Mr. Foster, the black briefcase that Ms. Thomasson observed in Mr. Foster's White House office on the night of July 20 and that a number of other witnesses observed there on July 22.

6. Summary: Briefcase

Based on careful consideration of all of the evidence, the conclusions

significantly supported are: (a) Mr. Foster's black briefcase remained in his office when he left on July 20; and (b) neither it nor another briefcase was in his car at Fort Marcy Park.

C. Notification

According to Secret Service records, the Secret Service was notified of Mr. Foster's death at about 8:30 p.m. Eastern time on July 20. The records reflect that various White House officials were then contacted.

An Arkansas Trooper has stated that, while on duty at the Arkansas Governor's Mansion, he was notified of Mr. Foster's death by Helen Dickey, at the time a 22-year-old personal assistant of the Clintons who lived on the third floor of the White House Residence. The trooper described Dickey as "hysterical" and "very upset" when she called. The trooper, who was working a shift until 10:30 p.m. Arkansas time that night, stated that Dickey called him before 7:30 p.m. Arkansas time (8:30 p.m. Eastern time); according to the interview report, he said "he could possibly be mistaken about the time the call from Dickey was received. The call could have been as late as 8:30 PM, Arkansas time. However, he still felt his best recollection was that the call was received sometime between 4:30 PM and 7:30 PM [Arkansas time]."

Helen Dickey stated that she was first notified of Mr. Foster's death by an employee of the White House Usher's Office at about 10:00 p.m. and that she became very upset. (The Dickeys had lived next door to the Fosters in Little Rock when Helen was younger.) She then contacted her mother in Virginia and her father in Georgia from a phone on the second floor of the White House Residence. Dickey stated that she later called (from a different phone) the Arkansas Governor's Mansion and talked to the trooper at approximately 10:30 p.m. Eastern time.

There are two other pieces of relevant evidence with respect to Ms. Dickey's statement. First, Ms. Dickey's diary entry for July 20 (written within a few days of the event) states in relevant part:

> I watched [Larry King Live] and about 10:30 [the Usher's Office employee] came up and told me they had found Vince Foster's body and that he'd killed himself. I waited for the punchline and lost it. I called Mom and Dad . . . . We went to Lisa's, and everyone was there . . .

Second, the Usher's Office employee confirmed that he notified Ms. Dickey of Mr. Foster's death shortly after 10:00 p.m. and said that Ms. Dickey immediately became hysterical, started screaming and crying, and ran downstairs. The Usher's Office employee "firmly believes he was the first to inform Dickey of the news of Foster's death because of her extreme reaction to the news."

The totality of the evidence – including the diary entry, the testimony of the Usher's Office employee, and the lack of any other evidence that White House or Secret Service personnel had knowledge of Mr. Foster's death at a time earlier than when the Park Police first notified the Secret Service -- does not support a conclusion that Ms. Dickey knew about Mr. Foster's death at some earlier time.

D. Search for Bullet

During the Park Police, Fiske, and OIC investigations, searches were conducted of Fort Marcy Park for the bullet that caused Mr. Foster's death.

On July 22, 1993, four Park Police personnel (Hill, Johnson, Rule, and Morrissette) searched with a metal detector the immediate area where the body was found. Their search for the bullet was unsuccessful.

Investigators in Mr. Fiske's Office conducted a search in the area where Mr. Foster's body was found. Their search for the bullet fired from Mr. Foster's gun was unsuccessful.

With the assistance of Dr. Lee, the National Park Service, and a large number of investigators, the OIC organized a broader search of Fort Marcy Park for the fatal bullet. The search was led by Richard K. Graham, an expert in crime scene metal detection. The search plan was devised utilizing information obtained through ballistics tests performed by the Army Research Laboratory, Aberdeen Proving Grounds, Maryland.

The search did not locate a bullet fired from the gun recovered from Mr. Foster's hand. That the search did not uncover the fatal bullet does not affect the conclusion that Mr. Foster committed suicide in Fort Marcy Park. Because a search covering the maximum range estimates "would have included a vast area . . . , a search which was limited in scope to the highest probability areas, closer to the minimum range estimates, was undertaken." In other words, while the OIC search covered a broader area than previous searches, "the

maximum range estimates" predicted the possibility that "the bullet could have cleared the tree tops in Ft. Marcy and landed well outside the park." Moreover, although lines ultimately were laid out within the park along the outer limits of a 90 degree arc to a distance of 175 meters, which represented the "highest probability areas," a full search of even the 90 degree-175 meter range would have included areas outside the park that were not searched. In addition, because "dense foliage and trees surround the area where Foster's body was discovered, and since there is a . . . cannon approximately 12.5 feet directly behind the location where the body lay, there is a distinct possibility the bullet's trajectory was altered due to its striking or ricocheting off a natural or man-made obstruction." Another variable is that "Foster's head could have been turned to one side or the other when the shot was fired."

Foster Report Table of Contents

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Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

IX. STATE OF MIND

In a death investigation, state-of-mind evidence can buttress the forensic and other evidence and, in that respect, is an issue within the scope of the investigation. For that reason, the OIC intensively examined Mr. Foster's state of mind and activities before his death. The OIC reconstructed and examined previously unreviewed documents from Mr. Foster's White House office. The OIC sought relevant documents from other sources. The OIC interviewed Mr. Foster's wife, sisters, mother, children, and other relatives; numerous friends in Arkansas and Washington; many colleagues who worked closely with him at the Rose Law Firm or the White House; and various other persons with potentially important information. During this effort, the OIC gathered extensive evidence relating to Mr. Foster's state of mind and activities.

The OIC is grateful to the Foster family members – including Alice Mae Foster, Lisa Foster, Sharon Bowman, Sheila Anthony, Beryl Anthony, and the Foster children, among others – for cooperating with this and prior investigations under painful and difficult circumstances. Lisa Foster and Mr. Foster's mother, Alice Mae Foster, not only spoke with OIC investigators at some length, but also provided additional information and assistance at their homes in Arkansas.

A. Dr. Berman's Analysis

Suicide, perhaps contrary to popular understanding, is a common manner of death in the United States. According to the Centers for Disease Control (CDC), suicide was the ninth leading cause of death among Americans in the period from 1980 through 1992. The CDC's statistics reveal that more individuals in the United States died by suicide than by homicide in every year since 1981. In the United States in 1993, 31,102 individuals committed suicide, and 18,940 of

them committed suicide with a firearm. During 1993, therefore, there were approximately 85 suicides per day, and 52 suicides by firearm per day, in the United States.

The OIC retained Dr. Alan Berman to review and analyze state-of-mind evidence gathered by the OIC in the course of its investigation. Dr. Berman, as noted above, has extensive experience and expertise in the study of suicide. He examined the evidence and reported his findings to the OIC.

In his report, Dr. Berman first noted that "[d]escriptors used by interviewees with regard to Vincent Foster's basic personality were extraordinarily consistent in describing a controlled, private, perfectionistic character whose public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance."

Mr. Foster's life, after "arriving in Washington, was filled with long, intense and demanding hours of work." Dr. Berman noted that Mr. Foster's May 8 commencement address to the University of Arkansas School of Law was "replete with reflections upon and regret regarding the changes wrought by his experiences in Washington." Mr. Foster had "uncharacteristically . . . talked of quitting," but considered a return to Little Rock to be a "humiliation."

Dr. Berman reported that "[m]istakes, real or perceived, posed a profound threat to his self-esteem/self-worth and represented evidence for a lack of control over his environment. Feelings of unworthiness, inferiority, and guilt followed and were difficult for him to tolerate. There are signs of an intense and profound anguish, harsh self-evaluation, shame, and chronic fear. All these on top of an evident clinical depression and his separation from the comforts and security of Little Rock. He, furthermore, faced a feared humiliation should he resign and return to Little Rock." The torn note "highlights his preoccupation with themes of guilt, anger, and his need to protect others."

Dr. Berman noted that Mr. Foster's admission to his sister on the Friday before his death that he was depressed was a "profound expression of his depression." Dr. Berman also noted Mr. Foster's July 19 call to Dr. Larry Watkins in Little Rock, during which Mr. Foster referred to symptoms of a mild depression and to stress, criticism, and long hours.

Dr. Berman stated that Mr. Foster was "not a helpseeker" and was "reluctant to seek help" although he was "[a]ware he was in trouble

psychologically." Dr. Berman stated that "[t]his difficulty accepting the vulnerable position is common to successful executives." Dr. Berman stated that "[b]y the Friday before his death he was desperate; calling for names of psychiatrists was a clear . . . admission of his failure. He was ambivalent and fearful about this helpseeking." He ultimately "preferred the safety of his family physician . . . to the immediacy and presence of other, unknown professionals in the DC area."

Dr. Berman said that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability." Dr. Berman concluded, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically even before this." Dr. Berman noted that there was some history of depression in the family.

Dr. Berman explained that for certain executives facing difficult circumstances, "[i]n essence, death is preferred to preserve one's identity. The suicide has an inability to tolerate an altered view of himself; suicide maintains a selfview and escapes having to incorporate discordant implications about the self. These types of suicides are typically complete surprises to others in the available support system."

As to why Mr. Foster was overwhelmed at that particular time, Dr Berman explained that Mr. Foster was "under an increasing burden of intense external stress, a loss of security, a painful scanning of his environment for negative judgments regarding his performance, a rigid hold of perfectionistic self-demands, a breakdown in and the absence of his usual ability to handle that stress primarily due to the impact of a mental disorder which was undertreated."

Mr. Foster apparently did not leave a note that specifically refers to or contemplates suicide. Dr. Berman indicated that the great majority of persons committing suicide do not leave a note. Dr. Berman also stated, with respect to the lack of a note in this case, that Mr. Foster was "intensely self-focused at this point; overwhelmed and out of control."

As to the Fort Marcy Park location, Dr. Berman stated that Mr. Foster "was ambivalent to the end" and may have driven for a while before going to Fort Marcy Park. He may have "simply and inadvertently happened upon the park or he may have purposely picked it off the area map found in his car." Dr. Berman stated that Mr. Foster's suicide in Fort Marcy Park is "[s]imilar to the typical

male physician who suicides by seeking the guaranteed privacy of a hotel room, and a 'do not disturb' sign"

In sum, Dr. Berman, based on his evaluation of the evidence, concluded: "In my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion"

B. Evidence

The OIC, like other investigations before, is not aware of a single, obvious triggering event that might have motivated Mr. Foster to commit suicide. Therefore, the following is simply a brief outline of some of the evidence relevant to the ultimate determination that Mr. Foster's state of mind was consistent with suicide. This outline is not designed to set forth or to suggest some particular reason or set of reasons why Mr. Foster committed suicide. Rather, the issue for purposes of the death investigation is whether Mr. Foster committed suicide, and this outline is designed to show that, as Dr. Berman concluded, compelling evidence exists that Mr. Foster was distressed or depressed in a manner consistent with suicide.

To begin with, in his six months in the White House, Mr. Foster was involved in work related to a number of important and difficult issues. The issues included, for example, the appointments and vetting of an Attorney General, a Supreme Court Justice, as well as many others (some of which developed into difficult situations abounding with unfavorable public comment); legal issues related to health care, such as medical malpractice reform; litigation related to the Health Care Task Force; the dismissal of White House Travel Office employees and the ensuing fallout from that incident; the Clintons' tax returns (which involved an issue regarding treatment of the Clintons' 1992 sale of their interest in Whitewater); the Clintons' blind trust; liaison with the White House Usher's Office over issues related to the White House Residence; and issues related to the Freedom of Information Act.

The work proved to be difficult and stressful. In a letter to a friend in Arkansas on March 4, 1993, for example, Mr. Foster wrote: "I have never worked so hard for so long in my life. The legal issues are mind boggling and the time pressures are immense. . . . The pressure, financial sacrifice and family disruption are the price of public service at this level. As they say, 'The wind blows hardest at the top of the mountain.'"

During that six-month period, certain other aspects of Mr. Foster's life also came under some scrutiny. For example, in May 1993, a controversy arose over membership of Administration officials in the Country Club of Little Rock, which had had no black members. Mr. Foster was a member of that club and resigned from it that month. On a copy of a May 11, 1993, newspaper article in Mr. Foster's office that mentioned the controversy, Mr. Foster wrote, "I wish I had done more."

At the same time, the White House staff generally was subject to media criticism during the first six months of the Administration. Some public criticism suggested incompetence, if not malfeasance, by staff members. Mr. Foster himself was mentioned in some of the critical editorial commentary. Numerous witnesses said that Mr. Foster was concerned and/or upset over the press criticism. According to Mr. Foster's brother-in- law, former Congressman Beryl Anthony, Mr. Foster said words to the effect that he had "spent a lifetime building [his] reputation" and was "in the process of having it tarnished."

As Dr. Berman noted, reputation was clearly important to Mr. Foster. Indeed, in the May 8, 1993, commencement address, Mr. Foster said that "[d]ents to the reputation in the legal profession are irreparable" and that "no victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." He emphasized that the "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."

In that commencement address, Mr. Foster also noted that there will be "failures, and criticisms and bad press and lies, stormy days and cloudy days." He advised to "[t]ake time out for yourself. Have some fun, go fishing, every once in a while take a walk in the woods by yourself.'" He suggested that "[i]f you find yourself getting burned out or unfulfilled, unappreciated[,] . . . have the courage to make a change."

The Travel Office matter, in particular, was the subject of public controversy beginning in May 1993 and continuing through Mr. Foster's death. Criticism focused on the White House's handling of the matter before and after the May 19 firings. Legislation enacted on July 2, 1993, required the General Accounting Office (GAO) to investigate the Travel Office firings. There was a possibility of some form of congressional review, or perhaps special counsel investigation, as well as the GAO investigation. During the week of

July 12, Mr. Foster contacted private attorneys seeking advice in connection with the Travel Office incident.

At some point in the last weeks of his life, Mr. Foster wrote a note that he had "made mistakes from ignorance, inexperience and overwork" and that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."

During that same period, according to Mr. Foster's immediate superior, Counsel Bernard Nussbaum, Mr. Foster's work effort decreased noticeably. According to William Kennedy, Sheila Anthony, and Lisa Foster, Mr. Foster said he was considering resigning.

Mr. Foster's sister Sheila Anthony said that Mr. Foster told her on Friday, July 16 that he was depressed. She furnished him the names of three psychiatrists. Mr. Foster did not speak to any of the three psychiatrists, although phone records show that Mr. Foster attempted to contact one of them on July 16. When Mr. Foster was found at Fort Marcy Park, a list of the three psychiatrists was in his wallet.

Lisa Foster said that her husband cried while talking to her on Friday night, July 16 and that Mr. Foster mentioned resigning during the weekend of July 16-18.

Meanwhile, Mr. Foster's mother, Alice Mae Foster, said that she talked to her son a day or two before his death and that he said he was unhappy because of his job and that it was "such a grind."

On Monday, July 19, Mr. Foster contacted Dr. Larry Watkins, his physician in Little Rock, and was prescribed an antidepressant. Watkins' typed notes of July 21 say the following:

> I talked to Vince on 7/19/93, at which time he complained of anorexia and insomnia. He had no GI [gastrointestinal] symptoms. We discussed the possibility of taking Axid or Zantac to help with any ulcer symptoms as he was under a lot of stress. He was concerned about the criticism they were getting and the long hours he was working at the White House. He did feel that he had some mild depression. I started him on Desyrel, 50 mg. He was to start with one at bedtime and move up to three. . . . I received word at 10:20 p.m. on 7/20/93 that he had committed suicide.

Dr. Watkins said that it was unusual, even unprecedented, for Mr.

Foster to call him directly. Lisa Foster said that Mr. Foster took one tablet of the antidepressant medication on the night of the 19th.

In short, the OIC cannot set forth a particular reason or set of reasons why Mr. Foster committed suicide. The important issue, from the standpoint of the death investigation, is whether Mr. Foster committed suicide. On that issue, the state-of-mind evidence is compelling, and it demonstrates that Mr. Foster was, in fact, distressed or depressed in a manner consistent with suicide. Indeed, the evidence was sufficient for Dr. Berman to conclude that "to a 100% degree of medical certainty, the death of Vincent Foster was a suicide."

Foster Report Table of Contents

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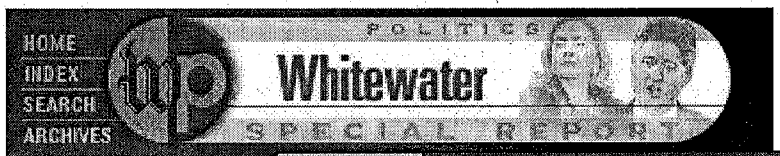
Back to the top

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER



WHITEWATER
Overview
Time Line
Key Stories
Links & Resources
Special Reports

Whitewater: The Foster Report

Back to Table of Contents

X. SUMMARY OF CONCLUSIONS

To sum up, the OIC has investigated the cause and manner of Mr. Foster's death. To ensure that all relevant issues were fully considered, carefully analyzed, and properly assessed, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman. The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C., for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides. The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, examining the analyses and conclusions of the OIC experts and investigators, and preparing this report.

The autopsy report and the reports of the pathologists retained by the OIC and Mr. Fiske's Office demonstrate that the cause of death was a gunshot wound through the back of Mr. Foster's mouth and out the back of his head. The autopsy photographs depict the wound in the back of the head, and the photographs show the trajectory rod through the wound. The evidence, including the photographic evidence, reveals no other trauma or wounds on Mr. Foster's body.

The available evidence points clearly to suicide as the manner of death. That conclusion is based on the evidence gathered and the analyses performed during previous investigations, and the additional evidence gathered and analyses performed during the OIC investigation, including the evaluations of Dr. Lee, Dr. Blackbourne, Dr. Berman, and the various OIC investigators.

When police and rescue personnel arrived at the scene, they found

Mr. Foster dead with a gun in his right hand. That gun, the evidence tends to show, belonged to Mr. Foster. Gunshot residue-like material was observed on Mr. Foster's right hand in a manner consistent both with test firings of the gun and with the gun's cylinder gap. Gunshot residue was found in his mouth. DNA consistent with that of Mr. Foster was found on the gun. Blood was detected on the paper initially used to package the gun. Blood spatters were detected on the lifts from the gun. In addition, lead residue was found on the clothes worn by Mr. Foster when found at the scene. This evidence, taken together, leads to the conclusion that Mr. Foster fired this gun into his mouth. This evidence also leads to the conclusion that this shot was fired while he was wearing the clothes in which he was found. Mr. Foster's thumb was trapped in the trigger guard, and the trigger caused a noticeable indentation on the thumb, demonstrating that the gun remained in his hand after firing.

The police detected no signs of a struggle at the scene, and examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging. Nor does the evidence reveal that Mr. Foster was intoxicated or drugged.

Dr. Lee found gunshot residue in a sample of the soil from the place where Mr. Foster was found. He also found a bone chip containing DNA consistent with that of Mr. Foster in debris from the clothing. Dr. Lee observed blood-like spatter on vegetation in the photographs of the scene. Investigators found a quantity of blood under Mr. Foster's back and head when the body was turned, and Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. In addition, the blood spatters on Mr. Foster's face had not been altered or smudged, contrary to what likely would have occurred had the body been moved and the head wrapped or cleaned. Fort Marcy Park is publicly accessible and traveled; Mr. Foster was discovered in that park in broad daylight; and no one saw Mr. Foster being carried into the park. All of this evidence, taken together, leads to the conclusion that the shot was fired by Mr. Foster where he was found in Fort Marcy Park.

The evidence with respect to state of mind points as well to suicide. Mr. Foster told his sister four days before his death that he was depressed; he cried at dinner with his wife four days before his death; he told his mother a day or two before his death that he was unhappy because work was "a grind"; he was consulting attorneys for legal advice the week before his death; he told several people he was considering resignation; he wrote a note that he "was not meant for

the job or the spotlight of public life in Washington. Here ruining people is considered sport." The day before his death, he contacted a physician and indicated that he was under stress. He was prescribed antidepressant medication and took one tablet that evening.

Dr. Berman concluded that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability." Dr. Berman stated, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically even before this." Dr. Berman concluded that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."

In sum, based on all of the available evidence, which is considerable, the OIC agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

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Back to the top | Foster Report Table of Contents

washingtonpost.com NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE
PRINT EDITION TOP NEWS WORLD NATION POLITICS METRO BUSINESS & TECH HEALTH OPINION WEATHER

yellowpages

What the Editorial Page Had to Say about the Attacks on Independent Counsel Starr

Washington Post, October 20, 1999

- Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. **The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and,** for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right.
- The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. **Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service.**

Washington Post, May 24, 2000

- Throughout the Monica Lewinsky scandal, **the White House tried to turn the tables on Kenneth Starr by making the prosecutor's conduct – rather than the president's – the issue.** In the White House version of events, a vindictive and ideologically motivated prosecutor seized on purely personal misconduct by the president and violated all manner of ethical rules to bring him down. The allegations of misconduct did, in fact, divert attention from Mr. Starr's investigation. So it is worth asking which, if either, of these men turns out to have a real problem under the rules of legal ethics. Conveniently, Mr. Starr and Mr. Clinton both faced reckonings on this score over the past week. **Last Thursday a federal judge threw out a series of ethical allegations against Mr. Starr. Four days later a disciplinary panel of the Arkansas Supreme Court decided that Mr. Clinton should be disbarred.**

Washington Post, November 11, 1999

- Mr. Clinton will surely not be remembered for any nobility or higher purpose. The president dragged the country through months of trauma to fight allegations that were, at least in the main, true. **His operatives smeared political and legal opponents.** To this day, he has never acknowledged the harm he did. At to this behavior, there was nothing "right about it.

Washington Post, September 15, 1999

- **Mr. Starr was attacked throughout the Lewinsky episode in a coordinated smear campaign that accused him publicly of a variety of types of misconduct. These accusations seriously undermined his investigation and distracted people from sober discussion either of the president's conduct or Mr. Starr's probe.**

The allegations took a great deal of time to investigate and sort out. Now, one by one, **they are proving meritless**, but only long after they have done their job of eroding confidence in his investigation. This is not to say that Mr. Starr has been a Boy Scout. There is much to criticize about his investigation. But there is a difference between criticism of Mr. Starr's judgment and allegations of illegalities or misconduct. **The readiness of many people to so confidently level grave allegations is a disturbing feature of the way our political culture responded to the Lewinsky scandal.**

Washington Post, June 5, 1998

- But the extra layers [of appellate review] **will grant the White House time: time in which to attack Mr. Starr's investigators and – even while extending the probe – complain about its duration and cost.** All this, naturally, without honoring the promise that President Clinton made at the outset of the Lewinsky matter that he would answer the legitimate questions at its heart.

Washington Post, March 5, 1998

- **The attacks on Mr. Starr are working, so there seems little reason to change anything. But Mr. Clinton owes an accounting that only he can give. The approach the White House has adopted instead – to keep mum, attack Mr. Starr, belittle the offense, shift the focus to anything you can think of but whether the president lied – is harmful, not just shifty.** The faster the country can get at the truth and decide what to do about it, the better. That's what matters, not the peripheral fireworks the White House would rather become the issue instead. That's why it's good news if Mr. Starr in fact is back at work.

Washington Post, February 25, 1998

- **The White House should remember that what is driving this story is not the conduct of Mr. Starr's staff**, alleged leaks, supposed media bias or – in Mrs. Clinton's now famous words – a "vast right wing conspiracy." Mr. Clinton is the only one who can make this matter go away, and he remains entirely free to do so at any time. The president should simply tell the real story now about what happened between him and Monica Lewinsky. If it causes him problems, he should take the hit and get it over with. Better that than prolonging a process that is doing no one any good – surely not him, and not the country either. **Whatever the truth, the longer he and his defenders spend attacking others for problems he alone can address, the harder a time his spin doctors will have persuading anyone to believe him when he finally is forced to talk.**

Washington Post, February 2, 1998

- **Our own sense, even so, is that step by step, each of the expansions of the investigation, including the current one, can be justified.** The bases have not been manufactured. They continue to derive, unfortunately, from the Clintons' own behavior. The questions raised have been serious ones and the kind that require independent investigation. That is what the defenders conveniently ignore.

Washington Post, September 27, 1996

- **We have seen no evidence of any impropriety in the conduct of the special prosecutor's office itself. Rather, Mr. Starr and his team seem to be following precisely the mandate they were set by a panel of federal judges at the request of Mr. Clinton's attorney general, Janet Reno.** That mandate ordered Mr. Starr to uncover whether "any individual" had committed a crime "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships" with Whitewater or the Madison Savings and Loan. If Mr. Clinton sees "a lot of evidence" that Mr. Starr is doing otherwise, he should share it.

Citation Search Result Rank 110 of 400 Database
10/20/99 WASHPOST A28 WP
10/20/99 Wash. Post A28
1999 WL 23309639

The Washington Post
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Wednesday, October 20, 1999

Editorial

Mr. Starr's Departure

AS LONG AS historians remain interested in American politics in the 1990s they are likely to debate the merits of **Kenneth Starr's** investigation. The parameters of the debate are already stark. Mr. Starr's defenders see him as a voice of principle who stood firm for the rule of law and courageously spoke unpopular truths about a president who had disgraced his office yet remained inexplicably popular. By contrast, Mr. Starr's detractors see him as a kind of demon who embodies everything puritanical andintrusive about contemporary American conservatism and whose zeal against a president from a different party led him on a crusade to bring him down, with whatever collateral consequences.

The reality is that neither of these narratives aptly describes Mr. Starr or the very mixed legacy that he left on resigning his post this week. Mr. Starr was given an almost impossible task. He was asked to address authoritatively a set of essentially unrelated public integrity questions of varying degrees of seriousness. The impossibility of his job was partly his own fault, since he made the mistake of accepting--and sometimes seeking--additional matters to review. But it is unclear whether anyonewith such broad jurisdiction could have avoided being perceived as President Clinton's personal prosecutor.

Mr. Starr's own errors contributed greatly to this perception. At times in his investigation, he clearly lacked perspective--going full throttle after relatively marginal characters and pursuing imprudent litigation and investigative strategies. He also had a maddening tendency to ignore appearances--even at the expense of the public credibility of his investigation. This was particularly regrettable because the circumstances of his own appointment, which followed the dismissal of the widely admired Robert Fiske for inadequate reasons, begged suspicion. Rather than allaying this concern, Mr. Starr seemed to taunt his doubters by maintaining his law practice and his relationship with conservative causes.

Yet the sum of Mr. Starr's faults constituted a mere shadow of

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the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right.

The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL** (UNSIGNED)

NEWS SUBJECT: Washington Post; **Editorial** & Columns; **Editorial** Page (WP EDC EDI)

NEWS CATEGORY: **EDITORIAL**

EDITION: FINAL

Word Count: 511
10/20/99 WASHPOST A28
END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation Search Result Rank 84 of 400 Database
5/24/00 WASHPOST A36 WP
5/24/00 Wash. Post A36
2000 WL 19610569

The Washington Post
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Wednesday, May 24, 2000

Editorial

Legal Ethics and Spin

THROUGHOUT THE Monica Lewinsky scandal, the White House tried to turn the tables on **Kenneth Starr** by making the prosecutor's conduct--rather than the president's--the issue. In the White House version of events, a vindictive and ideologically motivated prosecutor seized on purely personal misconduct by the president and violated all manner of ethical rules to bring him down. The allegations of prosecutorial misconduct did, in fact, divert attention from Mr. Clinton's own behavior and greatly weakenedpublic confidence in Mr. Starr's investigation. So it is worth asking which, if either, of these men turns out to have a real problem under the rules of legal ethics. Conveniently, Mr. Starr and Mr. Clinton both faced reckonings on this score over the past week. Last Thursday a federal judge threw out a series of ethical allegations against Mr. Starr. Four days later a disciplinary panel of the Arkansas Supreme Court decided that Mr. Clinton should be disbarred.

The disbarment recommendation is hardly a surprise. The false testimony that just about everyone understands Mr. Clinton gave under oath in the Paula Jones case clearly conflicts with the obligation of candor that a lawyer owes to the judicial system. The recusal of eight of the 14 members of the disciplinary committee--those with ties to the president--will inevitably raise questions about whether Mr. Clinton is being judged by political foes. But the reality is that the committee's options are limited. The evidence that Mr. Clinton lied is overwhelming. Judge Susan Webber Wright held as much in finding him in contempt of court. To have ignored so public a flouting of the ethical rules would have made a joke of the disciplinary process--a joke the committee could not afford. The only real question is whether a reprimand or a suspension from the bar is an adequate alternative to disbarment. It's not a flattering question.

The contrast with the ruling on Mr. Starr's conduct is quite striking. In unusually strong language, Senior U.S. District Judge John Nangle dismissed a series of misconduct complaints brought against the former independent counsel by a Connecticut lawyer named Francis Mandanici. Judge Nangle found "no support for the allegation"

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that Mr. Starr or his colleagues had tried to get people to testify falsely. And he described the contention that Mr. Starr harbored a potential conflict of interest with respect to conservative philanthropist Richard Mellon Scaife as "the stuff that dreams are made of." He called other allegations "nonsense" and "ridiculous." Whatever one thinks of Mr. Starr's investigation, and we have expressed our own reservations, Judge Nangle's opinion offers powerful vindication on some of the leading ethical charges.

Charges involving leaks and other issues remain to be resolved against Mr. Starr's former office. And the disbarment recommendation against Mr. Clinton is still only a recommendation. But the week's events make pretty clear which of the lawyers in this battle, Mr. Starr and Mr. Clinton, was the one with the ethical problems.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL** (UNSIGNED)

NEWS SUBJECT: Washington Post; **Editorials** and Columns; **Editorial** Page; Commentary/Opinion; Content Types; General News; **Editorial**; Crime and Courts; Political and General News; Crime (WP EDC EDI NEDC NCAT GEN NEDI GCRIM GCAT CRM)

NEWS CATEGORY: **EDITORIAL**

EDITION: FINAL

Word Count: 486
5/24/00 WASHPOST A36
END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation Search Result Rank 107 of 400 Database
11/11/99 WASHPOST A42 WP
11/11/99 Wash. Post A42
1999 WL 23314092

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Thursday, November 11, 1999

Editorial

Mr. Clinton's Claim to History

HAVING WON the battle to remain in office, President Clinton has begun trying to rehabilitate his reputation. While contemporary commentators may regard his conduct in the Monica Lewinsky episode as deplorable, the president recently told ABC News that "I think history will view this much differently." Historians, he said, will understand that there really was a right-wing effort to get him: "I made a personal mistake, and they spent $50 million trying to ferret it out and root it out, because theyhad nothing else to do, because all the other charges were totally false -- bogus, made up, and people were persecuted because they wouldn't commit perjury against me." In short, the president claimed, history "will say I made a bad personal mistake, I paid a serious price for it, but that I was right to stand and fight for my country and my Constitution and its principles, and that the American people were very good to stand with me."

President Clinton can perhaps be forgiven for wanting to shift the premises of the discussion of his impeachment. But no matter how mightily he strives, he cannot turn his fight for personal survival into a battle on behalf of the Constitution.

Following a habit that dates from his initial quasi-apologies for his conduct, the president describes his transgression as a "personal mistake" -- a phrase that seems to refer only to his sexual exploits rather than to his false testimony about them and his willingness to see others testify falsely to cover them up. His phrasing misses the point. Historians will surely recall that it was not any personal mistake but the question of whether the president had committed perjury and corrupted evidence in a federal proceeding that was the issue in his impeachment. They may also recall that it was not just independent counsel **Kenneth Starr** or the Republican House of Representatives but Judge Susan Webber Wright -- the same judge who threw out the Paula Jones lawsuit -- who described the president's testimony under oath unequivocally as "false, misleading and evasive answers that were designed to obstruct the judicial process."

Historians will have to cope with the troubling question of

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whether an effort to corrupt evidence of an affair in a civil lawsuit warrants impeachment. But the White House's effort to protect Mr. Clinton will surely not be remembered for any nobility or higher purpose. The president dragged the country through months of trauma to fight allegations that were, at least in the main, true. His operatives smeared political and legal opponents. To this day, he has never acknowledged the harm he did. As tohis behavior, there was nothing "right" about it.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL** (UNSIGNED)

NEWS SUBJECT: Washington Post; **Editorial** & Columns; **Editorial** Page (WP EDC EDI)

NEWS CATEGORY: **EDITORIAL**

EDITION: FINAL

Word Count: 444
11/11/99 WASHPOST A42
END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation Search Result Rank 111 of 400 Database
9/15/99 WASHPOST A24 WP
9/15/99 Wash. Post A24
1999 WL 23303560

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Wednesday, September 15, 1999

Editorial

Mr. Starr and Leaks

WHEN THE New York Times published a story back in January suggesting that **Kenneth Starr** believed he had the authority to indict President Clinton before he left office, the reaction against Mr. Starr was strong and immediate. It was, critics were quick to allege, another violation of grand jury secrecy, and the White House asked Judge Norma Holloway Johnson to investigate. Never mind that the story included nothing that looked much like grand jury information but, rather, reported on Mr. Starr's conclusion that it was legally possible to indict a sitting president and on the feeling of some of his staff that doing so would be a good idea. Never mind as well that this information was not really even news at all. The incident was widely decried as yet another example of Mr. Starr's behaving unethically in a vendetta against the president, and Judge Johnson made an initial finding that the office had violated the law.

Mr. Starr did himself no favors in the matter by initially denying that the story had come from his office, something his own internal investigation later showed to be false. This led to the resignation of his spokesman, Charles Bakaly III, whom the internal probe fingered as a source. As Mr. Bakaly had denied in an affidavit commenting on what Mr. Starr and his office were considering, Mr. Starr also referred him to the Justice Department for possible criminal prosecution.

Whatever comes of the Bakaly matter, it is worth noting that the underlying charge of a grand jury leak has, like so many allegations against Mr. Starr and his people, evaporated on neutral inspection. A unanimous panel of the D.C. Circuit ruled recently that "internal deliberations of prosecutors that do not directly reveal grand jury proceedings are not" covered by grand jury secrecy. The ruling does not clear Mr. Starr on all allegations of grand jury leaks, as a much larger group of 24 instances of alleged leaks remains before the courts. But the current ruling does suggest that at least some of these instances may be found not to have involved grand jury material after all.

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It is another example of an ethical allegation that many assumed self-evident melting on closer examination. Mr. Starr was attacked throughout the Lewinsky episode in a coordinated smear campaign that accused him publicly of a variety of types of misconduct. These accusations seriously undermined his investigation and distracted people from sober discussion either of the president's conduct or of Mr. Starr's probe.

The allegations took a great deal of time to investigate and sort out. Now, one by one, they are proving meritless, but only long after they have done their job of eroding confidence in his investigation. This is not to say that Mr. Starr has been a Boy Scout. There is much to criticize about his investigation. But there is a difference between criticism of Mr. Starr's judgment and allegations of illegalities or misconduct. The readiness of many people to so confidently level grave allegations is a disturbing feature of the way our political culture responded to the Lewinsky scandal.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL** (UNSIGNED)

NEWS SUBJECT: Washington Post; **Editorial** & Columns; **Editorial** Page (WP EDC EDI)

NEWS CATEGORY: **EDITORIAL**

EDITION: FINAL

Word Count: 516
9/15/99 WASHPOST A24
END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation Search Result Rank 78 of 112 Database
6/5/98 WASHPOST A30 WP
6/5/98 Wash. Post A30
1998 WL 11584368

The Washington Post
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Friday, June 5, 1998

Editorial

More Delay

IT IS understandable that the Supreme Court yesterday declined to review immediately two lower court decisions rejecting, in turn, the White House's assertion of attorney-client privilege and the Secret Service's claims of a fanciful "protective function" privilege. Once President Clinton backed off his executive privilege claims earlier this week, independent counsel **Kenneth Starr's** case that the Supreme Court should preempt review by the court of appeals grew weaker. There's a lot of reason to respect the normal appellate court hierarchy. And for the Supreme Court to jettison the tradition layers of appeal in the absence of an urgent constitutional controversy -- and the only controversy of constitutional dimensions was the discarded executive privilege claim -- may have been incautious.

The result -- more delay -- is nonetheless frustrating. The Secret Service's claimed privilege should not -- and, in all likelihood, will not -- be sustained. And the White House's vision of an expansive governmental attorney-client privilege was rejected decisively by the U.S. Court of Appeals for the 8th Circuit last year. Even Judge Norma Holloway Johnson's more generous vision of this controversial privilege would require that White House lawyer Bruce Lindsey give testimony before Mr. Starr's grand jury. So in the end, the additional layers of litigation seem unlikely to reverse Mr. Starr's victories.

But the extra layers will grant the White House time: time in which to attack Mr. Starr's investigators and -- even while extending the probe -- complain about its duration and cost. All this, naturally, without honoring the promise that President Clinton made at the outset of the Lewinsky matter that he would answer the legitimate questions at its heart. Those questions -- one strains to recall -- were not about the Secret Service, executive privilege, book purchases, talk-show lawyers or whether the president has an attorney-client relationship with the White House counsel. The questions were about whether President Clinton committed federal crimes by lying under oath about his relationship with a White House intern, suborning her perjury and obstructing justice by helping her

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find work in exchange for false testimony. The answers still have not been given.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL (UNSIGNED)**

EDITION: FINAL

Word Count: 352
6/5/98 WASHPOST A30
END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation Search Result Rank 89 of 112 Database
3/5/98 WASHPOST A20 WP
3/5/98 Wash. Post A20
1998 WL 2471151

The Washington Post
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Thursday, March 5, 1998

Editorial

Diversionary Flares

IN THE six weeks since the Monica Lewinsky scandal broke, the president's aides have been frantically launching diversionary flares to shift the public's attention from Bill Clinton's conduct. Most of these flares have sought to illuminate the flaws -- real and imagined -- of independent counsel **Kenneth Starr.** As White House spokesmen have shrouded Mr. Clinton's own behavior in the most general -- and least-informative -- denials, they have issued shrill denunciations of everything from Mr. Starr's budget, to his party affiliation, to his other legal work. It is all an effort to portray the most powerful man in the world -- a man who refuses to tell his own side of the story -- as a victim, and it would be merely silly were it not working so well.

Of course, the independent counsel has, in part, himself to thank for its success. When the White House stuck out its foot last week, he seemed only too eager to trip over it -- hauling Sidney Blumenthal before his grand jury to answer questions about the White House's efforts to smear him and his staff. It was a move that lent credence to all the portrayals of Mr. Starr as an overzealous prosecutor with an ax to grind against the president. It was the kind of favor that only an enemy could have donefor Mr. Clinton.

But after a spectacularly bad week in which he seemed to us, as to others, to have stumbled into the hands of his critics, Mr. Starr appears to be back on track. Instead of investigating who in the White House may or may not have been digging up and peddling stories meant to discredit him, his staff and their joint effort, he has returned to the basic question of whether President Clinton lied and, either directly or through aides and associates, encouraged others to lie in the Monica Lewinsky case.

In the midst of all this distraction, it is worth remembering what this investigation is supposedly about and why it remains important. The investigation is not about the president's private affairs, as his defenders constantly claim. It is, rather, about whether someone conspired to corrupt a civil suit in federal court in Arkansas. The allegations, if true, are important not because of some

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prurient interest in the president's sex life but because they address a fundamental issue of fairness in the administration of justice. One can believe or not believe Paula Jones, but she is surely entitled -- as are we all -- to have her case heard without having it marred by allegedly perjured testimony paid for with jobs. We continue to reserve judgment on the facts of the Lewinsky matter; but if the president did urge Ms. Lewinsky to lie under oath, this would be no insignificant matter that should be ignored because the underlying conduct is sexual in nature. It is critical, therefore, for Mr. Starr to stay focused on resolving the main issue authoritatively and quickly, rather than meandering off again into some examination of the White House's public relations strategy.

It is even more critical for the president to finally step up to the plate and face the questions that he has so embarrassingly dodged since the scandal began. This course is, needless to say, a tough sell at a time when Mr. Clinton is enjoying the highest approval ratings of his presidency. The attacks on Mr. Starr are working, so there seems little reason to change anything. But Mr. Clinton owes an accounting that only he can give. The approach the White House has adopted instead -- keep mum, attackMr. Starr, belittle the offense, shift the focus to anything you can think of but whether the president lied -- is harmful, not just shifty. The faster the country can get at the truth and decide what to do about it, the better. That's what matters, not the peripheral fireworks the White House would rather become the issue instead. That's why it's good news if Mr. Starr in fact is back at work.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL (UNSIGNED)**

EDITION: FINAL

Word Count: 674
3/5/98 WASHPOST A20
END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation Search Result Rank 90 of 112 Database
2/25/98 WASHPOST A16 WP
2/25/98 Wash. Post A16
1998 WL 2469580

The Washington Post
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Wednesday, February 25, 1998

Editorial

An Unruly Mess

THE WHITE HOUSE and **Kenneth Starr** are in a race to the bottom in the increasingly bizarre scandal surrounding Bill Clinton's relationship with Monica Lewinsky. The president's defenders have decided that smearing investigators -- rather than answering legitimate questions -- is the appropriate means of defending Mr. Clinton. Mr. Starr, meanwhile, appears to have come to the conclusion that this White House strategy itself may be an effort at intimidating prosecutors, and he absurdly issued a subpoenato presidential aide Sidney Blumenthal demanding that Mr. Blumenthal testify before the grand jury and apparently turn over documents that refer to Mr. Starr's office and staff.

On Sunday the White House denounced as "blatant lies" the suggestion that the president's troops authorized private snoopers to dig up dirt on those "investigators, prosecutors, or reporters" looking into the Lewinsky matter. Turns out, however, that Mr. Clinton's lawyers did retain the services of private eye Terry F. Lenzner (whom Mr. Starr has also subpoenaed). Mr. Lenzner, Mr. Clinton's lawyers said yesterday, has been working for them since 1994, "assist[ing] in the defense of matters related tothe president"; their statement, however, reiterates that he is "not investigating the personal lives of" those investigating Mr. Clinton. The continuing and indignant denial by the White House that it would hire a private sleuth to look for disparaging tidbits on Mr. Starr seems doubly peculiar, since officials are entirely open about the fact that smearing Mr. Starr and his deputies is their primary strategy. The New York Times actually quoted a White House official describing "our continuing campaign to destroy **Ken Starr**." What's more, if the president's aides are refraining from investigating the press for now, it's certainly not because they are above attacking journalists. In 1996, First Lady Hillary Clinton ordered attorneys for the president to write a report critiquing the coverage of Whitewater by Susan Schmidt, The Post's main reporter on the subject. Mrs. Clinton actually wanted the report released publicly, Post staff writer Howard Kurtz recently wrote, although White House spokesman Michael McCurry and special counsel Mark Fabiani killed that idea.

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Looking for dirt on prosecutors and trying to discredit straightforward reporting of embarrassing facts about yourself is indeed a sleazy strategy, but it is far from criminal. And it would be an abuse of his power if Mr. Starr hauled Mr. Blumenthal before the grand jury simply because the latter had played a key role in such an effort. A grand jury investigation is supposed to focus on allegations of criminal conduct, and a subpoena is not meant to be used as a retaliatory gesture. There is, at thisstage, no public evidence suggesting that Mr. Blumenthal's media campaign or his documents related to Mr. Starr are germane to any criminal allegations. Mr. Starr's explanation yesterday -- that the "misinformation" spread about prosecutors may be "intended to intimidate prosecutors and investigators, impede the work of the grand jury, or otherwise obstruct justice" -- seems pretty thin. Prosecutors get attacked every day by potential defendants, and having a thick skin is part of the job. If Mr. Starr's only basis for these subpoenas is the stated one, he should back down. Unless he possesses evidence suggesting that the White House is violating some law by attacking his people, his effort to investigate the defense is potentially an abuse -- and it certainly plays into the hands of those who regard his investigation as a reckless and partisan attack on the president.

This is a particular shame, because it is important that center stage in this drama be reserved for the main issue: the conduct of Bill Clinton. The White House spin-meisters have been able -- with Mr. Starr's help -- to create momentary distractions from the underlying scandal, but these distractions will only be momentary. The White House should remember that what is driving this story is not the conduct of Mr. Starr's staff, alleged leaks, supposed media bias or -- in Mrs. Clinton's now famous words -- a "vast right-wing conspiracy." Mr. Clinton is the only one who can make this matter go away, and he remains entirely free to do so at any time. The president should simply tell the real story now about what happened between him and Monica Lewinsky. If it causes him problems, he should take the hit and get it over with. Better that than prolonging a process that is doing no one any good -- surely not him, and not the country, either. Whatever the truth, the longer he and his defenders spend attacking others for problems he alone can address, the harder a time his spin doctors will have persuading anyone to believe him when finally he is forced to talk.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL (UNSIGNED)**

EDITION: FINAL

Word Count: 782
2/25/98 WASHPOST A16

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Citation
2/2/98 WASHPOST A18
2/2/98 Wash. Post A18
1998 WL 2465390

Search Result Rank 94 of 112 Database
WP

The Washington Post
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Monday, February 2, 1998

Editorial

The **Kenneth Starr** Question

LEAVE ASIDE the transparently demagogic political counterattack on **Kenneth Starr** by the Clinton White House. Others who are not working from anyone's talking points have come to wonder whether independent counsel **Kenneth Starr's** investigation has gotten out of hand. What began as a fairly conventional inquiry into the role, if any, of the Clintons in the draining and ultimate failure of an Arkansas savings and loan has become, as the daily soap opera attests, much more.

There are three main sources of unease with the way the investigation has been transformed. One has to do with the constant migration and broadening of Mr. Starr's jurisdiction. Whatever turns up ends up on Mr. Starr's platter, or so it seems. He has become less an independent counsel than a kind of standing inspector general for the Clinton White House. Second is the smarmy and personal zone into which the jurisdictional spread most recently has led him. This is now, at least in part, an inquiry intothe president's sex life, based on surreptitious tape recordings by one woman of the supposed confidences of another much younger one. It is, in this sense, a slimy and intrusive business with which no one can be comfortable. Finally, Mr. Starr has been charged by Mrs. Clinton and others with either conducting or lending himself to a political vendetta against the president. He denies it, but a number of the ancillary characters in the drama have openly anti-Clinton agendas, and on occasion Mr. Starr's own careless behavior has seemed to support the charge.

Our own sense, even so, is that step by step, each of the expansions of the investigation, including the current one, can be justified. The bases have not been manufactured. They continue to derive, unfortunately, from the Clintons' own behavior. The questions raised have been serious ones and the kind that require independent investigation. That is what the defenders conveniently ignore.

Mr. Starr's original mandate was to determine whether the Clintons and other political figures in Arkansas used the failed savings-and-loan association as a piggy bank in violation of the law. The special court that names an independent counsel at the attorney

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general's request gave him extremely broad authority to do so. He has caught some considerable fish, including Mr. Clinton's successor as governor of Arkansas; Mr. Clinton's first choice to be associate attorney general in the administration, Webster Hubbell; and the owners of the S&L, who were also the Clintons' business partners in the failed real estate venture called Whitewater, which has given the whole affair its name. What Mr. Starr has not been able to do, despite efforts to extract more information from lesser figures in the case, including Mr. Hubbell, is show that the Clintons themselves violated the law. He continues to feel that some witnesses have not been forthcoming, is looking for possible reasons why and is trying to squeeze them. This Whitewater part of the inquiry seems to have come down to a familiar endgame.

There were, meanwhile, two relatively minor expansions of his mandate -- as ever, with the attorney general's approval -- having to do with the firing of White House travel office employees early in the first term and the still not fully explained gathering in the White House, also in the first term, of FBI files on some Republicans. Both these presented issues that needed vetting by an independent counsel, and Mr. Starr was at hand. He seems to have been assigned them mainly as a matter of convenience.

In the current case, the tape recordings containing charges against the president -- charges whose seriousness has to do much more with possible perjury than with sex -- were brought to Mr. Starr by the woman who had made them. She appears to have done so in such a way that they might have been inadmissible in court. Mr. Starr wired her with her consent to remake them, in part to validate her claims. The wiring was a repulsive thing to do, but not illegal and evidently a fairly common prosecutorial practice. He apparently acted quickly partly because there was a threat that news of the tapes would shortly appear in print, as in fact it did. He then presented the evidence to the attorney general, who without much apparent hesitation agreed with him that the court should include them in his mandate. If not Mr. Starr, another counsel would plainly have had to be named. If ever there were a case the Justice Department cannot itself credibly investigate, this is it. The tawdriness of the business -- the illicit and sneaky nature of the taping, to say nothing of the content of the tapes -- is not Mr. Starr's fault. He drew what seems to us a strained connection between the Whitewater case and this, in that Washington lawyer and Clinton confidant Vernon Jordan could be found in both helping possible witnesses against the president find jobs. But that's not why he has this case, nor do we quarrel with his decision to take the first step of creating a clean tape, if that word can be used for any aspect of this case, before going to the attorney general.

Mr. Starr has been casual in the past about flashing his own conservative politics while occupying the office of independent

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counsel. It's a huge mistake. The whole purpose of naming an independent counsel is, insofar as possible, to de-politicize an investigation such as this. He risks the undermining of his own role. There are problems with Mr. Starr, but the basic problem here is not with him.

---- INDEX REFERENCES ----

KEY WORDS: **EDITORIAL (UNSIGNED)**

EDITION: FINAL

Word Count: 932
2/2/98 WASHPOST A18
END OF DOCUMENT

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Citation Search Result Rank 111 of 112 Database
9/27/96 WASHPOST A24 WP
9/27/96 Wash. Post A24
1996 WL 12722015

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Friday, September 27, 1996

Editorial

'Isn't It Obvious?'

"ISN'T IT obvious?" So responded President Clinton on television the other night when PBS host Jim Lehrer asked him whether special prosecutor **Kenneth Starr** is just out to "get" Mr. Clinton and Hillary Clinton. Mr. Clinton leveled an extraordinary charge against the special prosecutor. He paraphrased his convicted old friend, Susan McDougal, as believing that Mr. Starr wants her to perjure herself if necessary to build a case against the Clintons. Then Mr. Clinton said: "There's a lot of evidence to support that."

Well, that doesn't seem so obvious to us. Certainly Mr. Starr is a Republican, and he or his law firm, in their other work, may have left themselves open to conflict-of-interest charges -- charges the White House has been only too happy to whip up. But Mr. Clinton's latest assault goes well beyond what is legitimate in the way of campaign spin and counterspin.

We have seen no evidence of any impropriety in the conduct of the special prosecutor's office itself. Rather, Mr. Starr and his team seem to be following precisely the mandate they were set by a panel of federal judges at the request of Mr. Clinton's attorney general, Janet Reno. That mandate ordered Mr. Starr to uncover whether "any individual" had committed a crime "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships" with Whitewater or the Madison savings and loan. If Mr. Clinton sees "a lot of evidence" that Mr. Starr is doing otherwise, he should share it.

"Obvious" might better describe the questions that Mr. Starr has put to Susan McDougal and for which, to avoid answering, Mrs. McDougal has gone to jail in contempt of court. Mr. Starr wanted to know whether Mr. Clinton knew about illegal loans and whether he testified truthfully about them during the trial in which the McDougals themselves were convicted. Those, on their face, do not seem difficult questions to answer.

"Obvious," too, is Mr. Clinton's impropriety in dangling the

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possibility of a presidential pardon before Mrs. McDougal, who faces two years in prison for her four felony convictions. When Mr. Lehrer asked the president about a second-term pardon for her or other Whitewater-related figures, Mr. Clinton said he'd "given no consideration to that." Then he went on to describe the "regular process" for presidential pardons and to say that Whitewater-related cases "should be handled like others."

But these Whitewater cases are not like any other, because those seeking pardons may have information bearing on Mr. Clinton himself or on his wife. Before the election, Mr. Clinton should make clear that, if reelected, he will not subvert the judicial process through attacks on the special prosecutor or by abusing the president's pardon power. That much should be obvious.

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KEY WORDS: **EDITORIAL (UNSIGNED)**

EDITION: FINAL

Word Count: 461
9/27/96 WASHPOST A24
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Kaplan Leitch re
where to go tomorrow @ 11am

- 10th St?
- Ask for you? - Rm 4 ___?

4237

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Charles

BY FACSIMILE AND MAIL

February 16, 2005

Miss Harriet Miers
Counsel to the President
The White House
Washington, D.C. 20502

Re: Brett M. Kavanaugh
United States Court of Appeals, District of Columbia

Dear Miss Miers:

The purpose of this letter is to confirm the recommendation of this Committee previously given as to the nomination of Brett M. Kavanaugh for appointment as Judge of the United States Court of Appeals for the District of Columbia.

A substantial majority of the Committee is of the opinion that Brett M. Kavanaugh is Well Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia. A minority of the Committee is of the opinion that Brett M. Kavanaugh is Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia.

Yours very truly,

Thomas Z. Hayward, Jr.
Chair

TZH:mer

cc: Daniel J. Bryant, Esq.
ABA Standing Committee on Federal Judiciary

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BY FACSIMILE AND MAIL

February 16, 2005

Miss Harriet Miers
Counsel to the President
The White House
Washington, D.C. 20502

Re: Thomas Beall Griffith
United States Court of Appeals, District of Columbia

Dear Miss Miers:

The purpose of this letter is to confirm the recommendation of this Committee previously given as to the nomination of Thomas Beall Griffith for appointment as Judge of the United States Court of Appeals for the District of Columbia.

A majority of the Committee is of the opinion that Thomas Beall Griffith is Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia. A minority of the Committee is of the opinion that Thomas Beall Griffith is Not Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia.

Yours very truly,

Thomas Z. Hayward, Jr.
Chair

TZH:mer

cc: Daniel J. Bryant, Esq.
ABA Standing Committee on Federal Judiciary

490480/C/1

Brett M. Kavanaugh
3633 M Street, N.W., #3A
Washington, DC 20007

November 19, 2004

The Honorable Orrin G. Hatch
Chairman of the Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Attached please find responses to written questions from Members of the Committee.

Sincerely yours,

Brett M. Kavanaugh

Brett M. Kavanaugh

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Leahy

1. In your testimony before the Senate Judiciary Committee, you indicated that the work on judicial nominations was divided in the Office of White House Counsel among several Associate Counsels. You testified that you had "different areas of the country that we would work on and different nominations that we'd work on." You mentioned that California and Illinois were among the states you worked on, and that you "worked on certain circuit court nominations." A) Could you please list your particular geographic areas of responsibility, whether you covered just district or circuit court nominations or both within those areas, and the names of all of the circuit court nominees you worked on? B) What percentage of your time in the office would you say was devoted to judicial nominations? C) What other matters did you work on during your time in the Office of White House Counsel?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

The time I devoted to the judicial nomination and confirmation process varied but probably was about half my time when I worked in the Counsel's office. I also worked on a variety of ethics issues, legal policy matters such as victim compensation and liability issues, separation of powers issues, and records issues, among other matters.

2. A) Now that the ABA is no longer involved in the decision about whether or not to nominate someone for federal court vacancies, are there any other individuals or groups with whom the nominees are asked to meet as these choices are being made? B) In particular, have potential nominees been or are they now advised or sent to meet with or interview with individuals or groups outside of the government as part of the judicial selection process?

Response: No.

3. Did you or anyone else in the Office of White House Counsel seek advice or information or receive advice or information from any individuals or groups outside of the government when deciding on a judicial nominee? A) Were any White House officials from outside the Office of the White House Counsel involved in decisions on judicial selection? B) If so, who and from what offices? C) In particular, was Karl Rove involved in the judicial selection process, and if so, can you describe in detail his involvement?

Response: Outside groups and individuals – including Senators, Representatives, Governors, other state and local officials, local bar officials and lawyers, and members of interest groups – would often support or recommend candidates. That is traditional and appropriate. In addition, the Department of Justice conducts a thorough vetting process during which many individuals familiar with the candidate provide input regarding a candidate's qualifications and suitability for the federal bench. As Judge Gonzales previously has explained, judicial nomination recommendations are provided to the President by the judicial selection committee, which is chaired by Judge Gonzales and includes individuals from the White House and the Department of Justice. The President himself makes the decision in all cases to submit a particular judicial nomination to the Senate.

4. Did you work with others inside the government, including the Department of Justice and Senate Republicans and their staffs, to determine how to prepare the nominees or work to secure their confirmation?

Response: Yes, that is an important part of the work of the Counsel's office and the Department of Justice.

5. In your hearing testimony, you indicated that part of your responsibilities included "public liaison" work. That means working with groups from outside of the government. A) Did you have a regular meeting set up with outside groups or individuals? B) If so, please list the names of the outside groups or individuals with whom you regularly met, how often the meetings took place, and the nature of those meetings. C) If not, did you meet at any time with any outside groups or individuals about judicial nominations? D) Apart from groups or individuals involved in regular meetings, with which other outside groups or individuals have you met about judicial nominations? E) For each of these groups or individuals, please tell me how often you would meet with them and the nature of those meetings.

Response: We met with members of a wide variety of groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

6. In your hearing testimony you indicated there was a "team" that worked in Senator Hatch's office and Senator Frist's office on nominations. A) Who was on that team during the time you worked in the Office of the White House Counsel? B) How often would that team meet? C) Where did that team meet? D) What specifically was the work of that team?

Response: The people who worked on issues relating to judicial confirmations included the White House Counsel's office lawyers, staff of the White House Office of Legislative Affairs, other White House staff, Department of Justice lawyers and personnel, Members and staffs of the Senate Judiciary Committee, and Senate leadership Members and staffs, among others. As I understand it, previous Administrations of both parties operated in the same manner with respect to judicial nominations and confirmations. The White House and Department of Justice met often with Senate staffers in order to maintain communications regarding the status of individual judicial nominations and to discuss upcoming hearings, votes, or other issues. Meetings would occur in a variety of government rooms depending on convenience and availability.

7. At your hearing the subject of consulting on nominations to the D.C. Circuit came up. Did you or anyone involved in the judicial nominations process for President Bush ever discuss nominations to the D.C. District Court or the D.C. Circuit with any elected officials from the District of Columbia?

Response: I am aware that the Administration consults with Mayor Williams on a variety of issues affecting the District of Columbia, including local judges. I do not know whether he or other local elected officials have been consulted for vacancies on the D.C. Circuit Court of Appeals. I believe there has been consultation on certain D.C. District Court nominations.

8. President Clinton nominated several individuals to the circuit and district courts with no close ties to him or other Democrats but who were championed by Republican Senators because they were either registered Republicans or close friends of the Senator of the other party. For example, Judge Richard Tallman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gordon; Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator John Kyl, who struck the names of Democratic candidates; Judge William Traxler, who was put on the district court by President Reagan, was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond; Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Republican Senator Connie Mack. Please list the names of all of the circuit court nominations President Bush has made who were first recommended to you by a Democratic Senator.

Response: Recommendations for district and circuit nominees come to the Administration from many sources, and it is often difficult to identify the "first" recommendation of a particular candidate. I can say that there are numerous court of appeals nominees of President Bush who had the support of home-state Democratic Senators, including: Edith Brown Clement, Consuelo Callahan, Allyson Duncan, Dennis Shedd, Reena Raggi, Barrington Parker, Lavenski Smith, Steve Colloton, Michael Melloy, Carlos Bea, Richard Clifton, and Jay Bybee. We are proud of the strong support these court of appeals nominees received from the Democratic Senators in their home states.

9. I detailed the excellent credentials and experiences of Allen Snyder and Elena Kagan at your hearing. Why do you think you should be confirmed for a seat on the D.C. Circuit when Mr. Snyder and Ms. Kagan, about whom no objections of any substance were ever raised, were rejected by this Committee for that same position?

Response: I have met and think very highly of Mr. Snyder and Dean Kagan. The President has consistently stated that every judicial nominee deserves an up or down vote in the Senate, regardless of who is President. It is the Senate's decision whether to confirm or reject any individual nominee.

10. As you know there has been a lot of controversy surrounding the appointment of members to certain statutorily created bi-partisan boards and commissions. The White House gives a tortured interpretation to the statutes governing these bodies, claiming they permit the President to name not only the members of his political party, but also the members not of his political party, insisting that there is no requirement that the leadership of the political party opposite the President make these choices. Frankly, we find these contentions absurd and contrary to the letter and spirit of the law. A) Do you agree with the President's interpretation? B) What was your role in helping the President reach the conclusion that Democrats are not to pick nominees for Democratic seats?

Response: I am not familiar with any ongoing dispute of this sort.

11. Historian Richard Reeves said about Executive Order 13233 that, "[w]ith a stroke of the pen on November 1, President Bush stabbed history in the back and blocked Americans' right to know how Presidents [and Vice Presidents] have made decisions," and that the Order "ended more than 30 years of increasing openness in government." You testified at your hearing that you believed the "initial concern" by historians and archivists about Executive Order 13233 was "based on a misunderstanding." You indicated there were meetings with historians to discuss and explain the Order and that historians have found them useful. With which historians have you met and when did you meet with them?

Response: I do not have a full list of the individuals who attended such meetings. Professor Martha Kumar organized the groups that attended the meetings. They occurred about every six months while I was in the Counsel's office.

12. As you know, after Executive Order 13233 was promulgated, numbers of prominent historians and the major associations of historians, including the American Historical Association, and the Organization of American Historians, filed suit in federal court challenging the validity of the Order. Even after the meeting or meetings you held with them, they continued with the lawsuit. Indeed, one major plaintiff, the American Political Science Association, joined the suit after your meetings began. Their criticism continued as well. While the historians were complimentary of your personal demeanor in the initial meeting you had with them, they continued to be seriously concerned. For example, Robert Spitzer, president of the Presidency Research Group of the American Political Science Association said, "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . the situation continues to be deeply troubling." The late Hugh Graham, a Reagan historian and professor emeritus at Vanderbilt University, described the Executive Order as "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave." Your testimony about the historians seemed calculated to brush off this sort of criticism. A) Do you deny that the Order continues to be unacceptable to most historians? B) How can you reconcile what you told us at your hearing with the very real concerns that America's historians continue to have?

Response: I know some historians are not satisfied with the rules that apply to Presidential records. I believe their concern stems from the Presidential Records Act and the Supreme Court decision authored by Justice Brennan in Nixon v. GSA. I know some of them have expressed and continue to express concerns about the Order, but we respectfully believe that any continuing concerns in fact stem from the Act itself and the Supreme Court decision, not from the Order.

13. At your hearing, you testified that the Bush Administration's Executive Order 13233 ("Bush Order"), which you authored, was nothing more than an order that set forth "procedures" for complying with the Presidential Records Act ("PRA"). In fact, according to many scholars, journalists, and others, the Bush Order goes far beyond mere "procedures" and in effect significantly impedes the release of presidential records intended to be released under the PRA and in effect eviscerates important parts of the PRA, increasing government secrecy. Specifically they are concerned about the "demonstrated, specific need" language, even after the end of the 12-year period, about Sections 3(a)-(d) of the Bush Order which effectively provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public, about Sections 3(d) and 4 of the Bush Order, which require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances, about Section 3(d)(2) of the Bush Order which empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national

security would be affected by public release, about Section 10 of the Executive Order which permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability, about Section 11 of the Bush Order which allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to records under the PRA, and about Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. In light of these specific concerns, can you explain in detail the basis for your claim that the Order is procedural in nature, and is merely complying with the PRA?

Response: The Order faithfully implements the Presidential Records Act and Supreme Court case law. It establishes procedures to govern release of records consistent with the statute and the Supreme Court precedent. The Order does not set forth the circumstances under which an assertion of privilege should be made or would be successful. The issues identified in this question are either procedural or stem from the Act itself or court decisions on executive privilege.

14. At your hearing, you also testified that there was a "need" for the Bush Order to "establish procedures" under the PRA because the end of the 12-year period of repose for former President Reagan's records was coming to an end, that both the current president and the former president could assert privilege with respect to the records under Nixon v. GSA, and that "[n]o one really had a good idea how this was going to work." But the Congress specifically delegated to the National Archives and Records Administration ("the Archivist") the authority to adopt regulations, and after notice and comment, to adopt all rules necessary to carry out the PRA's provisions, which the Archivist did. A) In light of the existing regulations under the PRA, why did you and others at the White House deem it necessary to adopt the Bush Order, which occurred without any opportunity for public notice and comment? B) During the period of more than 6 months when the Bush White House was notified about the Reagan records but before the Bush Order, please describe what if any consultation occurred with the Archivist concerning any alleged need for additional regulations.

Response: As you noted, the 12-year period was coming to an end as President Bush took office. This was the first time that the Act's 12-year period had expired for records subject to the Act. The Order itself provides that it was issued to establish procedures to govern review of the records. We consulted often with the National Archives and Records Administration (NARA) during the drafting process, and Archivist Carlin testified to the Congress that NARA had unprecedented access and opportunity to share their experiences and views.

15. In his introduction at your hearing, Senator Cornyn mentioned that the two of you had worked on a case together. A) What was the case? B) In what capacity were you involved in it? C) How did you come to be involved in the case? D) Why did you choose to be involved? E) Have you helped prepare others for Supreme Court argument? F) If so, who, and for what cases? G) For each one, please explain how you became involved and why.

Response: He was counsel in Santa Fe Independent School District v. Doe, and I participated in a moot court session when he prepared for oral argument. I also submitted an amicus brief on behalf of my clients, Congressmen Largent and Watts. It is very common for lawyers who will be appearing before the Supreme Court to participate in moot court sessions prior to their arguments. Often, attorneys who have submitted amicus briefs are especially knowledgeable about the issues and will therefore participate in such moots. While I have participated in dozens of moot courts over many years, I do not have a list.

16. In your hearing testimony you mentioned pro bono work you had done, and that it proved you would not be a partisan or ideological judge. Please list all of the pro bono legal work you did while you were in private practice and explain how each project demonstrates your ability to be fair to all litigants.

Response: I have worked in public service for 11 of the 14 years since I graduated from law school. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work, including on the Elian Gonzales, Santa Fe, Good News Club, and Adat Shalom cases, as well as on a Florida school choice litigation matter. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to be balanced and fair. The American Bar Association evaluates the fairness of judicial nominees, among other considerations, and rated me "well-qualified" to be a judge on the D.C. Circuit.

17. On September 20, 2001, did you and others in the Administration present a proposal to Congressional staff that called for liability protection for the airline carriers involved in the September 11, 2001 attacks, including limitations on punitive damages against the air carriers, attorney fee caps on victims' attorneys and offsets of victim awards in court for any emergency or disaster relief payments to these victims?

Response: In the aftermath of September the 11th, many of the lawyers in the Counsel's Office were assigned to the myriad legal issues that arose out of the attack. Among other matters, I worked on liability and compensation issues involving the airlines and the victims of the attack and their families. I was involved in presenting an Administration

proposal on the liability issues. I believe the Administration proposal in many respects resembled the final legislation with respect to liability issues.

18. Did this proposal from the Administration, presented on September 20, 2001, to provide liability protection for the airline carriers involved in the September 11, 2001, attacks also contain any compensation program for the victims of the September 11, 2001 attacks?

Response: I believe the issue of victim compensation was initially separate from the issues of airline solvency and liability. The two issues were both addressed in the final bill.

19. During subsequent negotiations on this proposal to provide liability protection for the airline carriers involved in the September 11, 2001, attacks, did you initially oppose providing any compensation program for the victims of the September 11, 2001 attacks?

Response: On behalf of the Administration, Director Daniels expressed support for the final bill in a meeting in the Speaker's office on the night of September 20. I was present for that meeting. The Administration (and I as a representative of the Administration) supported compensation for the victims and families of the victims of the September 11th attacks. The Administration's general position was and has been that victims of terrorism should receive equal compensation and that families of wealthy victims usually should not receive more money than families of poor victims. The Administration has wanted these programs to be consistent with other federal compensation programs and has sought to ensure that they can be administered in a fair and expeditious manner.

20. In your hearing testimony, you explained that one of the reasons you want to be a judge is because you have a "commitment to protecting rights and liberties of the people." What in your record demonstrates a commitment to protecting the rights and liberties of all people?

Response: I have a strong commitment to public service and have spent 11 of the 14 years since I graduated from law school in public service. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to protect the rights and liberties of the people. The American Bar Association assesses the commitment to protecting the rights and liberties of all people when it evaluates judicial nominees, and the ABA concluded that I was "well-qualified" to be a judge on the D.C. Circuit. I have always tried to work hard and do my best for the public good, and I would continue to do so should I be confirmed to serve on the court of appeals.

21. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Charles Pickering. Pickering has called the fundamental "one-person one-vote" principle recognized by the Supreme Court under the Fourteenth Amendment "obtrusive." Fairley v. Forrest County, 814 F.Supp. 1327, 1330 (S.D. Miss. 1993). In order to redress serious problems of discrimination against African American voters in some cases, the courts (including the Supreme Court and the Fifth Circuit) have clearly recognized the propriety and importance of creating majority-black districts as a remedy under appropriate circumstances. Judge Pickering, however, has severely criticized this significant form of discrimination relief. In one opinion, he called it "affirmative segregation." Bryant v. Lawrence County, 814 F. Supp. 1346, 1351 (S.D. Miss. 1993). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? C) If so, did you express those concerns to your colleagues or to your superiors? D) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on voting rights. Was that your view? E) Why would you want to have someone with those views on the Fifth Circuit? F) Do you agree with Judge Pickering's views on voting rights as expressed above?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Judge Pickering addressed these questions at his hearings. I know that Judge Pickering received a well-qualified rating from the American Bar Association and is supported by many prominent African-Americans and Democrats in Mississippi. He has the strong support of both home-state Senators.

22. In two cases dismissing claims of race discrimination in employment, Pickering used identical language striking a similar theme. He wrote in both that "this case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority" and that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities." See Seeley v. City of Hattiesburg, No.2:96-CV-327PG (S.D. Miss., Feb. 17, 1998) (slip op. at 12); Johnson v. South Mississippi Home Health, No. 2:95-CV-367PG (S.D. Miss., Sept. 4, 1996) (slip op. at 10). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on employment discrimination. Was that your view? D) Why would you want to have someone with those views on the Fifth

Circuit? E) Do you agree with Judge Pickering's views on employment discrimination cases as expressed above?

Response: See response to question 21.

23. In a 1994 case in his courtroom, U.S. v. Swann, Judge Pickering has admitted that he engaged in *ex parte* communication with the Department of Justice, including one high-ranking official who was a personal friend, in order to reduce the sentence of a convicted cross-burner. It has been argued that Judge Pickering was just trying to address the disparate sentences received by the three defendants in the case, and that he believed Mr. Swann, who says [he] was not the "ringleader" in the cross burning, was being unfairly punished. In fact, all three of the defendants were found guilty, and it was Mr. Swann's wood, gasoline, truck and lighter that were used to build, douse, transport and ignite the cross on the lawn of an interracial couple. Mr. Swann, the only competent adult of the trio of perpetrators, was also the only defendant who rejected the plea offered by the government. He was convicted by a jury of his peers of all three counts brought by the Department of Justice, including one that required a five-year mandatory minimum sentence. This sentence was legislated by Congress and the judge had no discretion to depart from it. A) Were you or anyone else involved in his selection, nomination or hearing preparation aware of Judge Pickering's conduct in this case before he was nominated? B) If so, did you still recommend his nomination? If not, when did you become aware of it, and once you became aware of it did you recommend that he withdraw his nomination? C) Do you think it is in the public interest to have a judge on the bench who engaged in what several legal ethics experts have agreed was unethical behavior?

Response: See response to question 21.

24. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Priscilla Owen. She was the target of criticism from her conservative Republican colleagues. In FM Properties v. City of Austin, the majority calls her dissent "nothing more than inflammatory rhetoric." In Montgomery Independent School District v. Davis, the majority (which included your former boss, then-Justice Alberto Gonzales and two other Bush appointees) is quite explicit about its view that Owen's position disregards the law, saying that "nothing in the statute requires" what she says it does, and that, "the dissenting opinion's misconception . . . stems from its disregard of the procedural elements the Legislature established," and that the "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the board. . ." In In re Jane Doe, the majority includes an extremely unusual section explaining its view of the proper role of judges, admonishing the dissent joined by Justice Owen for going beyond its duty to interpret the law in an attempt to fashion policy, and in a separate concurrence, Justice Gonzales says that to the construe law as the dissent did "would be an unconscionable act of judicial activism." A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone who had been criticized by her own colleagues for misconstruing the law and engaging in judicial activism to

the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Owen, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit. Was that your view? D) Why would you want to have such an activist judge on the Fifth Circuit?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Justice Owen addressed these questions at her hearing. I know that Justice Owen received a unanimous well-qualified rating from the American Bar Association and is supported by three former Democrat Justices on the Texas Supreme Court, as well as more than a dozen past Presidents of the Texas State Bar. She has the strong support of both home-state Senators.

25. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Janice Rogers Brown. According to her questionnaire, her contact with the office began in the spring of 2001. Among the views that have made her nomination controversial was her statement that the Supreme Court's decisions 65 years ago to uphold humanitarian New Deal reforms – what she calls the "Revolution of 1937" – constituted a "disaster of epic proportions." Those 1937 decisions included rulings that upheld minimum wage laws, unemployment compensation laws, federal guarantees for collective bargaining, and the federal social security program. [Minimum wage laws – West Coast Hotel v. Parrish, 300 U.S. 379 (1937); federal unemployment compensation laws – Steward Machine Company v. Davis, 301 U.S. 548 (1937); collective bargaining guarantees – Jones and Laughlin Steel v. NLRB, 301 U.S. 1 (1937); federal social security system – Helvering v. Davis, 301 U.S. 619 (1937)] A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Brown, and I include you in that group, must have considered it in the public interest to have someone with those views on the D.C. Circuit, where she would be in a strong position to affect all of those programs. Was that your view? D) Why would you want to have someone with those views on the D.C. Circuit? E) Do you view the Supreme Court decisions she discussed as "disasters?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. Justice Brown and I were nominated at the same time for the same court. I also believe that Justice Brown addressed these questions at her hearing.

26. Justice Brown ruled in a dissenting opinion that any regulation constitutes a regulatory "taking" – hence requiring compensation – if it "benefit[s] one class of citizens [in that case, low income tenants] at the expense of another [in that case, landlords]." San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 126 (2002). Under that standard, virtually any law to protect certain citizens, such as environmental, health and safety, consumer protection, nursing home reform, or antidiscrimination standards, could be challenged. This of course was not just a

speech by Justice Brown; it was a dissenting opinion and a purported interpretation of the law. A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the DC Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

Response: See response to question 25.

27. Justice Brown has made some very radical statements in her opinions, dissents and speeches. For each of the statements below, please answer the following questions: A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the D.C. Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

> **"Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system permits them to extract...Big government is...[t]he drug of choice for multinational corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens."**
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> **"Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible." "A Whiter Shade of Pale," Speech to Federalist Society (April 20. 2000) ("Federalist speech").**
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> **"[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens." "Fifty Ways to Lose Your Freedom," Speech to Institute of Justice (Aug. 12, 2000)("IFJ speech").**
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> **"[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco...I would find the HCO [San Francisco Residential Hotel Unit Conversion and Demolition Ordinance] preempted by the Ellis Act and facially unconstitutional....Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the**

legitimacy of the government.... The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion." [Dissenting opinion in San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 120, 128-9 (Cal. 2002).]

Response: See response to question 25.

28. One of the nominees submitted during your tenure, recently given a recess appointment after his nomination failed on the Senate floor, is William Pryor. Among many other remarkable statements, Mr. Pryor praised as "sublime" and "brilliant" a 2001 Federal District Court decision, West Side Mothers v. Havemann, later reversed on appeal, that would deny patients a day in court to enforce their right to treatment in accord with Federal Medicaid standards – a right that has clearly existed dating back to the earliest days of the Medicaid program. That would include, for example, a large proportion of all Americans who must now reside in nursing homes. A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on this program. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you view the district court decision in West Side Mothers to be "sublime" or "brilliant?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Pryor addressed these questions at his hearing. I know that Judge Pryor received a qualified rating from the American Bar Association, has been elected and respected as Attorney General in Alabama, and is strongly supported by many Democrats in Alabama. He also has the strong support of both home-state Senators.

29. In a July 2000 speech Pryor stated: "I will end with my prayer for the next administration: Please God, no more Souters." Bill Pryor, "The Supreme Court as Guardian of Federalism," before the Federalist Society and Heritage Foundation (July 11, 2000). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you agree with Mr. Pryor that no more Supreme Court Justices like David Souter should be appointed? If not, why not?

Response: See response to question 28.

30. Mr. Pryor has criticized the Supreme Court's 7-1 ruling that the denial of admission to women by the Virginia Military Institute, a state-supported public university, violated the Equal Protection Clause. He said "[t]he Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on equal protection. Was that your view? D) Why would you want to have someone with those views on equal protection and equal treatment of women on the Eleventh Circuit? E) Do you agree with Mr. Pryor that the Supreme Court's decision in the VMI case represented the triumph of political correction over Constitutional principles?

Response: See response to question 28.

31. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Carolyn Kuhl. An *amicus curiae* brief that Kuhl co-authored when she served as Deputy Assistant Attorney General urged the Supreme Court to overturn Roe v. Wade, stating that: "the textual, historical and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, at 10 (July 15, 1985) (LEXIS pagination). The brief also asserted that the important principle of stare decisis should not stop the Court from overturning Roe. The brief claimed that "*[s]tare decisis* is a principle of stability. A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment." Id. at 10 (emphasis added). A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the Ninth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Kuhl, and I

include you in that group, must have considered it in the public interest to have someone with those views on the Ninth Circuit, where she would be in a strong position to affect the law on privacy and reproductive rights. Was that your view? D) Why would you want to have someone with those views on the Ninth Circuit? E) Do you agree with the views Judge Kuhl expressed in that brief? F) Do you believe Roe v. Wade is so flawed that it ought to be overturned?

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Kuhl addressed these questions at her hearing. I know that Judge Kuhl received a well-qualified rating from the American Bar Association and is supported by many prominent Democrats in California, such as Vilma Martinez. She also has the strong support of a very large number of prominent women judges and women lawyers in California, many of whom are Democrats.

32. Mr. Kavanaugh, in your work on judicial nominations in the White House Counsel's Office, I am sure you recall the February 2003 letter from the White House asserting that there was no "persuasive support in the history and precedent of judicial appointments" for our request for memos written by Mr. Estrada at the Justice Department. I found that letter to be completely inconsistent with the level of cooperation shown by other administrations toward such requests of Members of this co-equal branch. I also put into the Congressional Record excerpts of correspondence between President Reagan's Justice Department and the Senate Judiciary Committee demonstrating that the administration agreed to share legal memos written by and to Robert Bork and William Rehnquist during their judicial nominations—even though they had served for years as judges--and I also noted other examples in which legal memos were shared during nominations for lifetime or short-term posts, such as Brad Reynolds's nomination. A) Did you ever look at the correspondence between the Department of Justice and the Senate in the Bork, Rehnquist, Reynolds or other nominations? B) If you did examine that correspondence, then you must be aware that past administrations provided the Senate with numerous legal memos of nominees while your administration provided not a single one by Mr. Estrada. Even your administration provided the Senate EPW Committee with legal memoranda of Jeffrey Olmstead in connection with his short-term appointment. Please explain why the legal memos of an attorney in the White House Counsel's Office could be shared with the Senate but your administration refused to provide any legal memos by Mr. Estrada. C) We know that legal memos written by Carolyn Kuhl, when she was a legal advisor to the Attorney General and recommended that Bob Jones University be given tax exempt status despite its express policy of racial discrimination, were provided to Congress in the aftermath of that failed initiative. Please explain why her legal memos and those of her colleagues at the Justice Department could be shared with Congress but not any of the memos of Mr. Estrada. D) I am sure you will cite the letter from former Solicitors General. As you know, their policy preference to provide absolute protection to deliberations in their former office is not embodied in any statute or in the Constitution and, in fact, the disclosure to the Senate of numerous memos

written to Robert Bork and by him in the Solicitor General's Office (as well as other past disclosures) did not chill deliberations. As the Supreme Court noted in the Nixon tapes case, it is quite *unlikely* "that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure." U.S. v. Nixon, 418 U.S. 683 at 712 (1974); see also Clark v. United States, 289 U.S. 1, 16 (1933); McGrain v. Daugherty, 273 U.S. 135 (1927). The interest in candid deliberation does not create an absolute privilege against disclosure in response to a request of Members of a co-equal branch. What can you say to assure the Senate that you would give due respect to the prerogatives of the Senate and not just continue to favor maximizing this Administration's penchant for secrecy if you were confirmed?

Response: I believe that the Administration has addressed this issue in many letters to the Committee. Beyond that, it would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I know that Miguel Estrada received a unanimous well-qualified rating from the American Bar Association and was supported by many prominent Democrats and Hispanic organizations. I would faithfully follow the relevant Supreme Court precedent on the separation of powers and the prerogatives of the Executive Branch and the Senate.

33. Mr. Kavanaugh, you had significant responsibilities on judicial nominations in the White House Counsel's Office during much of the same period that Manuel Miranda worked for Senate Majority Leader Bill Frist's lead attorney on nominations and when Mr. Miranda worked as counsel to Senator Hatch on the Senate Judiciary Committee. You testified that during the years you worked on judicial nominations you met with Mr. Miranda and others on the Republican team "to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in." Mr. Miranda has asserted publicly that he took Democratic memos in part to find "information about when confirmation hearings would be held." A) From December 2001 through December 2002, did Mr. Miranda ever tell you when he thought Democrats would schedule hearings on the President's judicial nominees in advance of the public notice of hearings? B) Did he ever tell members of the White House team when he thought hearings would be scheduled or the likely timing of hearings throughout the year? C) Did other Republican Senate staffers provide you or your colleagues with such information or speculation? D) Did you ever inquire about the source of such speculation? How accurate was the speculation?

Response: See the response to questions 33-58 after question 58 below.

34. A) How often did you speak with Mr. Miranda from the time Senator Frist became the Majority Leader in late 2002 through May 2003, when you became staff secretary to the President? B) How often did you receive e-mail communications from him during this period? C) How often did you see him at meetings, either on the Hill or at the White House? Please provide the same information for the period December 2001 through December 2002.

35. You testified that Mr. Miranda did not ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee or any information that you believed or were led to believe was obtained or derived from Democratic files. A) Did Mr. Miranda ever discuss with you what the Democratic strategy on nominations was during the spring of 2003? B) Did he suggest to you or to others on your team that Democrats would filibuster any of the President's judicial nominees? C) Did you or your team have confidence that his speculations were accurate? D) Did you find, perhaps even in retrospect, that his intelligence was untoward or dubious?

36. One of Mr. Miranda's responsibilities during the period when your responsibilities overlapped was managing the Republican strategy during the floor fight on the nomination of Miguel Estrada to the court to which you are now nominated. A) Were you in daily contact with Mr. Miranda during this period? B) If you were not, which members of your team were responsible for or assisted with communications with him about the strategy for winning the confirmation of Mr. Estrada?

37. A) Did Mr. Miranda ever convey to you or any member of the White House staff the allegation that Mr. Estrada was being opposed because he was Latino, or similar words? B) Did you ever discuss this issue or allegation with Mr. Miranda or any other Senate staffer, including Senator McConnell's aide John Abegg, who was mentioned in the SAA report as providing at least one of the stolen computer files to Senator Hatch's chief nominations counsel, Rena Comisac, according to her statement? C) Did you ever discuss this issue or allegation with any Republican senate staffer or Senator?

38. A) Prior to the Bob Novak column published on February 9, 2003, did you hear that Democratic Senators had met in January regarding the decision to filibuster the nomination of Miguel Estrada? Mr. Novak has admitted writing a column published that day based on computer files that were stolen by others. B) Did you ever discuss the issue of Mr. Estrada's nomination or the filibuster with Mr. Novak? C) Did he ever indicate to you that he had a source or had seen a purported Democratic strategy memo on the Estrada filibuster? D) Did Mr. Novak ever speak with you or any of your colleagues in advance of the date that column was published about the decision to filibuster the Estrada nomination?

39. A) At any time from January 30th until November 14, 2003, did you ever hear that such a meeting occurred? B) Prior to November 14, 2003, did you hear that there was a computer file about any such meeting? According to reports, Senator Kyl's counsel Joe Matal received copies of some of the Democratic computer files from the Wall Street Journal on November 14, 2003. C) Were you or anyone at the

White House given copies of the purported Democratic computer files on November 14 or November 13 by staff of the Wall Street Journal or any other person?

40. A) Did you or anyone at the White House receive copies of any purported Democratic computer file, electronically or in hard copy, prior to November 14, 2003 or at any time since then? B) If your answer is "no," how do you know that no one on the White House staff saw such a memo? Mr. Gonzales wrote a letter in response to a letter of inquiry from Senator Leahy stating that the White House would not conduct an internal investigation to determine whether any of the stolen computer files were given to White House aides. C) Did you personally conduct any inquiry into whether any attorney or staff member of the White House received any of the stolen memos?

41. A) Please provide a list of the names of every staff member who worked on judicial nominations at the White House from December 2001 through December 2003, during the period that Mr. Miranda worked at the Senate and was stealing and reading Democratic computer files. Also, please indicate who from the Justice Department worked with you on nominations during this period.

42. According to the SAA report, Mr. Miranda directed that Jason Lundell provide computer files to the Executive Director of the Committee for Justice, Sean Rushton. You testified that you thought you "met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees." A) Please describe how you first met Mr. Rushton, how often you have met with him or spoken with him about nominations, and how often you have received e-mail communications from him about judicial nominations.

43. A) How often did you speak or meet with, or receive e-mail communications from, the leader of Committee for Justice, C. Boyden Gray, about judicial nominations issues? B) How often did you or members of the White House nominations team meet with or speak with either Mr. Rushton or Mr. Gray during 2003? The Committee for Justice has been a strong defender of Mr. Miranda's role in taking Democratic computer files, which is understandable I suppose since they received computer files at Mr. Miranda's direction according to Mr. Lundell. C) Please describe for the Committee any contacts you had with Mr. Gray, Mr. Rushton, or Mr. Lundell by phone, by e-mail, or in person during your work on judicial nominations.

44. A) Did you keep a telephone log, appointment book or any other document that makes any reference to Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Kay Daly (whose organization published some of the purported stolen computer files)?

45. Mr. Gray and Mr. Rushton's group, Committee for Justice, has held fundraisers with White House insiders like Karl Rove as well as members of the

Bush family, including the President's nephew. You testified that you had attended one of their fundraisers but you were not sure if you made a donation. A) Which fundraiser or fundraisers of theirs did you attend? B) Did you ever donate any money to this organization? C) Have you ever attended any other event sponsored or co-sponsored by this organization? Please be specific.

46. During the spring of 2003, the Committee for Justice began an attack ad campaign basically accusing Senate Democrats of opposing Mr. Estrada because he is Latino, an accusation that seems to be premised on Mr. Miranda's claims. A) Were you involved in any way in the creation of that ad or in any discussion about the benefits of any such ad campaign? B) Did you preview that ad before it was first aired? C) Did you ever discuss that ad, orally or in writing, with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? Did you ever discuss that ad with any other Republican Senate staffer or Senator?

47. During the spring of 2003 did you ever discuss the nomination of Priscilla Owen of Texas with Mr. Miranda? B) Did you ever discuss the Democratic or likely Democratic strategy with him on this nomination that was so important to the President, because she's from Texas, and to Mr. Rove, who was her state judicial election campaign strategist and fundraiser in the 1990s? C) Did you have any meetings with Mr. Miranda about this nomination? D) Did you have any e-mail communication about this nomination with him? E) Did you have any telephone conversations with him? F) Who on the White House staff was involved in the Owen nomination and floor strategy? G) Did you ever discuss, orally or in writing, Senator Kennedy's views on Justice Owen with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? With Mr. Novak? With Mr. Rove? Did you ever discuss this issue with any Republican in the Senate?

48. A) In April 2003, did you ever speak with any Republican in the Senate or any outside group or press about the issue of Democratic filibusters based on "substance as opposed to process?" B) Did you hear that or any similar phrase used by Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Rushton, Mr. Gray, or Ms. Daly?

49. A) Did you work with Mr. Miranda in his role in getting Majority Leader Frist to schedule a day of "constitutional debate" on the filibuster in March of 2003, when Vice President Cheney presided as President of the Senate? B) Did you discuss with Mr.Miranda, Mr. Abegg or any other Republican staffer strategies for overcoming the Democratic filibuster last spring? C) Were any outside organizations present at or involved in those discussions? D) Did you or any of your colleagues discuss that issue, orally or in writing, with Ms. Comisac or Mr. Dahl?

50. A) Were you involved in any way in the decision of Mr. Frist to hire Mr. Miranda as his chief aide on judicial nominations? B) Were you asked about

whether you thought he would do a good job by anyone on his staff ? C) Did you recommend him? D) Did Mr. Gray, Ms. Daly or any other leader of conservative groups commend Mr. Miranda's work on judicial nominations to you?

51. A) In the year 2002, when Mr. Miranda worked on the Judiciary Committee, did you have any communication with Mr. Miranda in 2002 about the nomination of Judge Dennis Shedd to the Fourth Circuit? B) Who on the White House staff was involved in the Shedd nomination, during the Committee consideration and the floor consideration? C) Which Senate staffers did you or White House staff work with on this nomination? D) Who worked on this nomination at the Justice Department? E) Did Mr. Miranda ever mention to you his views on the pace of consideration of the Shedd nomination? F) Did you ever have any communication, orally or in writing, about this matter with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly? G) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? H) Did you ever see any proposed questions for Judge Shedd that might be asked by Senate Democrats in advance of that hearing? I) Were you aware prior to Judge Shedd's hearing that there were concerns about Judge Shedd's civil rights record? How so?

52. A) From December 2001 through November 14, 2003, did you ever hear or learn that any Republican staffer claimed to have a Democratic mole or source or a "conscience stricken" Democrat who was providing Mr. Miranda or any other staffer with information about the hearing schedule or Democratic strategy? B) During this period did you ever hear a claim that there was a supposed computer glitch or security weakness that allowed Democratic computer files to be spied upon, read, stolen, printed or downloaded, prior to November 14, 2003?

53. A) Did you attend the nomination hearing for Miguel Estrada? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Who in the White House and at Justice worked on that nomination at that stage? E) Did any of them get that information? How do you know? F) Did you ever see or hear about any possible questions from Senate Democrats for Mr. Estrada that might be asked, in advance of that hearing?

54. A) Did you attend the first nomination hearing for Priscilla Owen? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Justice Owen that Senate Democrats might ask her in advance of that hearing?

55. A) Did you attend the nomination hearing for D. Brooks Smith? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Judge Smith that Senate Democrats might ask him in advance of that hearing?

56. During the winter of 2001 through the spring of 2002, did it come to your attention that Judge Charles Pickering's nomination was facing difficulty due to his legislative voting record on civil rights matters or his connection to the Mississippi Sovereignty Commission or his partner Carroll Gartin's ties to that Commission?

57. Mr. Miranda told the Los Angeles Times in a March 4 story that he believed that there was nothing wrong with him accessing the computer files of his opposing counsels on nominations and using them to help win what he calls the "judicial nominations war." In that story, he also noted that that trove of Democratic computer files he and Mr. Lundell located "was valuable information." In a March 5, 2004 Washington Times story, Mr. Miranda noted that he spied on and read the stolen computer files because he "had an obligation to learn everything [he] could possibly learn to defend [his] clients." He himself or through one of his proxies shared some of this valuable information with Mr. Novak and other columnists, as one of his primary responsibilities in Frist's office was dealing with the media and outreach to conservative groups and working with the White House, yet you are prepared to state unequivocally that you never saw or heard that Mr. Miranda had obtained Democratic computer files prior to his public admissions that he had done so?

58. Have you spoken with Mr. Miranda or received any written communication from him directly or through a third party about judicial nominations or the improper access of Democratic computer files between November 14, 2003 and today? B) Has the White House been approached or lobbied to hire him, as the Senate has?

Response to questions 33-58:

Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and

legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Kennedy

I. FOLLOW-UP ON QUESTIONS AT THE HEARING

A. THE DEMOCRATIC COMPUTER FILES

As you know, the questions surrounding the improper access to and dissemination of the Senate Democratic computer files have been referred for investigation by a special prosecutor. Since your office worked directly with both a key perpetrator and with other individuals and groups who appear to have received materials from the files, on the very subject of most of the files known to have been downloaded, it is to be expected that you and your office will be subjects of this investigation. We therefore need to be as sure as we can, before processing your nomination, that we have all of the information regarding your possible involvement in or knowledge of the matters under investigation.

You were asked a number of questions regarding this matter by Senators from both parties (see, e.g., pages 35-37, 97-100, 112-114 of the Transcript of the Hearing on the Nomination of Brett M. Kavanaugh, "hearing transcript"). In some cases the questions as asked were framed, or your answers were framed, in ways that restricted or limited them in some way, either by time frame (e.g., past, present, at, before or after a certain time), particular person (e.g., Rushton, Gray, Daly), a qualifier (e.g., "usually," "documents" vs. "information") or an ambiguous description (e.g., "that matter"), or otherwise. In some cases your answers were unresponsive even to the questions as asked.

Would you kindly review all of your testimony on this subject, and amplify each of your answers to provide and make clear that you are providing all of the information you have on the entire subject without regard to any restrictions or limitations or qualifiers in the original questions or your answers. In addition, where, on review you see that your answers were not fully responsive or were misleading in any way in view of your entire knowledge of the subject at any point in time, please provide fully responsive answers.

For example, when you were asked about the circumstances of your meetings with Manuel Miranda, you responded with what they "usually" were. In such a case, you should provide what the circumstances were in all instances, whether usual or unusual.

Similarly, you were asked two questions about whether you received documents or information that "appeared" to come from or that "you believed or were led to believe" came from Democratic files. Both answers were in the negative but were explained by almost identical statements, not responsive to the questions, that you were "not aware of that matter until I learned of it in the media." For present

purposes you should consider that you were asked: "Did Mr. Miranda (or anyone else) ever share, reference or provide you with any documents (or other facts, schedules, positions, plans or other information) that appeared to you (then or at any subsequent time, especially after you had become aware of the Republican access to Democratic files and had seen the files posted on the web or provided to the media and to groups or persons with whom you were in touch) to have been drafted or prepared by (or obtained or derived from the files, emails or other communications of) Democratic staff members of the Senate Judiciary Committee?

Similarly, you should re-frame your answer to the second question on page 37 of the hearing transcript to read its reference to "Associate White House Counsels" as including any interested White House staff, such as those in the Public Liaison or Legislative Affairs offices, to remove your own limitation to whether they were "aware" of the source of the materials and instead respond to the question asked, i.e., did they have access to the materials (or information), whether or not they were "aware" of the source.

As another example, you should review your answers to the questions regarding Boyden Gray on pages 113-114 of the hearing transcript, and remove your repeated limitation to "since I have been staff secretary," providing detailed information on your relationship to Mr. Gray throughout your White House employment.

In short, whether or not you believe the questions as asked should have elicited this information at the hearing, please fully disclose now, without standing on semantic limitations in the original questions or in this submission, everything you know, or in retrospect now realize or believe, about the circumstances surrounding the access to the Democratic files, the use and dissemination of the content or information derived from these files, and the availability of that content or information to you or anyone else in the White House, the Justice Department, the groups supporting the President's nominations, or anyone else outside the Democratic offices of the Judiciary Committee.

If this request is any way unclear, or leaves open any basis on which you might think that you need not provide everything you know on the entire subject, please let us know promptly, and we will clarify the request.

Response: Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. Also, to clarify one statement in your questions, I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past

Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

In addition to the above:

1. **Please provide your own conclusions as to the validity of Mr. Miranda's public statements as to his justification for his actions, their compliance with his ethical obligations, and the fact that he was operating in the interests of those who supported the nominations.**

Response: I am not familiar with all of Mr. Miranda's public statements regarding this issue, and it would not be appropriate in this context to comment on a matter under investigation.

2. **Since Boyden Gray has been publicly identified as a supporter of and spokesman for the White House on subjects relating to judicial nominations, please state whether you agree with his public defenses of Mr. Miranda, whether you or anyone at the White House have indicated to him that since he is so identified with the White House, he should desist from defending Mr. Miranda.**

Response: Mr. Gray is not an employee of the White House and does not speak on behalf of the White House. I am not familiar with particular public statements Mr. Gray may have made relating to Mr. Miranda.

3. **In view of Mr. Gonzales' refusal to investigate the subject, please state whether your (expanded) answer to the question on page 37 about whether "any other Associate White House Counsels had access" to the materials at issue is based on your own affirmative knowledge of what other White House staff knew or on your lack of knowledge of what other staff knew.**

Response: See my response to IA.

4. **Please state whether Mr. Miranda was ever involved in any of the moot courts or other meetings, conference calls, or conversations to prepare nominees for their hearings. If so, which ones?**

   a. **Did you ever meet with a nominee together with Mr. Miranda to prepare the nominee to testify before the Senate Judiciary Committee? If so, please describe that preparation and Mr. Miranda's role in it.**

   b. **Did Mr. Miranda ever directly or indirectly convey to any nominee, or to anyone involved in preparing any nominee, whether orally or in writing, any questions or areas of questioning that he suggested the nominee might be asked by any member of the Senate Judiciary Committee? If so, please describe the circumstances in which this occurred, and identify each nominee as to whose nomination Mr. Miranda's suggestion was made.**

Response: See my response to IA.

5. **Please describe any efforts you made, before or after your hearing, to review the materials and information you received from Mr. Miranda, other White House staff, the Justice Department, Mr. Gray, Mr. Rushton, Ms. Daly, or anyone else involved in judicial nominations, to determine whether anything they provided may have derived from the accessed Democratic files.**

Response: See my response to IA.

6. **Did Mr. Miranda ever tell you, suggest, or hint in any manner that he had a "source" or "mole" or other means of obtaining non-public information from the Democratic side? Did you ever hear that there was a disaffected Democratic staffer member or similar source providing such information?**

Response: See my response to IA.

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt toward Federalist Society members on the Administration's judicial nominations, you characterized the Society as "a group that brings together lawyers for conferences and legal panels. The Federalist Society does not take a position on issues. It does not have a platform." You said you were a member because it puts on "conferences and panels" where you can learn about issues and meet colleagues.

No reasonable person could think the Society is just a meeting place for lawyers. The Society's own website is much more candid than you were, describing it as "a group of conservatives and libertarians interested in the current state of the legal order." The Society decries, without attributing it to anyone in particular, the "orthodox liberal ideology which advocates a centralized and uniform society" and in pursuit of its goals has "created a conservative and libertarian intellectual network that extends to all levels of the legal community."

If, as a judge, your opinions merely followed and implemented the goals of the Society, would you still assert that you would not be "taking a position on issues" and not pursuing "a platform"?

Response: A judge should never attempt to follow or implement the goals of any organization. If confirmed as a judge, I would fairly and impartially interpret and apply the law.

C. PRYOR NOMINATION

Since responding to the questions on the Republican Attorneys General Association issue, have you reviewed your records and refreshed your recollections as to your role in preparing the nominee for questions on that subject? Please describe your role in more detail.

1. **You did not answer the questions I asked you on pages 134-135 of the hearing transcript, as to what if anything was done after the revelations in the media about the RAGA issue. Please do so in full now. Did you or anyone else in the White House or Justice Department check the issue out in more detail, have it investigated further, question the nominee about it, or otherwise follow up on the issue? Did any of you check with the RNC to determine who had the records that the nominee said they had? Please provide details on what was done, the results of any inquiry, and who received those results.**

Response: I believe Judge Pryor addressed these questions at his hearing. It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications.

2. **At any time before February 20, 2004, were you aware that Mr. Pryor was being considered for a recess appointment to the 11th Circuit? Were you aware that the recess which was going to be used was an intra-session recess of five business days surrounding a three-day holiday weekend? Were you aware that the appointment was to be made on the afternoon of the last business day of the recess? Were you aware that the shortest prior recess used for appointment of an Article III judge during an intra-session recess was a recess of 35 days? Did you express an opinion to anyone at the White House as to the validity or advisability of making such an unprecedented appointment? If so, without asking what your advice was, is there any reason we cannot assume that your advice had to have been either (a) that the appointment should be attempted, or (b) not followed.**

Response: It would not be appropriate in this context for me to discuss any internal Executive Branch communications on this matter. The United States Court of Appeals for the Eleventh Circuit has upheld the appointment of Judge Pryor.

3. **At your nomination hearing, I asked whether you assisted in preparing William Pryor to testify before the Senate Judiciary Committee. At that time, you indicated that you may have participated in a "moot court" session to prepare Mr. Pryor, but that you could not recall. Now that you have had additional time to review your work on nominations matters, please clarify whether you did in fact participate in a moot court preparation of Mr. Pryor.**

Response: I participated in moot court preparation for Judge Pryor.

4. **As you know, after William Pryor was nominated to the U.S. Court of Appeals for the Eleventh Circuit, several members of the Senate and the public expressed concern about extreme statements that Mr. Pryor had made, including his description of Roe v. Wade as "the worst abomination of constitutional law in our history." Do you agree with Mr. Pryor that Roe v. Wade is an "abomination of constitutional law"?**

Response: It would not be appropriate in this context for me to comment on the records of other nominees. Roe v. Wade is binding Supreme Court precedent. If confirmed, I would fairly and faithfully follow and apply all binding Supreme Court precedent, including Roe v. Wade.

5. **The Constitution gave the Senate a co-equal role in appointing federal judges to guarantee that the judiciary is independent, and does not simply reflect the political views of a particular President. The idea that federal judges should be independent of the other two branches of government is one of the most important aspects of our democracy. As I mentioned during your confirmation hearing, after the Supreme Court's 5 to 4 decision in Bush v. Gore, William Pryor stated that he had wanted the decision to be decided 5 to 4, so that President Bush "would have a full appreciation of the judiciary and judicial selection, so we can have no more appointments like Justice Souter." If all judges followed Mr. Pryor's view, the courts would be little more than an arm of the Executive Branch. Do you believe this is an appropriate view for a nominee to a federal court? Do you agree with Mr. Pryor's view about the role of federal judges?**

Response: I understand, respect, and fully appreciate the need for an independent Judiciary. I know how important an independent Judiciary is to our system of government, to the rule of law, and to the American people. It would not be appropriate in this context for me to comment on the records or statements of other nominees.

D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS

1. During your April 27, 2004, nomination hearing, you testified about your role in judicial nominations during the current Bush Administration and stated that you focused on "certain circuit court nominations" and on nominees from particular parts of the country.

a. Please note the month and year when you first began working on matters related to judicial nominations and, if you no longer have any role in matters related to nominations, the date on which your involvement in such matters ceased.

b. Which nominees did you work on, in any capacity?

c. With respect to each of the nominees listed in response, above, please describe your role in selecting, vetting, or recommending them for nomination to the federal courts of appeals, and please describe the role you played in their preparation for testimony or responses to written questions.

Response: I began working in the White House Counsel's Office in January 2001 and became Staff Secretary in July 2003. I began working on judicial nominations in January 2001. When I became Staff Secretary, I usually did not work on judicial nominations except to handle certain paperwork for the President.

I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

2. **During the hearing on your nomination, I asked what experience if any you have in labor law matters. Your answer noted that you have held several government positions, but did not identify whether you have any experience in labor law. Please clarify whether you worked on any cases or legal matters involving labor law claims, and if so, please identify the case and describe the nature of your work.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in labor law has been with respect to cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

3. **Please describe any legal experience you have involving the Americans with Disabilities Act. Please also describe any legal experience you may have involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act or any aspect of environmental law. In responding to this question, please identify the cases or legal matters on which you worked, and any role you played in drafting submissions or presenting oral argument to a court on these issues.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in disability and environmental law has been in cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

4. **In response to a question from Senator Schumer during the hearing on your nomination, you stated that you believed that you had attended a fundraiser for the Committee for Justice on at least one occasion. You could not recall whether you made a donation at that event, but indicated that you would check to confirm this fact.**

   a. **Please indicate whether you have ever attended a fundraiser for the Committee for Justice, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

   b. **Please state whether you have attended a fundraiser for the Coalition for a Fair Judiciary, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

Response: I attended one Friday happy hour hosted by the Committee for Justice in Washington, D.C. in the summer of 2003. Several hundred people attended. I believe I may have spent about $20 at the happy hour. Other than that, I have not attended any events for the Coalition for a Fair Judiciary or the Committee for Justice or contributed to them.

5. **You have testified that, as part of your work on judicial nominations, you coordinated with the White House Press Office and with outside organizations regarding nominees. As you know, Democrats who raised concerns about some of the Administration's most controversial nominees have been called anti-Black, anti-Latino, anti-Southern and anti-Catholic by some of these outside organizations.**

   a. **Did you play any role in encouraging conservative organizations and conservative media in these characterizations of Senators who opposed judicial nominees?**

   b. **Do you agree that such characterizations are unacceptable and mislead the public about the judicial nominations process?**

   c. **What if anything did you do to stop these White House supported organizations and surrogates from continuing to make these changes?**

Response: I spoke to and met with members of outside organizations who were interested in the judicial nomination and confirmation process. I have never encouraged anyone to portray Senators in the ways described in this question. No one in the Administration to my knowledge has ever made, suggested, or countenanced such charges.

II. OTHER ISSUES

The Office of the Counsel to the President plays a major role in decision-making with respect to access to Executive Branch materials and inquiries into allegations of improper activities by White House staff. Please provide a detailed description of your role in those activities, and specific responses to the questions below, answering any "yes" or "no" questions with a "yes" or "no" before providing any explanations. If any of your answers are classified, please separate the classified portions to the maximum extent possible, and provide a classified and unclassified version of such answers.

A. CIA LEAK INVESTIGATION

1. Did you have any role in any activity relating in any way to the leak of information regarding Valerie Plame? If so, please detail your role.

Response: No

2. Did you personally question staff members or receive, review, or become familiar with evidence relating in any way to this matter? If so, please provide the details of what you did.

Response: No

3. Have you been questioned by the Special Prosecutor, the FBI, or anyone else about this matter?

Response: No

4. Were you involved in any internal investigation within the Executive Branch as to this matter? If so, please provide the details of what you did.

Response: No

5. As a result of anything you did, saw, read or heard, do you know who the person(s) was (were) who communicated information about Ms. Plame to the media? If so please provide the details of what you know.

Response: No

6. To the best of your knowledge, what efforts were made by your office or any other office in the White House to determine who disclosed the Plame information? Were you satisfied that all possible efforts were made to discover the facts? What other steps could have been taken that were not taken? Did you attempt to take those steps?

Response: I do not have knowledge of this matter and these issues.

7. Did you participate in the screening process conducted by the Counsel's office before materials on this subject requested by the Department of Justice were provided to the Department? Please describe that process and your role in detail.

Response: No. I assumed my position as Staff Secretary in July 2003.

8. **What steps do you believe should have been or should be taken against anyone involved in disclosing the Plame information? Do you know whether such steps have been taken? If so, please provide the details of what steps have been taken and what other steps you believe should be taken.**

Response: I am not familiar with the facts relating to this matter and did not work on this matter.

B. BARRIERS TO ACCESS TO 9/11 INFORMATION

1. **Did you or anyone else in your office or, to the best of your knowledge, elsewhere in the White House, have any contact in 2001 or 2002 with (a) any member or staff of the Senate Judiciary Committee, or (b) any other Senator or Senate staff, with respect to the Committee's desire to investigate issues relating to the 9/11 attacks? If so, please provide details of what you did and what you know. What do you know about the efforts to deny authorization or funding for that investigation? What was your role and that of your office? If your office had nothing to do with that matter, who handled it for the White House?**

Response: I did not work on this matter.

2. **Did you or anyone else in your office or, to your knowledge, elsewhere in the White House have any role in the denial, delay or limitation of access to the materials and information requested by the Joint Intelligence Committees for their inquiry into 9/11 as described in the Appendix to their Report? In particular, did you or your office participate in any way in the decision to classify the fact that the President had received the PDB dated August 6, 2001? If either answer is yes, please provide details of what you know and what you did.**

Response: I did not work on this matter.

3. **Did you or your office have a role (a) in formulating or implementing the White House opposition to the establishment of the 9/11 Commission before September 2002, (b) in negotiating the details of the legislation establishing the Commission's mandate and structure once the White House agreed to its establishment, or (c) in considering, determining, and negotiating with regard to the White House responses to requests from the Commission for materials, interviews, and information? Please describe your own role in detail.**

Response: I did not work on this matter.

4. **Were you in any way responsible for the White House statements that it was impermissible for Ms. Rice to testify and for the White House to release the August 6th 2001 PDB? If so, please describe your role in detail.**

Response: I did not work on this matter.

5. **Do you see any meaningful distinctions between President Ford's public testimony before a House subcommittee in 1974 and President Bush's appearance before the 9/11 Commission which justify his refusal to testify in public?**

Response: I did not work on this matter.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

Response: The responsibility for reviewing background investigation files was performed by the Counsel and Deputy Counsel to the President, as well as attorneys in the Department of Justice. I therefore was rarely involved in that particular aspect of the judicial selection process.

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

Response: Yes.

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . . The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: I believe Judge Pickering addressed inquiries about this matter in his confirmation hearings. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a

confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black,* and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black.* Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" -- free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: On these kinds of ethics issues, I would faithfully follow all applicable statutes, court decisions, and policies. I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Response: It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Schumer

1. When the Supreme Court issues non-unanimous opinions, Justice Scalia and Justice Ginsburg frequently find themselves in disagreement with each other. Do you more frequently agree with Justice Scalia's position or Justice Ginsburg's?

Response: As an appeals court judge, I would faithfully apply the Supreme Court's decisions regardless of who authored any particular decision. I have great respect for all of the Justices on the current Court; eight of them were serving on the Court when I was a law clerk for Justice Kennedy. All of the Supreme Court Justices disagree with one another at times, and that is expected and understandable since the Supreme Court decides only the most difficult and complex cases.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of the hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that's about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

2. At your confirmation hearing, you testified that you "don't know in the vast, vast majority of cases" what nominees' positions are on choice "unless there has been a public record before." As you know, with numerous nominees there has been "a public record before." They have run or been active in anti-choice organizations, have sponsored anti-choice legislation, have worked for anti-choice causes, and in the instance of Justice Priscilla Owen as described by White House Counsel and then-Texas Supreme Court Justice Alberto Gonzales, engaged in "unconscionable judicial activism" on the anti-choice side of a case that came before her as a judge.

The record of Democratic Senators makes it patently clear that none of us has a litmus test when we vote on judges. We have voted for dozens who are

demonstrably anti-choice. Many, however, believe that this Administration has a litmus test when it comes to choosing judicial nominees.

a. **Do you agree that based on the records of numerous judicial nominees, the White House had substantial reason to be confident that they are anti-choice?**

b. **Do you agree that based on Democratic Senators' records of voting for a substantial majority of the nominees whose records show them to be anti-choice, it is clear we do not have a litmus test?**

c. **At your hearing, you testified that you are "sure there are many" of President Bush's judicial nominees who are pro-choice. Please identify those judicial nominees of this Administration whose records provide substantial reason to believe they are pro-choice.**

Response: I do not agree that "numerous nominees" have had a public record on abortion. I am aware of only a handful out of more than 200 judicial nominees who had any kind of record that would indicate what their personal views on abortion are. I cannot identify which of the more than 200 judicial nominees are pro-life or pro-choice (with the few exceptions of nominees who had taken public positions on the issue) because the President does not have a litmus test on this issue and the Administration does not ask judicial candidates their views on this issue.

3. If you are confirmed and, as a judge, you find yourself in the identical circumstances that Justice Scalia found himself in for Cheney v. U.S. District Court, will you recuse yourself?

Response: On recusal issues, I would faithfully follow all applicable statutes, court decisions, and policies, including 28 U.S.C. 455.

4. Over the last few years, progressive groups have been excoriated by the right wing for their role in the confirmation of federal judges. My view is that outside groups on both sides, representing the interests of millions of Americans, have an appropriate place in the nomination and confirmation process. But there seems to be a certain degree of denial on the Right when it comes to recognizing that outside groups on both sides are involved in the process. We all know that organizations such as the Committee for Justice, Coalition for a Fair Judiciary, and individuals such as C. Boyden Gray and Kay Daly have been active in the efforts to confirm President Bush's judicial nominees.

I want to be clear in asking this question, that I have no objection to the involvement of activist groups on the Right. My objection is to the hypocrisy of the criticism when the Right is engaged in conduct identical to what progressives are doing.

To set the record straight on the extent of their involvement, please describe the interaction, during your time in the White House Counsel's Office, between the

Administration and the below-listed outside groups and non-government employees regarding judicial nominations, including but not limited to their roles in identifying individuals for judicial nominations, advocating for or against their nominations, evaluating and vetting them, and developing strategies around their nominations and confirmations.

a. Committee for Justice (and officers and employees thereof)
b. C. Boyden Gray
c. Coalition for a Fair Judiciary (and officers and employees thereof)
d. Kay Daly
e. Sean Rushton
f. The Federalist Society (and officers and employees thereof)

Response: I agree that outside groups have a perfectly legitimate and appropriate role in expressing their views on the judicial nomination and confirmation process. Members of the Administration met with outside groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

5. You took over as White House staff secretary in May of 2003, just weeks before Administration officials leaked the identity of then-covert CIA operative Valerie Plame to retaliate for her husband's authoring an op-ed that criticized the Administration. As staff secretary, you control the flow of most paper to the President. Ms. Plame's name was leaked on or about July 13, 2003.

I want to be absolutely clear that I have no reason to believe you had anything to do with the leaking of Ms. Plame's name or that you know anything about who committed that crime. However, given that you have been nominated for such a high post and given the positions you have held in the White House, both in the counsel's office and as staff secretary, I believe we have a duty to get your responses to the following questions on the record.

a. What, if anything, do you know about the identity of the person or people who made Ms. Plame's name public?

Response: See the response to this series of questions after question g below.

b. Have you spoken with investigators and/or prosecutors working on the Plame case, regarding the Plame case?

c. Have you testified in the Grand Jury in the Plame case?

d. Have you been told that you are either a target or a subject of the investigation into the criminal leaking of Ms. Plame's identity.

e. Before July 14, 2003, did you see any paper or electronic document submitted to the President (or otherwise) bearing Ms. Plame's name, identity, or otherwise referencing the wife of Ambassador Joe Wilson?

i. If so, please describe in detail what you saw.

ii. If so, have you informed the federal prosecutors investigating the case of what you saw?

f. Were you aware that anyone was discussing or considering making Ms. Plame's name (or the identity of a covert CIA operative) public before such occurred?

g. Were you aware of any other discussion or consideration of any other actions directed toward Ambassador Joe Wilson after publication of his op-ed that criticized the Administration?

Response: I began my service as Staff Secretary in early July 2003. I am not familiar with the facts relating to this matter, and the answer to these questions is no.

Responses of Brett M. Kavanaugh to the
Written Questions of Senator Durbin

1. At your nomination hearing, you discussed your involvement in the judicial nomination process when you worked in the White House Counsel's office. You indicated that you were involved in both the selection side and the confirmation side, but you described only the confirmation side. Please provide details about your role in the selection side. What was the nature of your role in selecting judicial nominees for President Bush?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. In assisting with Illinois district court nominations, I worked with members of your staff, as well as staff who worked for Senator Fitzgerald. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

2. For the following judicial nominees, please indicate: (A) whether you recommended the nominee for the position to which he or she was nominated, and (B) the nature of your involvement in their selection and confirmation: Miguel Estrada, Charles Pickering, Priscilla Owen, William Pryor, Carolyn Kuhl, Janice Rogers Brown, William Myers III, Claude Allen, Terrence Boyle, D. Brooks Smith, Dennis Shedd, Michael McConnell, Jeffrey Sutton, John Roberts, Jay Bybee, Timothy Tymkovich, William Haynes, J. Leon Holmes, and Paul Cassell.

Response: It would not be appropriate in this context for me to disclose advice and recommendations that were provided to the President or Judge Gonzales. As I noted in response to Question 1, I participated in the meetings of a judicial selection committee that was responsible for making recommendations to the President. During my time, each of the nominees listed in your question was evaluated and discussed. As with prior Administrations, the White House Counsel's Office and Department of Justice attorneys

assist judicial nominees in the confirmation process, which included reviewing nomination paperwork and preparing for hearings. As part of my responsibilities, I assisted several judicial nominees in this manner, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

3. When you were helping select judicial nominees for President Bush, did you give preference to individuals who were members of the Federalist Society? Did you consider membership in the Federalist Society to be a positive factor for a potential nominee? Why?

Response: The President has selected judicial nominees based on their qualifications, including their intellect, integrity, and temperament, and whether they will fairly and strictly interpret the law. As far as I am aware, the majority of President Bush's judicial nominees have not been members of the Federalist Society.

4. In your capacity as Staff Secretary and Assistant to the President, have you worked on judicial nominations issues either formally or informally? If so, were you involved in the decision to give recess appointments to Charles Pickering and William Pryor? If you were, please describe the nature of your involvement and recommendations. If you no longer work on judicial nominations, please indicate the month you stopped working on this issue.

Response: I became Staff Secretary in early July 2003. As Staff Secretary, I perform traditional tasks assigned to that position, such as assisting with the President's signing of commissions, orders, and other documents, reviewing and clearing memoranda for the President, coordinating drafts of Presidential speeches, and helping to prepare the President's briefing books. In that office, I usually do not work on judicial nominations except with respect to coordinating paperwork. If asked by the President, Counsel, or other members of the staff for my opinion or advice, I provide it as appropriate. As I noted in response to Question 2, it would not be appropriate in this context for me to disclose recommendations or advice that were provided to the President or Judge Gonzales.

5. You and Justice Janice Rogers Brown were nominated together to the 11th and 12th seats on the D.C. Circuit. During the Clinton Administration, some Senate Republicans argued that there was no need for these seats to be filled because the workload did not warrant it. President Clinton nominated individuals to the 11th and 12th seats but those nominees were never given a hearing and vote. There is no evidence that the workload of the D.C. Circuit has increased since that time. In fact, since 1997 the number of appeals is down 27%, the number of pending cases is down 28%, and the number of written decisions per judge is down 14%. In this light, do you believe that it is advisable to fill these seats today? Was any consideration given by the Bush White House to not filling these seats? Please explain.

Response: Congress decides the appropriate number of seats on the federal courts of appeals. Congress historically has done this in consultation with the Judicial Conference of the United States. My understanding is that Congress established in the early 1980's that the D.C. Circuit should have 12 seats.

6. What role did you play in helping judicial nominees answer written questions submitted by Senators on the Judiciary Committee? Please provide examples.

Response: On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

7. You served as a law clerk to Supreme Court Justice Anthony Kennedy. In a December 2003 *Vanity Fair* article, a fellow law clerk of yours at the Supreme Court discussed your attitude about death penalty appeals. He said: "You'd kind of know instinctively how he'd come out, no matter what the petition was." What is your response to this statement? Without naming specific cases, were there any capital punishment cases you worked on in which you recommended that the death penalty not be administered?

Response: The statement is unattributed and inaccurate. I cannot respond to the remainder of the question because law clerks maintain the confidentiality of their work as Supreme Court clerks in perpetuity. It therefore would not be appropriate for me to disclose recommendations or advice I provided to Justice Kennedy on particular cases or matters.

8. At your hearing, Senator Kennedy asked whether you agreed with the statement from the Federalist Society's mission statement that "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Please provide a more direct and complete answer to the question than the one you gave Senator Kennedy at your hearing.

Response: I did not find political affiliation or ideology to correlate to whether one was a good law school professor. It is my impression and widely believed that most law school faculties are composed primarily of Democrats; for example, most of my professors at Yale Law School were Democrats, and many likely would describe themselves as liberal. I liked my law school professors and learned a lot from them and consider them mentors and in many cases friends.

9. One of the stated goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities do you believe need to be reordered within the legal system of America?

Response: At the federal level, Congress and the President determine what laws to pass based on their assessment of priorities and values. The courts must fairly interpret that law and not assume the role of legislators. As an appeals court judge, I would carefully follow the precedents of the Supreme Court and fairly interpret and apply the statutes passed by Congress.

10. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

A. As someone who had significant responsibility at the White House for carrying out this mandate, do you believe that President Bush has been successful in fulfilling this pledge?

B. How would you describe the judicial philosophy of Justices Scalia and Thomas?

C. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

D. Do you consider yourself to be a strict constructionist? Why or why not?

***E.* Do you think that the Supreme Court's landmark decisions in *Brown v. Board of Education, Miranda v. Arizona,* and *Roe v. Wade* are consistent with strict constructionism? Why or why not?**

Response: President Bush has stated that he seeks judicial nominees who will apply the law as written and not legislate from the bench. He seeks nominees who have demonstrated that they know the difference between personal opinion and the strict interpretation of the law. Almost all of President Bush's judicial nominees have been rated "Well Qualified" or "Qualified" by the American Bar Association and have been confirmed by the Senate.

If confirmed, I would fairly interpret and apply the law, carefully and strictly adhere to the text of the Constitution and of the statutes passed by Congress, and faithfully follow the binding precedents of the Supreme Court and D.C. Circuit. Beyond that, I would not attach any particular overarching label to my likely judicial approach.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of [the] hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. See Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg also specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

11. In the case *Rice v. Cayetano*, you were the counsel of record in an amicus brief arguing that the state of Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs. In a 1999 *Wall Street Journal* op-ed you wrote about *Rice v. Cayetano* entitled "Are Hawaiians Indians? The Justice Department Thinks So," you expressed considerable cynicism about the Clinton Administration's justification for filing a brief on behalf of the state of Hawaii. You wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."

A. Do you stand by your statement that the Clinton Administration filed a brief on behalf of Hawaii because "Hawaii is a strongly Democratic state," and that the Clinton Administration took "the politically correct position" in order to "support the state's system of racial separatism"?

B. Do you believe there are any instances in which the Ashcroft Justice Department has failed – in your words – "to put law and principle above politics and expediency"? If so, please provide specific examples.

Response: I wrote that op-ed in conjunction with my representation of a client and did so to advance the position of my client. As the article states, my client argued that Hawaiians could not be analogized to Native Americans for the purposes of justifying a racial voting qualification. The Department of Justice took the opposite view. The

Supreme Court agreed 7-2 with the position of my client. It would not be appropriate for me to state my agreement or disagreement with what I wrote as a lawyer for a client. That said, I usually do not think it appropriate or necessary to ascribe negative motives to decisions of government officials. The statement in this article could have been phrased differently; had it been phrased differently, it would have more effectively represented my client's interests. With respect to sub-part B of the question, the answer is no.

12. In your *Wall Street Journal* op-ed, you wrote that the position of the Clinton Administration was "to allow political correctness to trump the Constitution." You also wrote: "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe." Justices Ginsburg and Stevens were apparently "fooled" by the Justice Department because they dissented in this case and largely adopted the Justice Department's position. At your nomination hearing, however, you described Justice Ginsburg as "an excellent Justice." Do you believe that your *Wall Street Journal* op-ed was excessively harsh in its condemnation of the Clinton Administration and Supreme Court Justices who voted for that Administration's position?

Response: As I noted in response to Question 11, I believe the passage you quote would have more effectively supported my client's position had it been phrased differently.

13. One of your clients in the *Rice v. Cayetano* case was the Center for Equal Opportunity, an organization that opposes the use of affirmative action. The organization's mission statement refers to affirmative action as "racial preferences" and states: "CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting."

A. Do you believe that affirmative action constitutes a "racial preference"?

B. Do you share the desire of your former client to prevent the use of affirmative action in the contexts of employment, education, and voting?

Response: The Supreme Court has decided many cases on affirmative action programs and, if confirmed, I would faithfully follow those precedents. The Court has established detailed tests to assess whether affirmative action programs are race-based or race-neutral – and also whether they pass constitutional muster. My personal views or the views of my former clients on these or other issues would not affect how I would approach decisions as an appeals court judge. I would carefully and faithfully follow all precedent of the Supreme Court.

14. In the case *Santa Fe Independent School District v. Doe*, you wrote an amicus brief on behalf of Representatives J.C. Watts and Steve Largent in which you argued that the use of loudspeakers for student-led prayers at high school football games did not constitute an Establishment Clause violation of the First Amendment. The Supreme Court rejected your argument by a vote of 6-3, ruling that the prayer involved both perceived and actual endorsement of religion. Do you believe that the Supreme Court was wrong in reaching that decision?

Response: As a judicial nominee, it would not be appropriate for me to comment on whether a particular Supreme Court decision was correct, for the reasons set forth by Justice Ginsburg in her hearing, for example. See also response to question 10 above. As an appeals court judge, I would faithfully apply the Supreme Court's decision in the Santa Fe case, which resolved a question that had previously divided lower courts after the question had been left open in Lee v. Weisman (1992).

15. Other than the work you performed on behalf of J.C. Watts and Steve Largent in *Santa Fe Independent School District v. Doe*; in defense of a local ordinance that granted religious entities an exemption from the county's zoning restrictions; and on behalf of the American relatives of Elian Gonzalez, please describe all other pro bono legal work that you have performed as an attorney.

Response: I have worked in public service as a government lawyer for 11 of the 14 years since I graduated from law school. In private practice, I spent a significant amount of time doing pro bono and reduced-fee work. In addition to the cases you cited, for example, I worked on a religious freedom case in the Supreme Court known as Good News Club v. Milford Central School District. I also worked on school choice litigation in Florida for a reduced fee.

16. You indicate on your Senate questionnaire that you "went to Deland, Florida, in November 2000 to participate in legal activities related to the recount." Please describe these activities in more detail.

Response: Republican and Democratic lawyers observed the recount activities in Florida in 2000. I was part of a group of Republican lawyers that provided observers for the recount in Volusia County. The recount activities in Volusia County were relatively quick and uncontroversial.

17. You indicate on your Senate questionnaire that you were the Regional Coordinator for Pennsylvania, Maryland, Delaware, and the District of Columbia for a group called "Lawyers for Bush Cheney 2000." Please describe your activities

as Regional Coordinator.

Response: Among other activities, I would participate in weekly conference calls, communicate with the state directors for the states I was assigned about their efforts to recruit members for Lawyers for Bush-Cheney, and attend events held for Governor Bush.

18. On your Senate questionnaire, you stated: "In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit." Please provide more information about the meaning of that statement. Why were you not selected for the Fourth Circuit? Was the opposition of the Maryland Senators a factor in your not being selected?

Response: I met at length with Senator Sarbanes, and he indicated that my record made me a better nominee for the D.C. Circuit than for the Fourth Circuit since I had practiced primarily in Washington and as a government lawyer. He made it clear that he would not support a nominee for that seat on the Fourth Circuit unless the nominee was a Maryland lawyer, maintained an office in Maryland, and practiced regularly in the Maryland courts. He said that Senator Mikulski agreed with him about this.

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001	Draft	[Edits on the Myth/Fact Sheet - page 4-6]	3	N.D.	P5;
002	Chart	[Ages]	1	N.D.	P6/b6;
003	Email	Confirm Stats - To: Jonathan Ganter - From: Kyle Sampson	1	07/29/2003	P6/b6;
004	Email	RE: Judge Bio Info - To: Jonathan Ganter - From: Sheila Joy	1	07/29/2003	P6/b6;
005	Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;
006	List	[List of Questions]	1	N.D.	P5;
007	Draft	Brett Kavanaugh - Judicial Nominees	1	N.D.	P5;

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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
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RESTRICTION CODES

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Written Questions for Brett Kavanaugh from Sen. Feingold

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . . The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

   (a) Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

   (b) Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

   (c) Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

(a) When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

(b) Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

(c) Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black,* and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black.* Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

(a) Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

(b) Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" -- free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

(a) Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

(b) If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

(a) Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

(b) Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Questions for Brett Kavanaugh from Senator Charles E. Schumer

1. When the Supreme Court issues non-unanimous opinions, Justice Scalia and Justice Ginsburg frequently find themselves in disagreement with each other. Do you more frequently agree with Justice Scalia's position or Justice Ginsburg's?

2. At your confirmation hearing, you testified that you "don't know in the vast, vast majority of cases" what nominees' positions are on choice "unless there has been a public record before." As you know, with numerous nominees there has been "a public record before." They have run or been active in anti-choice organizations, have sponsored anti-choice legislation, have worked for anti-choice causes, and in the instance of Justice Priscilla Owen as described by White House Counsel and then-Texas Supreme Court Justice Alberto Gonzales, engaged in "unconscionable judicial activism" on the anti-choice side of a case that came before her as a judge.

The record of Democratic Senators makes it patently clear that none of us has a litmus test when we vote on judges. We have voted for dozens who are demonstrably anti-choice. Many, however, believe that this Administration has a litmus test when it comes to choosing judicial nominees.

a. Do you agree that based on the records of numerous judicial nominees, the White House had substantial reason to be confident that they are anti-choice?

b. Do you agree that based on Democratic Senators' records of voting for a substantial majority of the nominees whose records show them to be anti-choice, it is clear we do not have a litmus test?

c. At your hearing, you testified that you are "sure there are many" of President Bush's judicial nominees are pro-choice. Please identify those judicial nominees of this Administration whose records provide substantial reason to believe they are pro-choice.

3. If you are confirmed and, as a judge, you find yourself in the identical circumstances that Justice Scalia found himself in for Cheney v. U.S. District Court, will you recuse yourself?

4. Over the last few years, progressive groups have been excoriated by the right wing for their role in the confirmation of federal judges. My view is that outside groups on both sides, representing the interests of millions of Americans, have an appropriate place in the nomination and confirmation process. But there seems to be a certain degree of denial on the Right when it comes to recognizing that outside groups on both sides are involved in the process. We all know that organizations such as the Committee for Justice, Coalition for a Fair Judiciary, and individuals such as C. Boyden Gray and Kay Daly have been active in the efforts to confirm President Bush's judicial nominees.

I want to be clear in asking this question, that I have no objection to the involvement of activist groups on the Right. My objection is to the hypocrisy of the criticism when the Right is engaged in conduct identical to what progressives are doing.

To set the record straight on the extent of their involvement, please describe the interaction, during your time in the White House Counsel's Office, between the Administration and the below-listed outside groups and non-government employees regarding judicial nominations, including but not limited to their roles in identifying individuals for judicial nominations, advocating for or against their nominations, evaluating and vetting them, and developing strategies around their nominations and confirmations.

a. Committee for Justice (and officers and employees thereof)
b. C. Boyden Gray
c. Coalition for a Fair Judiciary (and officers and employees thereof)
d. Kay Daly
e. Sean Rushton
f. The Federalist Society (and officers and employees thereof)

5. You took over as White House staff secretary in May of 2003, just weeks before Administration officials leaked the identity of then-covert CIA operative Valerie Plame to retaliate for her husband's authoring an op-ed that criticized the Administration. As staff secretary, you control the flow of most paper to the President. Ms. Plame's name was leaked on or about July 13, 2003.

I want to be absolutely clear that I have no reason to believe you had anything to do with the leaking of Ms. Plame's name or that you know anything about who committed that crime. However, given that you have been nominated for such a high post and given the positions you have held in the White House, both in the counsel's office and as staff secretary, I believe we have a duty to get your responses to the following questions on the record.

a. What, if anything, do you know about the identity of the person or people who made Ms. Plame's name public?

b. Have you spoken with investigators and/or prosecutors working on the Plame case, regarding the Plame case?

c. Have you testified in the Grand Jury in the Plame case?

d. Have you been told that you are either a target or a subject of the investigation into the criminal leaking of Ms. Plame's identity.

e. Before July 14, 2003, did you see any paper or electronic document submitted to the President (or otherwise) bearing Ms. Plame's name, identity, or otherwise referencing the wife of Ambassador Joe Wilson?

i. If so, please describe in detail what you saw.

ii. If so, have you informed the federal prosecutors investigating the case of what you saw?

f. Were you aware that anyone was discussing or considering making Ms. Plame's name (or the identity of a covert CIA operative) public before such occurred?

g. Were you aware of any other discussion or consideration of any other actions directed toward Ambassador Joe Wilson after publication of his op-ed that criticized the Administration?

Questions for Brett Kavanaugh from Senator Patrick Leahy

1. In your testimony before the Senate Judiciary Committee, you indicated that the work on judicial nominations was divided in the Office of White House Counsel among several Associate Counsels. You testified that you had "different areas of the country that we would work on and different nominations that we'd work on." You mentioned that California and Illinois were among the states you worked on, and that you "worked on certain circuit court nominations." A) Could you please list your particular geographic areas of responsibility, whether you covered just district or circuit court nominations or both within those areas, and the names of all of the circuit court nominees you worked on? B) What percentage of your time in the office would you say was devoted to judicial nominations? C) What other matters did you work on during your time in the Office of White House Counsel?

2. A) Now that the ABA is no longer involved in the decision about whether or not to nominate someone for federal court vacancies, are there any other individuals or groups with whom the nominees are asked to meet as these choices are being made? B) In particular, have potential nominees been or are they now advised or sent to meet with or interview with individuals or groups outside of the government as part of the judicial selection process?

3. Did you or anyone else in the Office of White House Counsel seek advice or information or receive advice or information from any individuals or groups outside of the government when deciding on a judicial nominee? A) Were any White House officials from outside the Office of the White House Counsel involved in decisions on judicial selection? B) If so, who and from what offices? C) In particular, was Karl Rove involved in the judicial selection process, and if so, can you describe in detail his involvement?

4. Did you work with others inside the government, including the Department of Justice and Senate Republicans and their staffs, to determine how to prepare the nominees or work to secure their confirmation?

5. In your hearing testimony, you indicated that part of your responsibilities included "public liaison" work. That means working with groups from outside of the government. A) Did you have a regular meeting set up with outside groups or individuals? B) If so, please list the names of the outside groups or individuals with whom you regularly met, how often the meetings took place, and the nature of those meetings. C) If not, did you meet at any time with any outside groups or individuals about judicial nominations? D) Apart from groups or individuals involved in regular meetings, with which other outside groups or individuals have you met about judicial nominations? E) For each of these groups or individuals, please tell me how often you would meet with them and the nature of those meetings.

6. In your hearing testimony you indicated there was a "team" that worked in Senator Hatch's office and Senator Frist's office on nominations. A) Who was on that team during the time you worked in the Office of the White House Counsel? B) How often would that team meet? C) Where did that team meet? D) What specifically was the work of that team?

7. At your hearing the subject of consulting on nominations to the D.C. Circuit came up. Did you or anyone involved in the judicial nominations process for President Bush ever discuss nominations to the D.C. District Court or the D.C. Circuit with any elected officials from the District of Columbia?

8. President Clinton nominated several individuals to the circuit and district courts with no close ties to him or other Democrats but who were championed by Republican Senators because they were either registered Republicans or close friends of the Senator of the other party. For example, Judge Richard Tallman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gordon; Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator John Kyl, who struck the names of Democratic candidates; Judge William Traxler, who was put on the district court by President Reagan, was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond; Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Republican Senator Connie Mack. Please list the names of all of the circuit court nominations President Bush has made who were first recommended to you by a Democratic Senator.

9. I detailed the excellent credentials and experiences of Allen Snyder and Elena Kagan at your hearing. Why do you think you should be confirmed for a seat on the D.C. Circuit when Mr. Snyder and Ms. Kagan, about whom no objections of any substance were ever raised, were rejected by this Committee for that same position?

10. As you know there has been a lot of controversy surrounding the appointment of members to certain statutorily created bi-partisan boards and commissions. The White House gives a tortured interpretation to the statutes governing these bodies, claiming they permit the President to name not only the members of his political party, but also the members not of his political party, insisting that there is no requirement to that the leadership of the political party opposite the President make these choices. Frankly, we find these contentions absurd and contrary to the letter and spirit of the law. A) Do you agree with the President's interpretation? B) What was your role in helping the President reach the conclusion that Democrats are not to pick nominees for Democratic seats?

11. Historian Richard Reeves said about Executive Order 13233 that, "[w]ith a stroke of the pen on November 1, President Bush stabbed history in the back and blocked Americans' right to know how Presidents [and Vice Presidents] have made decisions," and that the Order, "ended more than 30 years of increasing openness in government." You testified at your hearing that you believed the "initial concern" by historians and archivists about Executive Order 13223 was, "based on a misunderstanding." You indicated there were meetings with historians to discuss and explain the order and that historians have found them useful. With which historians have you met and when did you meet with them?

12. As you know, after Executive Order 13223 was promulgated, numbers of prominent historians and the major associations of historians, including the American Historical Association, and the Organization of American Historians, filed suit in federal court challenging the validity of the Order. Even after the meeting or meetings you held with them, they continued with the lawsuit. Indeed, one major plaintiff, the American Political

Science Association, joined the suit after your meetings began. Their criticism continued as well. While the historians were complementary of your personal demeanor in the initial meeting you had with them, they continued to be seriously concerned. For example, Robert Spitzer, president of the Presidency Research Group of the American Political Science Association said, "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . the situation continues to be deeply troubling." The late Hugh Graham, a Reagan historian and professor emeritus at Vanderbilt University, described the Executive Order as "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave." Your testimony about the historians seemed calculated to brush off this sort of criticism. A) Do you deny that the Order continues to be unacceptable to most historians? B) How can you reconcile what you told us at your hearing with the very real concerns that America's historians continue to have?

13. At your hearing, you testified that the Bush Administration's Executive Order 13233 ("Bush Order"), which you authored, was nothing more than an order that set forth "procedures" for complying with the Presidential Records Act ("PRA"). In fact, according to many scholars, journalists, and others, the Bush Order goes far beyond mere "procedures" and in effect significantly impedes the release of presidential records intended to be released under the PRA and in effect eviscerates important parts of the PRA, increasing government secrecy. Specifically they are concerned about the "demonstrated, specific need" language, even after the end of the 12-year period, about Sections 3(a)-(d) of the Bush Order which effectively provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public, about Sections 3(d) and 4 of the Bush Order, which require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances, about Section 3(d)(2) of the Bush Order which empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national security would be affected by public release, about Section 10 of the Executive Order which permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability, about Section 11 of the Bush Order which allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to records under the PRA, and about Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. In light of these specific concerns, can you explain in detail the basis for your claim that the Order is procedural in nature, and is merely complying with the PRA?

14. At your hearing, you also testified that there was a "need" for the Bush Order to "establish procedures" under the PRA because the end of the 12-year period of repose for former President Reagan's records was coming to an end, that both the current president and the former president could assert privilege with respect to the records under Nixon v. GSA,

and that "[n]o one really had a good idea how this was going to work." But the Congress specifically delegated to the National Archives and Records Administration ("the Archivist") the authority to adopt regulations, and after notice and comment, to adopt all rules necessary to carry out the PRA's provisions, which the Archivist did. A) In light of the existing regulations under the PRA, why did you and others at the White House deem it necessary to adopt the Bush Order, which occurred without any opportunity for public notice and comment? B) During the period of more than 6 months when the Bush White House was notified about the Reagan records but before the Bush Order, please describe what if any consultation occurred with the Archivist concerning any alleged need for additional regulations.

15. In his introduction at your hearing, Senator Cornyn mentioned that the two of you had worked on a case together. A) What was the case? B) In what capacity were you involved in it? C) How did you come to be involved in the case? D) Why did you choose to be involved? E) Have you helped prepare others for Supreme Court argument? F) If so, who, and for what cases? G) For each one, please explain how you became involved and why.

16. In your hearing testimony you mentioned pro bono work you had done, and that it proved you would not be a partisan or ideological judge. Please list all of the pro bono legal work you did while you were in private practice and explain how each project demonstrates your ability to be fair to all litigants.

17. On September 20, 2001, did you and others in the Administration present a proposal to Congressional staff that called for liability protection for the airline carriers involved in the September 11, 2001 attacks, including limitations on punitive damages against the air carriers, attorney fee caps on victims' attorneys and offsets of victim awards in court for any emergency or disaster relief payments to these victims?

18. Did this proposal from the Administration, presented on September 20, 2001, to provide liability protection for the airline carriers involved in the September 11, 2001, attacks also contain any compensation program for the victims of the September 11, 2001 attacks?

19. During subsequent negotiations on this proposal to provide liability protection for the airline carriers involved in the September 11, 2001, attacks, did you initially oppose providing any compensation program for the victims of the September 11, 2001 attacks?

20. In your hearing testimony, you explained that one of the reasons you want to be a judge is because you have a "commitment to protecting rights and liberties of the people." What in your record demonstrates a commitment to protecting the rights and liberties of all people?

21. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Charles Pickering. Pickering has called the fundamental "one-person one-vote" principle recognized by the Supreme Court under the Fourteenth Amendment "obtrusive." Fairley v. Forrest County, 814 F.Supp. 1327, 1330 (S.D. Miss. 1993). In order to redress serious problems of discrimination against African American voters in some cases, the courts (including the Supreme Court and the Fifth Circuit) have clearly recognized the propriety and importance of creating majority-black districts as a

remedy under appropriate circumstances. Judge Pickering, however, has severely criticized this significant form of discrimination relief. In one opinion, he called it "affirmative segregation." Bryant v. Lawrence County, 814 F. Supp. 1346, 1351 (S.D. Miss. 1993). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? C) If so, did you express those concerns to your colleagues or to your superiors? D) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on voting rights. Was that your view? E) Why would you want to have someone with those views on the Fifth Circuit? F) Do you agree with Judge Pickering's views on voting rights as expressed above?

22. In two cases dismissing claims of race discrimination in employment, Pickering used identical language striking a similar theme. He wrote in both that "this case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority" and that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities." See Seeley v. City of Hattiesburg, No.2:96-CV-327PG (S.D. Miss., Feb. 17, 1998) (slip op. at 12); Johnson v. South Mississippi Home Health, No. 2:95-CV-367PG (S.D. Miss., Sept. 4, 1996)(slip op. at 10). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on employment discrimination. Was that your view? D) Why would you want to have someone with those views on the Fifth Circuit? E) Do you agree with Judge Pickering's views on employment discrimination cases as expressed above?

23. In a 1994 case in his courtroom, U.S. v. Swann, Judge Pickering has admitted that he engaged in *ex parte* communication with the Department of Justice, including one high-ranking official who was a personal friend, in order to reduce the sentence of a convicted cross-burner. It has been argued that Judge Pickering was just trying to address the disparate sentences received by the three defendants in the case, and that he believed Mr. Swann, who says was not the "ringleader" in the cross burning, was being unfairly punished. In fact, all three of the defendants were found guilty, and it was Mr. Swann's wood, gasoline, truck and lighter that were used to build, douse, transport and ignite the cross on the lawn of an interracial couple. Mr. Swann, the only competent adult of the trio of perpetrators, was also the only defendant who rejected the plea offered by the government. He convicted by a jury of his peers of all three counts brought by the Department of Justice, including one that required a five-year mandatory minimum sentence. This sentence was legislated by Congress and the judge had no discretion to depart from it. A) Were you or anyone else involved in his selection, nomination or hearing preparation aware of Judge Pickering's conduct in this case before he was nominated? B) If so, did you still recommend his nomination? If not, when did you become aware of it, and once you became aware of it did you recommend that he withdraw his nomination? C) Do you think it is in the public interest to have a judge on

the bench who engaged in what several legal ethics experts have agreed was unethical behavior?

24. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Priscilla Owen. She was the target of criticism from her conservative Republican colleagues. In FM Properties v. City of Austin, the majority calls her dissent, "nothing more than inflammatory rhetoric." In Montgomery Independent School District v. Davis, the majority (which included your former boss, then-Justice Alberto Gonzales and two other Bush appointees) is quite explicit about its view that Owen's position disregards the law, saying that "nothing in the statute requires" what she says it does, and that, "the dissenting opinion's misconception . . . stems from its disregard of the procedural elements the Legislature established," and that the, "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the board. . ." In In re Jane Doe, the majority includes an extremely unusual section explaining its view of the proper role of judges, admonishing the dissent joined by Justice Owen for going beyond its duty to interpret the law in an attempt to fashion policy, and in a separate concurrence, Justice Gonzales says that to the construe law as the dissent did, "would be an unconscionable act of judicial activism." A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone who had been criticized by her own colleagues for misconstruing the law and engaging in judicial activism to the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Owen, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit. Was that your view? D) Why would you want to have such an activist judge on Fifth Circuit?

25. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Janice Rogers Brown. According to her questionnaire, her contact with the office began in the spring of 2001. Among the views that have made her nomination controversial was her statements that the Supreme Court's decisions 65 years ago to uphold humanitarian New Deal reforms – what she calls the "Revolution of 1937" – constituted a "disaster of epic proportions." Those 1937 decisions included rulings that upheld minimum wage laws, unemployment compensation laws, federal guarantees for collective bargaining, and the federal social security program. [Minimum wage laws – West Coast Hotel v. Parrish, 300 U.S. 379 (1937); federal unemployment compensation laws – Steward Machine Company v. Davis, 301 U.S. 548 (1937); collective bargaining guarantees – Jones and Laughlin Steel v. NLRB, 301 U.S. 1 (1937); federal social security system – Helvering v. Davis, 301 U.S. 619 (1937)] A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Brown, and I include you in that group, must have considered it in the public interest to have someone with those views on the D.C. Circuit, where she would be in a strong position to affect all of those programs. Was that your view? D) Why would you want to have someone with those views on the D.C. Circuit? E) Do you view the Supreme Court decisions she discussed as "disasters?"

26. Justice Brown ruled in a dissenting opinion that any regulation constitutes a regulatory "taking" – hence requiring compensation – if it "benefit[s] one class of citizens [in that case, low income tenants] at the expense of another [in that case, landlords]." San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 126 (2002). Under that standard, virtually any law to protect certain citizens, such as environmental, health and safety, consumer protection, nursing home reform, or antidiscrimination standards, could be challenged. This of course was not just a speech by Justice Brown; it was a dissenting opinion and a purported interpretation of the law. A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the DC Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

27. Justice Brown has made some very radical statements in her opinions, dissents and speeches. For each of the statements below, please answer the following questions: A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the DC Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

► "Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system permits them to extract...Big government is...[t]he drug of choice for multinational corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens."

► "Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible." "A Whiter Shade of Pale," Speech to Federalist Society (April 20. 2000)("Federalist speech").

► "[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens." "Fifty Ways to Lose Your Freedom," Speech to Institute of Justice (Aug. 12, 2000)("IFJ speech").

► "[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco...I would find the HCO [San Francisco Residential Hotel Unit Conversion and Demolition Ordinance] preempted by the Ellis Act and facially unconstitutional. ...Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government. ...The right to express one's individuality and essential human dignity through the free use of property is just as important as the

right to do so through speech, the press, or the free exercise of religion." [Dissenting opinion in San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 120, 128-9 (Cal. 2002).]

28. One of the nominees submitted during your tenure, recently given a recess appointment after his nomination failed on the Senate floor, is William Pryor. Among many other remarkable statements, Mr. Pryor praised as "sublime" and "brilliant" a 2001 Federal District Court decision, West Side Mothers v. Havemann, later reversed on appeal, that would deny patients a day in court to enforce their right to treatment in accord with Federal Medicaid standards – a right that has clearly existed dating back to the earliest days of the Medicaid program. That would include, for example, a large proportion of all Americans who must now reside in nursing homes. A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on this program. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you view the district court decision in West Side Mothers to be "sublime" or "brilliant?"

29. In a July 2000 speech Pryor stated: "I will end with my prayer for the next administration: Please God, no more Souters." Bill Pryor, "The Supreme Court as Guardian of Federalism," before the Federalist Society and Heritage Foundation (July 11, 2000). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you agree with Mr. Pryor that no more Supreme Court Justices like David Souter should be appointed? If not, why not?

30. Mr. Pryor has criticized the Supreme Court's 7-1 ruling that the denial of admission to women by the Virginia Military Institute, a state-supported public university, violated the Equal Protection Clause. He said: [t]he Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area. Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your

superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on equal protection. Was that your view? D) Why would you want to have someone with those views on equal protection and equal treatment of women on the Eleventh Circuit? E) Do you agree with Mr. Pryor that the Supreme Court's decision in the VMI case represented the triumph of political correction over Constitutional principles?

31. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Carolyn Kuhl. An *amicus curiae* brief that Kuhl co-authored when she served as Deputy Assistant Attorney General urged the Supreme Court to overturn Roe v. Wade, stating that: "the textual, historical and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, at 10 (July 15, 1985) (LEXIS pagination). The brief also asserted that the important principle of stare decisis should not stop the Court from overturning Roe. The brief claimed that "*[s]tare decisis* is a principle of stability. A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment." Id. at 10 (emphasis added). A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the Ninth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Kuhl, and I include you in that group, must have considered it in the public interest to have someone with those views on the Ninth Circuit, where she would be in a strong position to affect the law on privacy and reproductive rights. Was that your view? D) Why would you want to have someone with those views on the Ninth Circuit? E) Do you agree with the views Judge Kuhl expressed in that brief? F) Do you believe Roe v. Wade is so flawed that it ought to be overturned?

32. Mr. Kavanaugh, in your work on judicial nominations in the White House Counsel's Office, I am sure you recall the February 2003 letter from the White House asserting that there was no "persuasive support in the history and precedent of judicial appointments" for our request for memos written by Mr. Estrada at the Justice Department. I found that letter to be completely inconsistent with the level of cooperation shown by other administrations toward such requests of Members of this co-equal branch. I also put into the Congressional Record excerpts of correspondence between President Reagan's Justice Department and the Senate Judiciary Committee demonstrating that the administration agreed to share legal memos written by and to Robert Bork and William Rehnquist during their judicial nominations—even though they had served for years as judges--and I also noted other examples in which legal memos were shared during nominations for lifetime or short-term posts, such as Brad Reynolds's nomination. A) Did you ever look at the correspondence between the Department of Justice and the Senate in the Bork, Rehnquist, Reynolds or other nominations? B) If you did examine that correspondence, then you must be aware that past administrations provided the Senate with numerous legal memos of nominees while your administration provided not a single one by Mr. Estrada. Even

your administration provided the Senate EPW Committee with legal memoranda of Jeffrey Olmstead in connection with his short-term appointment. Please explain why the legal memos of an attorney in the White House Counsel's Office could be shared with the Senate but your administration refused to provide any legal memos by Mr. Estrada. C) We know that legal memos written by Carolyn Kuhl, when she was a legal advisor to the Attorney General and recommended that Bob Jones University be given tax exempt status despite its express policy of racial discrimination, were provided to Congress in the aftermath of that failed initiative. Please explain why her legal memos and those of her colleagues at the Justice Department could be shared with Congress but not any of the memos of Mr. Estrada. D) I am sure you will cite the letter from former Solicitors General. As you know, their policy preference to provide absolute protection to deliberations in their former office is not embodied in any statute or in the Constitution and, in fact, the disclosure to the Senate of numerous memos written to Robert Bork and by him in the Solicitor General's Office (as well as other past disclosures) did not chill deliberations. As the Supreme Court noted in the Nixon tapes case, it is quite *unlikely* "that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure." U.S. v. Nixon, 418 U.S. 683 at 712 (1974); see also Clark v. United States, 289 U.S. 1, 16 (1933); McGrain v. Daugherty, 273 U.S. 135 (1927). The interest in candid deliberation does not create an absolute privilege against disclosure in response to a request of Members of a co-equal branch. What can you say to assure the Senate that you would give due respect to the prerogatives of the Senate and not just continue to favor maximizing this Administration's penchant for secrecy if you were confirmed?

33. Mr. Kavanaugh, you had significant responsibilities on judicial nominations in the White House Counsel's Office during much of the same period that Manuel Miranda worked for Senate Majority Leader Bill Frist's lead attorney on nominations and when Mr. Miranda worked as counsel to Senator Hatch on the Senate Judiciary Committee. You testified that during the years you worked on judicial nominations you met with Mr. Miranda and others on the Republican team "to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in." Mr. Miranda has asserted publicly that he took Democratic memos in part to find "information about when confirmation hearings would be held." A) From December 2001 through December 2002, did Mr. Miranda ever tell you when he thought Democrats would schedule hearings on the President's judicial nominees in advance of the public notice of hearings? B) Did he ever tell members of the White House team when he thought hearings would be scheduled or the likely timing of hearings throughout the year? C) Did other Republican Senate staffers provide you or your colleagues with such information or speculation? D) Did you ever inquire about the source of such speculation? How accurate was the speculation?

34. A) How often did you speak with Mr. Miranda from the Senator Frist became the Majority Leader in late 2002 through May 2003, when you became staff secretary to the President? B) How often did you receive e-mail communications from him during this period? C) How often did you see him at meetings, either on the Hill or at the White House? Please provide the same information for the period December 2001 through December 2002.

35. You testified that Mr. Miranda did not ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee or any information that you believed or were led to believe was obtained or derived from Democratic files. A) Did Mr. Miranda ever discuss with you what the Democratic strategy on nominations was during the spring of 2003? B) Did he suggest to you or to others on your team that Democrats would filibuster any of the President's judicial nominees? C) Did you or your team have confidence that his speculations were accurate? D) Did you find, perhaps even in retrospect, that his intelligence was untoward or dubious?

36. One of Mr. Miranda's responsibilities during the period when your responsibilities overlapped was managing the Republican strategy during the floor fight on the nomination of Miguel Estrada to the court to which you are now nominated. A) Were you in daily contact with Mr. Miranda during this period? B) If you were not, which members of your team were responsible for or assisted with communications with him about the strategy for winning the confirmation of Mr. Estrada?

37. A) Did Mr. Miranda ever convey to you or any member of the White House staff the allegation that Mr. Estrada was being opposed because he was Latino, or similar words? B) Did you ever discuss this issue or allegation with Mr. Miranda or any other Senate staffer, including Senator McConnell's aide John Abegg, who was mentioned in the SAA report as providing at least one of the stolen computer files to Senator Hatch's chief nominations counsel, Rena Comisac, according to her statement]? C) Did you ever discuss this issue or allegation with any Republican senate staffer or Senator?

38. A) Prior to the Bob Novak column published on February 9, 2003, did you hear that Democratic Senators had met in January regarding the decision to filibuster the nomination of Miguel Estrada? Mr. Novak has admitted writing a column published that day based on computer files that were stolen by others. B) Did you ever discuss the issue of Mr. Estrada's nomination or the filibuster with Mr. Novak? C) Did he ever indicate to you that he had a source or had seen a purported Democratic strategy memo on the Estrada filibuster? D) Did Mr. Novak ever speak with you or any of your colleagues in advance of the date that column was published about the decision to filibuster the Estrada nomination?

39. A) At any time from January 30th until November 14, 2003, did you ever hear that such a meeting occurred? B) Prior to November 14, 2003, did you hear that there was a computer file about any such meeting? According to reports, Senator Kyl's counsel Joe Matal received copies of some of the Democratic computer files from the Wall Street Journal on November 14, 2003. C) Were you or anyone at the White House given copies of the purported Democratic computer files on November 14 or November 13 by staff of the Wall Street Journal or any other person?

40. A) Did you or anyone at the White House receive copies of any purported Democratic computer file, electronically or in hard copy, prior to November 14, 2003 or at any time since then? B) If your answer is "no," how do you know that no one on the White House staff saw such a memo? Mr. Gonzales wrote a letter in response to a letter of inquiry from Senator Leahy stating that the White House would not conduct an internal investigation to

determine whether any of the stolen computer files were given to White House aides. C) Did you personally conduct any inquiry into whether any attorney or staff member of the White House received any of the stolen memos?

41. A) Please provide a list of the names of every staff member who worked on judicial nominations at the White House from December 2001 through December 2003, during the period that Mr. Miranda worked at the Senate and was stealing and reading Democratic computer files. Also, please indicate who from the Justice Department worked with you on nominations during this period.

42. According to the SAA report, Mr. Miranda directed that Jason Lundell provide computer files to the Executive Director of the Committee for Justice, Sean Rushton. You testified that you thought you "met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees." A) Please describe how you first met Mr. Rushton, how often you have met with him or spoken with him about nominations, and how often you have received e-mail communications from him about judicial nominations.

43. A) How often did you speak or meet with, or receive e-mail communications from, the leader of Committee for Justice, C. Boyden Gray, about judicial nominations issues? B) How often did you or members of the White House nominations team meet with or speak with either Mr. Rushton or Mr. Gray during 2003? The Committee for Justice has been a strong defender Mr. Miranda's role in taking Democratic computer files, which is understandable I suppose since they received computer files at Mr. Miranda's direction according to Mr. Lundell. C) Please describe for the Committee any contacts you had with Mr. Gray , Mr. Rushton, or Mr. Lundell by phone, by e-mail, or in person during your work on judicial nominations.

44. A) Did you keep a telephone log, appointment book or any other document that makes any reference to Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Kay Daly (whose organization published some of the purported stolen computer files)?

45. Mr. Gray and Mr. Rushton's group, Committee for Justice, has held fundraisers with White House insiders like Karl Rove as well as members of the Bush family, including the President's nephew. You testified that you had attended one of their fundraisers but you were not sure if you made a donation. A) Which fundraiser or fundraisers of theirs did you attend? B) Did you ever donate any money to this organization? C) Have you ever attended any other event sponsored or co-sponsored by this organization? Please be specific.

46. During the spring of 2003, the Committee for Justice began an attack ad campaign basically accusing Senate Democrats of opposing Mr. Estrada because he is Latino, an accusation that seems to be premised on Mr. Miranda's claims. A) Were you involved in any way in the creation of that ad or in any discussion about the benefits of any such ad campaign? B) Did you preview that ad before it was first aired? C) Did you ever discuss that ad, orally or in writing, with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With

Mr. Abegg? With Mr. Dahl? With Ms. Comisac? Did you ever discuss that ad with any other Republican Senate staffer or Senator?

47. A) During the spring of 2003 did you ever discuss the nomination of Priscilla Owen of Texas with Mr. Miranda? B) Did you ever discuss the Democratic or likely Democratic strategy with him on this nomination that was so important to the President, because she's from Texas, and to Mr. Rove, who was her state judicial election campaign strategist and fundraiser in the 1990s? C) Did you have any meetings with Mr. Miranda about this nomination? D) Did you have any e-mail communication about this nomination with him? E) Did you have any telephone conversations with him? F) Who on the White House staff was involved in the Owen nomination and floor strategy? G) Did you ever discuss, orally or in writing, Senator Kennedy's views on Justice Owen with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? With Mr. Novak? With Mr. Rove? Did you ever discuss this issue with any Republican in the Senate?

48. A) In April 2003, did you ever speak with any Republican in the Senate or any outside group or press about the issue of Democratic filibusters based on "substance as opposed to process?" B) Did you hear that or any similar phrase used by Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Rushton, Mr. Gray, or Ms. Daly?

49. A) Did you work with Mr. Miranda in his role in getting Majority Leader Frist to schedule a day of "constitutional debate" on the filibuster in March of 2003, when Vice President Cheney presided as President of the Senate? B) Did you discuss with Mr.Miranda, Mr. Abegg or any other Republican staffer strategies for overcoming the Democratic filibuster last spring? C) Were any outside organizations present at or involved in those discussions? D) Did you or any of your colleagues discuss that issue, orally or in writing, with Ms. Comisac or Mr. Dahl?

50. A) Were you involved in any way in the decision of Mr. Frist to hire Mr. Miranda as his chief aide on judicial nominations? B) Were you asked about whether you thought he would do a good job by anyone on his staff ? C) Did you recommend him? D) Did Mr. Gray, Ms. Daly or any other leader of conservative groups commend Mr. Miranda's work on judicial nominations to you?

51. A) In the year 2002, when Mr. Miranda worked on the Judiciary Committee, did you have any communication with Mr. Miranda in 2002 about the nomination of Judge Dennis Shedd to the Fourth Circuit? B) Who on the White House staff was involved in the Shedd nomination, during the Committee consideration and the floor consideration? C) Which Senate staffers did you or White House staff work with on this nomination? D) Who worked on this nomination at the Justice Department? E) Did Mr. Miranda ever mention to you his views on the pace of consideration of the Shedd nomination? F) Did you ever have any communication, orally or in writing, about this matter with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly? G) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? H) Did you ever see any proposed questions for Judge Shedd that might be asked by Senate Democrats in advance

of that hearing? I) Were you aware prior to Judge Shedd's hearing that there were concerns about Judge Shedd's civil rights record? How so?

52. A) From December 2001 through November 14, 2003, did you ever hear or learn that any Republican staffer claimed to have a Democratic mole or source or a "conscience stricken" Democrat who was providing Mr. Miranda or any other staffer with information about the hearing schedule or Democratic strategy? B) During this period did you ever hear a claim that there was a supposed computer glitch or security weakness that allowed Democratic computer files to be spied upon, read, stolen, printed or downloaded, prior to November 14, 2003?

53. A) Did you attend the nomination hearing for Miguel Estrada? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Who in the White House and at Justice worked on that nomination at that stage? E) Did any of them get that information? How do you know? F) Did you ever see or hear about any possible questions from Senate Democrats for Mr. Estrada that might be asked, in advance of that hearing?

54. A) Did you attend the first nomination hearing for Priscilla Owen? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Justice Owen that Senate Democrats might ask her in advance of that hearing?

55. A) Did you attend the nomination hearing for D. Brooks Smith? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Judge Smith that Senate Democrats might ask him in advance of that hearing?

56. During the winter of 2001 through the spring of 2002, did it come to your attention that Judge Charles Pickering's nomination was facing difficulty due to his legislative voting record on civil rights matters or his connection to the Mississippi Sovereignty Commission or his partner Carroll Gartin's ties to that Commisssion?

57. Mr. Miranda told the Los Angeles Times in a March 4, 2003 story that he believed that there was nothing wrong with him accessing the computer files of his opposing counsels on nominations and using them to help win what he calls the "judicial nominations war." In that story, he also noted that that trove of Democratic computer files he and Mr. Lundell located "was valuable information." In a March 5, 2004 Washington Times story, Mr. Miranda he noted that he spied on and read the stolen computer files because he "had an obligation to learn everything [he] could possibly learn to defend [his] clients." He himself or through one of his proxies shared some of this valuable information with Mr. Novak and other columnists, as one of his primary responsibilities in Frist's office was

dealing with the media and outreach to conservative groups and working with the White House, yet you are prepared to state unequivocally that you never saw or heard that Mr. Miranda had obtained Democratic computer files prior to his public admissions that he had done so?

58. A) Have you spoken with Mr. Miranda or received any written communication from him directly or through a third party about judicial nominations or the improper access of Democratic computer files between November 14, 2003 and today? B) Has the White House been approached or lobbied to hire him, as the Senate has?

Written Questions from Sen. Richard Durbin
Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the D.C. Circuit
Senate Judiciary Committee
May 4, 2004

1. At your nomination hearing, you discussed your involvement in the judicial nomination process when you worked in the White House Counsel's office. You indicated that you were involved in both the selection side and the confirmation side, but you described only the confirmation side. Please provide details about your role in the selection side. What was the nature of your role in selecting judicial nominees for President Bush?

2. For the following judicial nominees, please indicate: (A) whether you recommended the nominee for the position to which he or she was nominated, and (B) the nature of your involvement in their selection and confirmation: Miguel Estrada, Charles Pickering, Priscilla Owen, William Pryor, Carolyn Kuhl, Janice Rogers Brown, William Myers III, Claude Allen, Terrence Boyle, D. Brooks Smith, Dennis Shedd, Michael McConnell, Jeffrey Sutton, John Roberts, Jay Bybee, Timothy Tymkovich, William Haynes, J. Leon Holmes, and Paul Cassell.

3. When you were helping select judicial nominees for President Bush, did you give preference to individuals who were members of the Federalist Society? Did you consider membership in the Federalist Society to be a positive factor for a potential nominee? Why?

4. In your capacity as Staff Secretary and Assistant to the President, have you worked on judicial nominations issues either formally or informally? If so, were you involved in the decision to give recess appointments to Charles Pickering and William Pryor? If you were, please describe the nature of your involvement and your recommendations. If you no longer work on judicial nominations, please indicate the month you stopped working on this issue.

5. You and Justice Janice Rogers Brown were nominated together to the 11th and 12th seats on the D.C. Circuit. During the Clinton Administration, some Senate Republicans argued that there was no need for these seats to be filled because the workload did not warrant it. President Clinton nominated individuals to the 11th and 12th seats but those nominees were never given a hearing and vote. There is no evidence that the workload of the D.C. Circuit has increased since that time. In fact, since 1997 the number of appeals is down 27%, the number of pending cases is down 28%, and the number of written decisions per judge is down 14%. In this light, do you believe that it is advisable to fill these seats today? Was any consideration given by the Bush White House to not filling these seats? Please explain.

6. What role did you play in helping judicial nominees answer written questions submitted by Senators on the Judiciary Committee? Please provide examples.

7. You served as a law clerk to Supreme Court Justice Anthony Kennedy. In a December 2003 *Vanity Fair* article, a fellow law clerk of yours at the Supreme Court discussed your attitude about death penalty appeals. He said: "You'd kind of know instinctively how he'd come out, no matter what the petition was." What is your response to this statement? Without naming specific cases, were there any capital punishment cases you worked on in which you recommended that the death penalty not be administered?

8. At your hearing, Senator Kennedy asked whether you agreed with the statement from the Federalist Society's mission statement that "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Please provide a more direct and complete answer to the question than the one you gave Senator Kennedy at your hearing.

9. One of the stated goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities do you believe need to be reordered within the legal system of America?

10. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

A. As someone who had significant responsibility at the White House for carrying out this mandate, do you believe that President Bush has been successful in fulfilling this pledge?

B. How would you describe the judicial philosophy of Justices Scalia and Thomas?

C. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

D. Do you consider yourself to be a strict constructionist? Why or why not?

E. Do you think that the Supreme Court's landmark decisions in *Brown v. Board of Education, Miranda v. Arizona, Roe v. Wade* are consistent with strict constructionism? Why or why not?

11. In the case *Rice v. Cayetano*, you were the counsel of record in an amicus brief arguing that the state of Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs. In a 1999 *Wall Street Journal* op-ed you wrote

about *Rice v. Cayetano* entitled "Are Hawaiians Indians? The Justice Department Thinks So," you expressed considerable cynicism about the Clinton Administration's justification for filing a brief on behalf of the state of Hawaii. You wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."

A. Do you stand by your statement that the Clinton Administration filed a brief on behalf of Hawaii because "Hawaii is a strongly Democratic state," and that the Clinton Administration took "the politically correct position" in order to "support the state's system of racial separatism"?

B. Do you believe there are any instances in which the Ashcroft Justice Department has failed – in your words – "to put law and principle above politics and expediency"? If so, please provide specific examples.

12. In your *Wall Street Journal* op-ed, you wrote that the position of the Clinton Administration was "to allow political correctness to trump the Constitution." You also wrote: "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe." Justices Ginsburg and Stevens were apparently "fooled" by the Justice Department because they dissented in this case and largely adopted the Justice Department's position. At your nomination hearing, however, you described Justice Ginsburg as "an excellent Justice." Do you believe that your *Wall Street Journal* op-ed was excessively harsh in its condemnation of the Clinton Administration and Supreme Court Justices who voted for that Administration's position?

13. One of your clients in *Rice v. Cayetano* case was the Center for Equal Opportunity, an organization that opposes the use of affirmative action. The organization's mission statement refers to affirmative action as "racial preferences" and states: "CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting."

A. Do you believe that affirmative action constitutes a "racial preference"?

B. Do you share the desire of your former client to prevent the use of affirmative action in the contexts of employment, education, and voting?

14. In the case *Santa Fe Independent School District v. Doe*, you wrote an amicus brief on behalf of Representatives J.C. Watts and Steve Largent in which you argued that the use of loudspeakers for student-led prayers at high school football games did not constitute an Establishment Clause violation of the First Amendment. The Supreme Court rejected your argument by a vote of 6-3, ruling that the prayer involved both

perceived and actual endorsement of religion. Do you believe that the Supreme Court was wrong in reaching that decision?

15. Other than the work you performed on behalf of J.C. Watts and Steve Largent in *Santa Fe Independent School District v. Doe*; in defense of a local ordinance that granted religious entities an exemption from the county's zoning restrictions; and on behalf of the American relatives of Elian Gonzalez, please describe all other pro bono legal work that you have performed as an attorney.

16. You indicate on your Senate questionnaire that you "went to Daland, Florida, in November 2000 to participate in legal activities related to the recount." Please describe these activities in more detail.

17. You indicate on your Senate questionnaire that you were the Regional Coordinator for Pennsylvania, Maryland, Delaware, and the District of Columbia for a group called "Lawyers for Bush Cheney 2000." Please describe your activities as Regional Coordinator.

18. On your Senate questionnaire, you stated: "In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit." Please provide more information about the meaning of that statement. Why were you not selected for the Fourth Circuit? Was the opposition of the Maryland Senators a factor in your not being selected?

Written Questions of Senator Edward Kennedy
to Brett Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

I. FOLLOW-UP ON QUESTIONS AT THE HEARING

A. THE DEMOCRATIC COMPUTER FILES

As you know, the questions surrounding the improper access to and dissemination of the Senate Democratic computer files have been referred for investigation by a special prosecutor. Since your office worked directly with both a key perpetrator and with other individuals and groups who appear to have received materials from the files, on the very subject of most of the files known to have been downloaded, it is to be expected that you and your office will be subjects of this investigation. We therefore need to be as sure as we can, before processing your nomination, that we have all of the information regarding your possible involvement in or knowledge of the matters under investigation.

You were asked a number of questions regarding this matter by Senators from both parties (see, e.g., pages 35-37, 97-100, 112-114 of the Transcript of the Hearing on the Nomination of Brett M. Kavanaugh, "hearing transcript"). In some cases the questions as asked were framed, or your answers were framed, in ways that restricted or limited them in some way, either by time frame (e.g., past, present, at, before or after a certain time), particular person (e.g., Rushton, Gray, Daly), a qualifier (e.g., "usually," "documents" vs. "information") or an ambiguous description (e.g., "that matter"), or otherwise. In some cases your answers were unresponsive even to the questions as asked.

Would you kindly review all of your testimony on this subject, and amplify each of your answers to provide and make clear that you are providing all of the information you have on the entire subject without regard to any restrictions or limitations or qualifiers in the original questions or your answers. In addition, where, on review you see that your answers were not fully responsive or were misleading in any way in view of your entire knowledge of the subject at any point in time, please provide fully responsive answers.

For example, when you were asked about the circumstances of your meetings with Manuel Miranda, you responded with what they "usually" were. In such a case, you should provide what the circumstances were in all instances, whether usual or unusual.

Similarly, you were asked two questions about whether you received documents or information that "appeared" to come from or that "you believed or were led to believe" came from Democratic files. Both answers were in the negative but were explained by almost identical statements, not responsive to the questions, that you were "not aware of that matter until I learned of it in the media." For present purposes you should consider that you were asked: "Did Mr. Miranda (or anyone else) ever share, reference or provide you with any documents (or other facts, schedules, positions, plans or other information)

that appeared to you (then or at any subsequent time, especially after you had become aware of the Republican access to Democratic files and had seen the files posted on the web or provided to the media and to groups or persons with whom you were in touch) to have been drafted or prepared by (or obtained or derived from the files, emails, or other communications of) Democratic staff members of the Senate Judiciary Committee?

Similarly, you should re-frame your answer to the second question on page 37 of the hearing transcript to read its reference to "Associate White House Counsels" as including any interested White House staff, such as those in the Public Liaison or Legislative Affairs offices, to remove your own limitation to whether they were "aware" of the source of the materials and instead respond to the question asked, i.e., did they have access to the materials (or information), whether or not they were "aware" of the source.

As another example, you should review your answers to the questions regarding Boyden Gray on pages 113-14 of the hearing transcript, and remove your repeated limitation to "since I have been staff secretary," providing detailed information on your relationship to Mr. Gray throughout your White House employment.

In short, whether or not you believe the questions as asked should have elicited this information at the hearing, please fully disclose now, without standing on semantic limitations in the original questions or in this submission, everything you know, or in retrospect now realize or believe, about the circumstances surrounding the access to the Democratic files, the use and dissemination of the content or information derived from these files, and the availability of that content or information to you or anyone else in the White House, the Justice Department, the groups supporting the President's nominations, or anyone else outside the Democratic offices of the Judiciary Committee.

If this request is any way unclear, or leaves open any basis on which you might think that you need not provide everything you know on the entire subject, please let us know promptly, and we will clarify the request.

In addition to the above:

1. Please provide your own conclusions as to the validity of Mr. Miranda's public statements as to his justification for his actions, their compliance with his ethical obligations, and the fact that he was operating in the interests of those who supported the nominations.

2. Since Boyden Gray has been publicly identified as a supporter of and spokesman for the White House on subjects relating to judicial nominations, please state whether you agree with his public defenses of Mr. Miranda, whether you or anyone at the White House have discussed Mr. Gray's position on this subject with Mr. Gray, and whether you or anyone at the White House have indicated to him that since he is so identified with the White House, he

should desist from defending Mr. Miranda.

3. In view of Mr. Gonzales' refusal to investigate the subject, please state whether your (expanded) answer to the question on page 37 about whether "any other Associate White House Counsels had access" to the materials at issue is based on your own affirmative knowledge of what other White House staff knew or on your lack of knowledge of what other staff knew.

4. Please state whether Mr. Miranda was ever involved in any of the moot courts or other meetings, conference calls, or conversations to prepare nominees for their hearings. If so, which ones?

   a. Did you ever meet with a nominee together with Mr. Miranda to prepare the nominee to testify before the Senate Judiciary Committee? If so, please describe that preparation and Mr. Miranda's role in it.

   b. Did Mr. Miranda ever directly or indirectly convey to any nominee, or to anyone involved in preparing any nominee, whether orally or in writing, any questions or areas of questioning that he suggested the nominee might be asked by any member of the Senate Judiciary Committee? If so, please describe the circumstances in which this occurred, and identify each nominee as to whose nomination Mr. Miranda's suggestion was made.

5. Please describe any efforts you made, before or after your hearing, to review the materials and information you received from Mr. Miranda, other White House staff, the Justice Department, Mr. Gray, Mr. Rushton, Ms. Daly, or anyone else involved in judicial nominations, to determine whether anything they provided may have derived from the accessed Democratic files.

6. Did Mr. Miranda ever tell you, suggest, or hint in any manner that he had a "source" or "mole" or other means of obtaining non-public information from the Democratic side? Did you ever hear that there was a disaffected Democratic staffer member or similar source providing such information?

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt towards Federalist Society members on the Administration's judicial nominations, you characterized the Society as "a group that brings together lawyers for conferences and legal panels. The Federalist society does not take a position on issues. It does not have a platform." You said you were a member because it puts on "conferences and panels" where you can learn about issues and meet colleagues.

No reasonable person could think the Society is just a meeting place for lawyers. The Society's own website is much more candid than you were, describing it as "a group of conservatives and libertarians interested in the current state of the legal order." The Society decries, without attributing it to anyone in particular, the "orthodox liberal ideology which advocates a centralized and uniform society" and in pursuit of its goals has "created a conservative and libertarian intellectual network that extends to all levels of the legal community."

If, as a judge, your opinions merely followed and implemented the goals of the Society, would you still assert that you would not be "taking a position on issues" and not pursuing "a platform"?

C. PRYOR NOMINATION

Since responding to the questions on the Republican Attorneys General Association issue, have you reviewed your records and refreshed your recollections as to your role in preparing the nominee for questions on that subject? Please describe your role in more detail.

1. You did not answer the questions I asked you on pages 134-35 of the hearing transcript, as to what, if anything was done, after the revelations in the media about the RAGA issue. Please do so in full now. Did you or anyone else in the White House or Justice Department check the issue out in more detail, have it investigated further, question the nominee about it, or otherwise follow up on the issue? Did any of you check with the RNC to determine who had the records on the matter, talk to those involved, or ask to see the records that the nominee said they had? Please provide details on what was done, the results of any inquiry, and who received those results.

2. At any time before February 20, 2004, were you aware that Mr. Pryor was being considered for a recess appointment to the 11th Circuit? Were you aware that the recess which was going to be used was an intra-session recess of five business days surrounding a three-day holiday weekend? Were you aware that the appointment was to be made on the afternoon of the last business were you aware that the appointment was to be made on the afternoon of the last business day of the recess? Were you aware that the shortest prior recess used for appointment of an Article III judge during an intra-session recess was a recess of 35 days? Did you express an opinion to anyone at the White House as to the validity or advisability of making such an unprecedented appointment? If so, without asking what your advice was, is there any reason we cannot assume that your advice had to have been either (a) that the appointment should be attempted, or (b) not followed.

3. At your nomination hearing, I asked whether you assisted in preparing William Pryor to testify before the Senate Judiciary Committee. At that time, you indicated that you may have participated in a "moot court" session to prepare Mr. Pryor, but that you could not recall. Now that you have had additional time to review your work on nominations matters, please clarify whether you did in fact participate in a moot court preparation of Mr. Pryor.

4. As you know, after William Pryor was nominated to the U.S. Court of Appeals for the Eleventh Circuit, several members of the Senate and the public expressed concern about extreme statements that Mr. Pryor had made, including his description of Roe v. Wade as "the worst abomination of constitutional law in our history." Do you agree with Mr. Pryor that Roe v. Wade is an "abomination of constitutional law"?

5. The Constitution gave the Senate a co-equal role in appointing federal judges to guarantee that the judiciary is independent, and does not simply reflecting the political views of a particular President. The idea that federal judges should be independent of the other two branches of government is one is one of the most important aspects of our democracy. As I mentioned during your confirmation hearing, after the Supreme Court's 5 to 4 decision in Bush v. Gore, William Pryor stated that he had wanted the decision to be decided 5 to 4, so that President Bush "would have a full appreciation of the judiciary and judicial selection, so we can have no more appointments like Justice Souter." If all judges followed Mr. Pryor's view, the courts would be little more than an arm of the Executive branch. Do you believe this is an appropriate view for a nominee to a federal court? Do you agree with Mr. Pryor's view about the role of federal judges?

D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS

1. During your April 27, 2004, nomination hearing, you testified about your role in judicial nominations during the current Bush Administration and stated that you focused on "certain circuit court nominations" and on nominees from particular parts of the country.

   a. Please note the month and year when you first began working in matters related to judicial nominations and, if it you no longer have any role in matters related to nominations, the date on which your involvement in such matters ceased.

   b. Which nominees did you work on, in any capacity?

c. With respect to each of the nominees listed in response to 3.a., above, please describe your role in selecting, vetting, or recommending them for nomination to the federal courts of appeals, and please describe the role you played in their preparation for testimony or responses to written questions.

2. During the hearing on your nomination, I asked what experience, if any, you have in labor law matters. Your answer noted that you have held several government positions, but did not identify whether you have any experience in labor law. Please clarify whether you worked on any cases or legal matters involving labor law claims, and if so, please identify the case and describe the nature of your work.

3. Please describe any legal experience you have involving the Americans with Disabilities Act. Please also describe any legal experience you may have involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act or any aspect of environmental law. In responding to this question, please identify the cases or legal matters on which you worked, and any role you played in drafting submissions or presenting oral argument to a court on these issues.

4. In response to a question from Senator Schumer during the hearing on your nomination, you stated that you believed that you had attended a fund raiser for the Committee for Justice on at least one occasion. You could not recall whether you made a donation at that event, but indicated that you would check to confirm this fact.

a. Please indicate whether you have ever attended a fundraiser for the Committee for Justice, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.

b. Please state whether you have attended a fundraiser for the Coalition for a Fair Judiciary, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.

5. You have testified that, as part of your work on judicial nominations, you coordinated with the White House Press Office and with outside organizations regarding nominees. As you know, Democrats who raised concerns about some of the Administration's most controversial nominees have been called anti-Black, anti-Latino, anti-Southern, and anti-Catholic by some of these outside organizations.

   a. Did you play any role in encouraging conservative organizations and conservative media in these characterizations of Senators who opposed judicial nominees?

   b. Do you agree that such characterizations are unacceptable and mislead the public about the judicial nominations process?

   c. What if anything did you do to stop these White House supported organizations and surrogates from continuing to make these charges?

II. OTHER ISSUES

The Office of the Counsel to the President plays a major role in decision-making with respect to access to Executive Branch materials and inquiries into allegations of improper activities by White House staff. Please provide a detailed description of your role in these activities, and specific responses to the questions below, answering any "yes" or "no" questions with a "yes" or "no" before providing any explanations. If any of your answers are classified, please separate the classified portions to the maximum extent possible, and provide a classified and unclassified version of such answers.

A. CIA LEAK INVESTIGATION

1. Did you have any role in any activity relating in any way to the leak of information regarding Valerie Plame? If so, please detail your role.

2. Did you personally question staff members or receive, review, or become familiar with evidence relating in any way to this matter? If so, please provide the details of what you did.

3. Have you been questioned by the Special Prosecutor, the FBI, or anyone else about this matter?

4. Were you involved in any internal investigation within the Executive Branch as to this matter? If so, please provide the details of what you did.

5. As a result of anything you did, saw, read or heard, do you know who the person(s) was (were) who communicated information about Ms. Plame to the media? If so please provide the details of what you know.

6. To the best of your knowledge, what efforts were made by your office or any other office in the White House to determine who disclosed the Plame information? Were you satisfied that all possible efforts were made to discover the facts? What other steps could have been taken that were not taken? Did you attempt to take those steps?

7. Did you participate in the screening process conducted by the Counsel's office before materials on this subject requested by the Department of Justice were provided to the Department? Please describe that process and your role in detail.

8. What steps do you believe should have been or should be taken against anyone involved in disclosing the Plame information? Do you know whether such steps have been taken? If so, please provide the details of what steps have been taken and what other steps you believe should be taken.

B. BARRIERS TO ACCESS TO 9/11 INFORMATION

1. Did you or anyone else in your office or, to the best of your knowledge, elsewhere in the White House, have any contact in 2001 or 2002 with (a) any member or staff of the Senate Judiciary Committee, or (b) any other Senator or Senate staff, with respect to the Committee's desire to investigate issues relating to the 9/11 attacks? If so, please provide details of what you did and what you know. What do you know about the efforts to deny authorization or funding for that investigation? What was your role and that of your office? If your office had nothing to do with that matter, who handled it for the White House?

2. Did you or anyone else in your office or, to your knowledge, elsewhere in the White House have any role in the denial, delay or limitation of access to the materials and information requested by the Joint Intelligence Committees for their inquiry into 9/11 as described in the Appendix to their Report? In particular, did you or your office participate in any way in the decision to classify the fact that the President had received the PDB dated August 6, 2001? If either answer is yes, please provide details of what you know and what you did.

3. Did you or your office have a role (a) in formulating or implementing the White House opposition to the establishment of the 9/11 Commission before September 2002, (b) in negotiating the details of the legislation establishing the Commission's mandate and structure once the White House agreed to its establishment, or (c) in considering, determining, and negotiating with regard to the White House responses to requests from the Commission for materials, interviews and information? Please describe your own role in detail.

4. Were you in any way responsible for the White House statements that it was impermissible for Ms. Rice to testify and for the White House to release the August 6, 2001 PDB? If so, please describe your role in detail.

5. Do you see any meaningful distinctions between President Ford's public testimony before a House subcommittee in 1974 and President Bush's appearance before the 9/11 Commission which justify his refusal to testify in public?

Federal Register

Monday,
November 5, 2001

Part IV

The President

Executive Order 13233—Further Implementation of the Presidential Records Act

Federal Register
Vol. 66, No. 214
Monday, November 5, 2001

Presidential Documents

Title 3—

The President

Executive Order 13233 of November 1, 2001

Further Implementation of the Presidential Records Act

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. *Definitions.*

For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

(c) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

Sec. 2. *Constitutional and Legal Background.*

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." *Id.* at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." *Id.* at 449. The Court also held that a former President, although no longer

a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448.

(c) The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a "demonstrated, specific need" for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. *Procedure for Administering Privileged Presidential Records.*

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent with or after the former President's review of the records, the incumbent President or his designee may also review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. *Concurrence by Incumbent President.*

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. *Incumbent President's Right to Obtain Access.*

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. *Right of Congress and Courts to Obtain Access.*

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. *No Effect on Right to Withhold Records.*

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. *Withholding of Privileged Records During 12-Year Period.*

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. *Establishment of Procedures.*

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. *Designation of Representative.*

The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discre tion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. *Vice Presidential Records.*

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

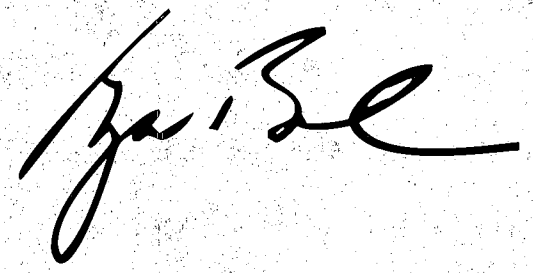
(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. *Judicial Review.*

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. *Revocation.*

Executive Order 12667 of January 18, 1989, is revoked.



THE WHITE HOUSE,
November 1, 2001.

[FR Doc. 01–27917
Filed 11–2–01; 11:23 am]
Billing code 3195–01–P

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

FACSIMILE COVER SHEET

Date April 26, 2004

To: Kristi Remington

Fax: 202-514-5715

From: Charles Duggan

Phone: (202) 456-2318 Fax: (202) 456-5813

Number of Pages (including cover sheet): 4
Message:

Just a few light edit/suggestions on the myth/fact sheet.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	[Edits on the Myth/Fact Sheet - page 4-6]	3	N.D.	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
10167

OA Num.:
6324

NARA Num.:
6125

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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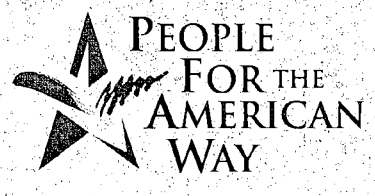

Report of People For the American Way in Opposition to the Confirmation of Brett M. Kavanaugh to the United States Court of Appeals for the D.C. Circuit

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April 26, 2004

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Introduction

President Bush's nomination of Starr Report co-author Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit has created significant controversy. The *New York Times* has termed the nomination part of the Administration's "further effort to remake the federal courts in its own ideological image."[1] The *Washington Post* commented that the nomination would "only inflame further the politics of confirmation to one of the country's highest-quality courts."[2]

In fact, the D.C. Circuit has not only seen many high quality jurists appointed to it, but it is also widely recognized for its uniquely important role in reviewing federal agency action. Congress has given the court exclusive jurisdiction to review some agency conduct, such as important Federal Communications Commission and environmental matters, and the D.C. Circuit is often the last word on federal agency actions, since the Supreme Court reviews so few lower court decisions.

Kavanaugh's relative inexperience and record, however, including his extraordinary dedication to partisan priorities, make him a particularly inappropriate choice for this critically important court. A 1990 graduate of Yale Law School, Mr. Kavanaugh's legal resume is thin at best. When asked in the Senate Judiciary Committee's questionnaire to state the number of cases he has tried to verdict or judgement, he replied "[n]one, as I have not been a trial lawyer."[3] In the same questionnaire, when asked to name his ten most significant litigated matters, Kavanaugh was apparently hard pressed to fill out the list, citing a number of cases in which he made no courtroom appearance at all and only submitted briefs, including two cases in which he authored only the friend-of-the-court brief of someone who was not even a party to the litigation. Kavanaugh is not a prolific legal scholar either, with only two law journal publications to his credit.[4]

This stands in marked contrast to the D.C. Circuit judges previously appointed by presidents of both parties. Of the 22 judges appointed to the D.C. Circuit since the Nixon administration, only one – Kenneth Starr – had less legal experience at the time of his appointment than Kavanaugh. A number had previously been judges, high-ranking

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[1] Editorial, More Conservatives for the Courts, *New York Times*, July 29, 2003.
[2] Editorial, Fueling the Fire, *Washington Post*, Aug. 1, 2003.
[3] Answers to Senate Judiciary Committee Question 17(c)(4).
[4] *Id.* at Questions 18, 12. One of his law journal publications is a student note arguing that defendants must be present at, and allowed to offer a rebuttal during, *Batson* hearings (hearings held to determine whether the prosecution improperly removed members from the jury pool because of their race). Brett Kavanaugh, Defense Presence and Participation: A Procedural Minimum for *Batson v. Kentucky* Hearings, 99 Yale L.J. 187, Oct. 1989. The other publication is an article examining the Independent Counsel law. Brett Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133, July 1998. Other than judicial clerkships and work for Kenneth Starr and the Bush White House, Kavanaugh's questionnaire states that his experience consists of one year at the Solicitor General's Office and approximately four years at the law firm of Kirkland & Ellis. Answers to Senate Judiciary Questions 6, 17.

Justice Department attorneys, and distinguished professors. Kavanaugh's resume simply pales by comparison.

Furthermore, most of Kavanaugh's relatively brief legal career has consisted largely of partisan political activities that militate strongly against his confirmation to the D.C. Circuit. In particular, Kavanaugh has spent most of his legal career in Kenneth Starr's Office of the Independent Counsel or in the Office of the White House Counsel in the current Bush Administration where he helped direct the Administration's effort to pack the courts with extreme right-wing nominees. Kavanaugh was responsible for drafting Starr's articles of impeachment against President Clinton, which were widely criticized as "strain[ing] credulity"[5] and being based on "shaky allegations,"[6] and later defended even the most questionable conduct by Starr. In the White House Counsel's Office, Kavanaugh has had major responsibility for selecting and "marshalling the fleet"[7] of far-right appellate judicial nominees by the Bush Administration, and for seeking to expand unilateral presidential privilege and secrecy, despite his contrary efforts under Kenneth Starr to defeat such claims of privilege. Indeed, a presidential order that reportedly resulted from Kavanaugh's efforts on behalf of the Bush Administration was described by one prominent historian as "a victory for secrecy in government" that was "so total that it would make Nixon jealous in his grave."[8]

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation.[9] Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law" and an "open mind to decision-making," but also a "commitment to protecting the rights of ordinary Americans" and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."[10] Based on these criteria, as discussed below, Kavanaugh's confirmation to a lifetime position on the critical Court of Appeals for the D.C. Circuit should be rejected.

Choosing Judicial Nominees

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[5] Glenn R. Simpson, Starr's Report Makes Powerful Case – but for what?, *Wall Street Journal*, Sept. 14, 1998 (hereinafter Simpson).

[6] Stephen Hedges and Ken Armstrong, Starr's Case Unique and Hardly Airtight, *Chicago Tribune*, Sept. 13, 1998 (hereinafter Hedges).

[7] Neil A. Lewis, Bush Selects Two for Bench, Adding Fuel to Senate Fire, *New York Times*, July 26, 2003 (hereinafter Lewis).

[8] Carl M. Cannon, For the Record, *National Journal*, Jan. 12, 2002 (hereinafter Cannon) (quoting Hugh Graham). Kavanaugh was also a regional coordinator for Lawyers for Bush / Cheney in 2000, went to Florida after the 2000 election for Bush / Cheney "to participate in legal activities related to the recount, "and has been an active member of the Federalist Society." Answers to Senate Judiciary Committee Questions II6, 6, 9, 10.

[9] *See* Law Professors' Letter of July 13, 2001 (available from People For the American Way).

[10] *Id.*

Kavanaugh has been "deeply involved"[11] in one of the most controversial undertakings of the current Administration: the selection of the president's judicial nominees. This is, in Kavanaugh's words, "one of [the president's] most important responsibilities."[12] As Associate Counsel to the President from 2001 – 2003, Kavanaugh served directly under White House Counsel Alberto Gonzalez as his "main deputy on the subject" of judicial nominees.[13] This position earned Kavanaugh membership in the Administration's critical Judicial Selection Committee, a joint enterprise between White House staff and the Justice Department's Office of Legal Policy, chaired by Gonzalez, which has been responsible for the selection of judicial nominees.[14] Kavanaugh has thus played a key role in Administration efforts at "remaking the judiciary" to "place on the bench those who share the president's judicial philosophy."[15]

Kavanaugh has reportedly "been responsible for marshaling the fleet of largely conservative judicial nominees the president has sent to the Senate,"[16] and a look at the candidates Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy and interest in seeing the American judiciary remade in a right-wing "ideological image." According to several accounts, Kavanaugh personally "coordinated" the Administration's nominations of Priscilla Owen to the Fifth Circuit and Miguel Estrada to the D.C. Circuit.[17] Priscilla Owen's nomination continues to be blocked because her record as a far right judicial activist is so extreme that even White House Counsel Alberto Gonzalez once accused her and her dissenting colleagues of committing "an unconscionable act of judicial activism."[18] Widely termed a "stealth candidate," Estrada's nomination was withdrawn after an extended filibuster.[19]

One of the most controversial aspects of the Estrada confirmation battle, which directly contributed to the failure of the nomination, was Estrada's persistent refusal to answer questions concerning his jurisprudential views or philosophy. Because Estrada had a limited "paper trail" and the Department of Justice refused to release any legal memoranda he wrote while serving in the Department, a particularly important way for Senators to learn important information about his jurisprudential views was by directly

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[11] Sheldon Goldman, W. Bush Remaking the Judiciary: Like Father Like Son?, *Judicature* at p. 284, May-June, 2003 (hereinafter Goldman).

[12] *Id.*

[13] Jeffrey Toobin, Advice and Dissent, *The New Yorker*, May 26, 2003 (Kavanaugh was the "main deputy" to Alberto Gonzalez who "control[s]" the nomination process in the Bush White House). In July 2003, Kavanaugh left the White House Counsel's office and became Assistant to the President and Staff Secretary.

[14] Goldman

[15] *Id.* at 782.

[16] Lewis.

[17] Dana Milbank, Whitewater Lawyer Turns Proponent of Presidential Power, *Washington Post*, Oct. 15, 2002 (hereinafter "Milbank"); Jack Newfield, More Bad Judges, *The Nation*, Jan. 26, 2004 (hereinafter Newfield) (Kavanaugh "coordinated" the Estrada and Owen nominations).

[18] *See* People For the American Way, Why the Senate Judiciary Committee Was Right to Reject the Confirmation of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit, Jan. 23, 2003.

[19] Dana Bash, Judicial Nominee Estrada Withdraws His Name, CNN, Sept. 4, 2003, available at http://www.cnn.com/2003/LAW/09/04/estrada.judgeship/index.html; Jonathan Groner, Estrada – Just One Vote Away?, *Legal Times*, Sept. 30, 2002 (hereinafter Groner).

questioning Estrada during his Senate Judiciary Committee hearing. Estrada's refusal to answer a number of their questions made it impossible for committee members to learn enough about Estrada to responsibly carry out their constitutionally mandated duty to give "advice and consent" to the President's judicial nominees. Disturbingly, one report indicates that Estrada refused to answer these questions at the direct advice of the Administration,[20] suggesting a deliberate effort to subvert the Senate's co-equal role in the nomination process. Given Kavanaugh's apparent "coordination" of the Estrada nomination, this issue raises further troubling concerns about Kavanaugh's actions.

Kavanaugh also publicly praised Estrada and Owen, along with the rest of Bush's first eleven picks for the courts of appeals, as being what the President "was looking for. A group of nominees, in terms of their excellence, which they all shared, and their integrity, which they all shared, and support, which is huge, which they all shared. It was a diverse group, a well qualified group, a bi-partisan group. It was an incredibly credentialed group."[21] While the group Kavanaugh described included some of the administration's most controversial nominees to date, such as Priscila Owen, Miguel Estrada, Terrence Boyle, Dennis Shedd, and Jeffrey Sutton, few would argue that many exemplified exactly what the President "was looking for": lawyers or judges with extreme right-wing records who would assist the Administration in seeking to "remake the federal courts in its own ideological image." Owen and Estrada were such troublesome nominees that they earned the distinction of being among the six nominees – out of a total of 179 considered by the Senate thus far – to be blocked on the Senate floor by filibuster. Boyle's record on civil rights and other issues is so troubling that one of his home state senators, John Edwards, has refused to return his "blue slip," which has effectively brought his nomination to a halt for the present.[22] That three of the first eleven candidates were so extreme that they have been unable to be approved by the Senate seems to indeed confirm that they were what the Administration "was looking for."

Of the initial nominees that were approved by the Senate, many received a great deal of opposition during their confirmation process. Several have already written opinions that seek to limit civil rights and constitutional liberties and implement dangerous "federalist" philosophies. For example, Dennis Shedd and Michael McConnell have used their positions to seek to overturn National Labor Relations Board rulings against anti-union discrimination and unfair labor practices by employers.[23] Edith Brown Clement joined dissents arguing that the Hobbs Act (an important federal criminal law prohibiting robbery and extortion affecting interstate commerce) should be severely limited on "federalism" grounds[24] and supporting the unlawful firing of a public school

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[20] Groner.
[21] Goldman at 296.
[22] *See* Letter of Senator John Edwards to Senate Judiciary Chairman Hatch, March 31, 2002; Kevin Begos, Dole, Edwards at Odds Over Judicial Nominee, *Winston-Salem Journal*, May 10, 2003.
[23] National Labor Relations Board v. Transpersonnel, Inc., 349 F.3d 175, 2003 U.S. App. LEXIS 23133 (4th Cir. 2003) (Shedd wrote the majority opinion); National Labor Relations Board v. Interstate Builders, Inc., 2003 U.S. App. LEXIS 24153 (10th Cir. 2003) (J., McConnell, dissenting in part).
[24] United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (en banc), cert. denied, 124 S.Ct. 1749 (2003).

teacher who was dismissed without the required hearing.[25] Jeffrey Sutton authored a dissent that sought to severely cut back federal arson law due to federalism concerns.[26] One John Roberts dissent questioned the constitutionality of the Endangered Species Act.[27] Kavanaugh's praise of such nominees, as well as his hand in selecting them, calls into serious question his own legal philosophy.[28]

A number of other Bush Administration nominees selected during Kavanaugh's tenure as Associate Counsel to the President have also come from "the far right of the political spectrum."[29] Many, who like Kavanaugh, Sutton, and Clement, have been Federalist Society members, have had their sights set on limiting federal power, weakening the Commerce Clause, and severely limiting congressional authority, even to the point of literally rolling back the New Deal.[30] These adherents to Federalist Society ideals, such as William Pryor and Carolyn Kuhl, have been among the most right-wing people nominated by the Administration to serve in any capacity.

Just as troubling as the legal and ideological views of Bush Administration candidates is a report that suggests the White House officials involved in judicial selection have imposed a rigorous anti-reproductive choice litmus test on potential judicial nominees. Last year, the *Philadelphia Daily News* reported that Republican Senators Arlen Specter and Rick Santorum had requested that the Administration nominate a western Pennsylvania woman to fill a vacancy on the Third Circuit Court of Appeals left by the passing of a female jurist. They recommended four women they believed were qualified for the job, but all were rejected. The *Daily News* reported that all but one of the women were rejected because they were not "sufficiently conservative or pro-life."[31] One source was quoted as saying, "[n]o western [Pennsylvania] woman could be found that was acceptable to the White House."[32] Instead, the nomination was given to Pennsylvania Attorney General Mike Fisher, who unsuccessfully ran for

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[25] Coggin v. Longview Independent School District, 337 F.3d 459 (5th Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 579 (2003).

[26] United States v. Laton, 2003 U.S. App. LEXIS 24770 (6th Cir. 2003) (Sutton, J., dissenting).

[27] Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting).

[28] Bush nominees who have written and joined disturbing opinions and dissents are not limited to this first group of eleven. To learn more about the records of the new Bush judges that Kavanaugh helped select, *see* People For the American Way Foundation, Confirmed Judges, Confirmed Fears, Jan. 23, 2004, *available at* www.pfaw.org.

[29] David Margolick, Bush's Court Advantage, *Vanity Fair*, Dec. 2003, at 146 (hereinafter Margolick).

[30] *See e.g.* People For the American Way, Report of People For the American Way In Opposition to the Confirmation of William H. Pryor to the United States Court of Appeals for the Eleventh Circuit, June 10, 2003 at 4 – 11; People For the American Way, Report of People For the American Way in Opposition to the Confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit, March 31, 2003. *See also*, People For the American Way Foundation, The Federalist Society: From Obscurity to Power, Aug. 2001 (updated Jan. 2003), at 17 – 22. *See also, Id.* at 33 (reporting that of the first eleven Bush appellate court nominees, six were Federalist Society members).

[31] Gar Joseph, Ball in Fisher's Court to Replace Judge; PA. Senators Want a Woman After White House Says It Couldn't Find One, *Philadelphia Daily News*, Apr. 11, 2003. The fourth woman was reportedly unacceptable because "the Republicans didn't want to lose her as a candidate for the state Supreme Court [that] year." *Id.*

[32] *Id.*

governor on an anti-choice platform the year before.[33] In fact, one Pennsylvania newspaper specifically criticized the fact that "the abortion issue was put forth by the Bush Administration as the sole litmus test" leading to Fisher's nomination.[34] Such a frightening anti-choice litmus test for judicial nominees recalls the Reagan and Bush I administrations, when potential nominees – and even their colleagues – were vigorously interrogated about their abortion views as a prerequisite for earning a nomination to the federal bench.[35] As one of the top White House officials working on judicial nominations, serious questions are presented about Kavanaugh's role in the reported revival of this deplorable practice.

Another dangerous tactic used by some in seeking to promote the President's judicial nominees was the theft by several Republican staffers of over 4,000 files containing confidential internal memos authored by Democratic Judiciary staff over the last two years in a scandal popularly known as "memogate."[36] Remarkably, many right-wing advocates have been so unapologetic for the unethical, and likely illegal, theft that they have criticized Judiciary Committee Chairman Orrin Hatch for authorizing an investigation of the tampering.[37] The result of that investigation was a report by Senate Sergeant-at-Arms William Pickle that strongly suggested wrongdoing by the Senate aides and was referred to the Justice Department for possible criminal investigation and prosecution.[38] It remains unclear how widely the memos were circulated, though it is certainly possible that Kavanaugh, as one of the top White House officials involved in the nomination process during the period in question, would have been privy to the improperly obtained information. The Senate Judiciary Committee should fully question Kavanaugh on this subject. In any event, Kavanaugh's key role in the Administration's judicial nominations efforts raises serious concerns about his own nomination.

"A Starr Protégé"

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[33] Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 1); Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 3), both *available at* http://www.pacatholic.org/election%20archive/primary%202002.pdf (visited 3/02/04). Fisher received the nomination despite the fact he had just had a $220,000 civil rights judgement entered against him for violating the civil rights of employees under his control (*Micewski v. Fisher*, No. 3:00-CV-0521 (M.D.Pa. Feb. 12, 2003) (special verdict judgment)).

[34] Editorial, Fisher as an Appeals Judge: Attorney General has done a yeoman job, but selection shouldn't be based mainly on his abortion position, *Harrisburg Patriot News*, April 30, 2003.

[35] Transcript of "All Things Considered" broadcast, National Public Radio report, Aug. 28, 1985 ("One female [prospective Reagan nominee] . . . said she was asked repeatedly how she would rule on an abortion case if it came before her. Another . . . said her fellow judges were called by Justice Department officials and asked for her views on abortion." *See also* People For the American Way, Assault on Liberty, (1992) at p. 6, available from People For the American Way.

[36] Helen Dewar, GOP Aides Implicated in Memo Downloads, *Washington Post*, March 5, 2004. Some memos were also taken from Senator Hatch's computer files.

[37] *Id.*

[38] Dori Meinert, Theft of Democrats' Computer Memos Referred to Justice Department, Copley News Service, March 11, 2004.

One of the most significant chapters in Kavanaugh's brief legal career has been the five years he spent as part of Kenneth Starr's Office of Independent Counsel, participating in several investigations concerning the conduct of President Clinton. Frequently described as a "Starr protégé,"[39] Kavanaugh began his stint in the Special Prosecutor's office by heading up the investigation into White House Deputy Counsel Vince Foster's suicide.[40] As the Whitewater investigation appeared to be winding down, Kavanaugh returned to private practice for a brief period, but then re-joined Starr's office when the Monica Lewinsky scandal broke. Reflecting on why Kavanaugh chose to return to the Special Prosecutor's office at that point, one lawyer close to the case reportedly noted "[t]hat was slime time. He wanted to be there for the kill."[41]

Of course, the Special Prosecutor's investigation culminated with the release of the Starr Report, of which Kavanaugh was a co-author.[42] The report consisted of two parts: the narrative, which offered what journalists called "an exhaustive chronology of Clinton's sexual escapades,"[43] and the grounds for impeachment, which outlined the 11 specific counts that the Special Prosecutor believed justified impeaching the President for "high crimes and misdemeanors." Kavanaugh was one of the two authors of the grounds for impeachment.[44]

The eleven specific counts Kavanaugh outlined against the President included five allegations of perjury, five allegations of obstruction of justice, and one allegation that Clinton's actions were "inconsistent [with his] . . . constitutional duty to faithfully execute the laws."[45] Even conservative commentators and legal scholars were largely unimpressed by Kavanaugh's work. The *Wall Street Journal* noted that a number of former prosecutors and legal scholars found the case against the President to "strain credulity" and to be based on "suppositional reasoning."[46] The *Chicago Tribune* described Kavanaugh's tortured arguments as "[u]nique and [h]ardly [a]irtight" and reported that many experts accused the report of "using explicit descriptions of sexual acts to paper over shaky allegations."[47] For example, Kavanaugh's assertion that Clinton could be convicted of obstruction of justice because he lied to friends who later repeated his stories to the grand jury was "a real stretch," according to Miami lawyer Neal Sonnett, who noted it was a "theory that I've never seen or heard of in the criminal law."[48] Even the strongest parts of Kavanaugh's argument were weaker than many believed would be necessary to win a conviction. Richard Phelan, the Chicago attorney who led the investigation concerning House Speaker Jim Wright in the late 1980s, noted

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[39] *See* Susan Schmidt and Dan Morgan, Starr: Witnessing for the Prosecution, *Washington Post*, Nov. 19, 1998; Michael Lind, All the President's Messes, *New York Times*, July 11, 1999; David W. Chen and Neil A. Lewis, Testing of a President: The Authors, *New York Times*, Sept. 12, 1998 (hereinafter Chen).
[40] Margolick at p. 162.
[41] *Id.*
[42] *Id.*
[43] Ronald Brownstein, For Clinton Foes, Morality Clouds Political Storm Over Starr Report, *Los Angeles Times*, Sept. 14, 1998 (hereinafter Brownstein).
[44] Questionnaire at Question 17(b)(1); Chen.
[45] Hedges.
[46] Simpson.
[47] Hedges.
[48] *Id.*

that while the case that Clinton had lied under oath was relatively strong, perjury was rarely successful as a stand-alone charge, and was usually tacked onto a more weighty fraud or drug indictment. "If you prosecuted every guy who lied in a deposition about something," Phelan noted, "we'd have half the people in this country locked up."[49] Many members of Congress on both sides of the aisle were equally unimpressed. Senator Specter said he believed many senators would vote that the allegations in the report were "not proved" if they were given that option.[50] The fact that Kavanaugh's most significant legal accomplishment to date was a listing of dubious legal charges -- bolstered by evidence many still believe was only brought to light to embarrass the President -- raises serious questions about his work as a lawyer as well as his willingness to twist legal theory to suit his political ends.

While Kavanaugh has taken pains to point out that he did not personally have a hand in authoring the even more controversial narrative section of the Starr Report,[51] he has nonetheless fully defended Starr's conduct as Special Prosecutor. Rarely missing an opportunity to praise Starr, Kavanaugh authored a series of op-eds in the fall and summer of 1999 fiercely defending his mentor and his actions in the face of growing criticism.[52] Kavanaugh wrote that "Starr [] conducted thorough and fair investigations . . .; exercised discretion where appropriate and firmness where necessary; . . . and displayed honor and determination in the face of relentless political attacks."[53] Kavanaugh repeatedly lauded Starr as a man of "extraordinary accomplishment and integrity," even calling him "an American hero."[54] In one instance, Kavanaugh sent a letter to the editor of the *New York Times* specifically to rebut an article that had mistakenly claimed Kavanaugh had found certain of Starr's tactics inappropriate.[55] In another letter, Kavanaugh praised Starr's "honor" and insisted that "Judge Starr has consistently performed with the highest skill and integrity and [I] . . . feel sick about the abuse he has suffered."[56]

Most Americans will recall that Starr's tactics included not only releasing "an exhaustive chronology of Clinton's sexual escapades"[57] despite the fact that most legal experts found it "difficult to see the legal purpose of such disclosures,"[58] but also a wide array of questionable acts which were highly offensive to Clinton supporters and foes alike. Monica Lewinsky was reportedly taken to a hotel room and interrogated for 12

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[49] *Id.*
[50] CNN, Three GOP Moderates Will Vote Against Conviction, Feb. 10, 1999, available at cnn.com.
[51] Questionnaire Answer 17(b)(1) (Kavanaugh notes that the report is "a matter of some continuing controversy" and states that he was only involved in writing the grounds for impeachment).
[52] Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999; Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999; Robert Bittman and Brett M. Kavanaugh, Op-Ed, Indictment of an Ex-President?, *Washington Post*, Aug. 31, 1999; Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.
[53] Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.
[54] *Id.* and Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.
[55] Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.
[56] Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999.
[57] Brownstein.
[58] *Id.*

hours while her requests to call her attorney were denied,[59] and her mother was forced to testify before the grand jury.[60] According to several reports, secret grand jury information was intentionally leaked by Starr's office in an effort to undermine the president.[61] Innumerable public servants were subpoenaed and harassed – from the lowest staffers to the highest government officials – in what 14 Democratic members of the House Judiciary Committee described as "a means of preventing or intimidating them from criticizing [Starr] . . . [a method which is] clearly outrageous and may be prohibited by federal law."[62] Starr's tactics were so extreme as to alienate many, including Republicans. A number of prominent Republicans, including Senators Arlen Specter and John McCain, criticized Starr for being too aggressive in the course of his investigation.[63] Especially in light of such concerns, Kavanaugh's unqualified praise and endorsement of Starr and his tactics raises disturbing concerns about Kavanaugh's own legal judgment.

A Malleable View on Privilege

Kavanaugh's work as one of the architects of the Bush Administration judicial nominations effort and his willingness to align himself with Kenneth Starr are not the only examples of his devotion to right-wing political causes. Rather, his stunning willingness to twist and shift legal theories and philosophies to best serve partisan interests is highly disturbing as well. An examination of the roles Kavanaugh has played in the Clinton and Bush II Administrations demonstrates the point. During the Clinton Administration, as discussed above, Kavanaugh was a key figure in the office of Special Prosecutor Kenneth Starr and, before ascending to the role of Starr Report co-author, worked to gain unprecedented access to the records of the President of the United States. In his role in the Bush administration, however, Kavanaugh seems to have radically changed his views on presidential privilege and has worked diligently to ensure that the current President works with an unprecedented ability to keep presidential actions and records secret from Congress and the public. As summed up in the *Washington Post*, "within a few years, Kavanaugh's work has gone from being described as 'a serious blow to the presidency,' as Clinton lawyer Lloyd Cutter put it, to promoting an 'imperial presidency,' as Rep. Henry A. Waxman (D-Calif.) put it."[64]

As a member of Starr's Whitewater team, Kavanaugh was directly involved in a number of pivotal cases challenging long-held ideas of privilege and presidential privacy. Apparently intent on working to diminish presidential power and privilege, Kavanaugh played a key role in the following controversial cases:

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[59] Michael Grunwald, Hardball at the Ritz Puts Starr on the Spot, *Washington Post*, Sept. 23, 1998.
[60] Dan Balz, Week 4: All Eyes on Grand Jury, Lewinski's Mother, Washington Post, Feb. 15, 1998.
[61] Joe Conason, Starr Springs a Leak, Salon, Oct. 1998, available at http://www.salon.com/news/1998/10/cov_30newsc.html.
[62] CNN, Clinton Aide Appears Before Grand Jury, Feb. 26, 1998, available at www.cnn.com/ALLPOLITICS/1998/02/26/lewinskiscandal/.
[63] Howard Kurtz, Starr Is Urged to Curtail Inquiry, *Washington Post*, Mar. 2, 1998; Dan Carney and Carrol J. Doherty, GOP Struggles to find Strategy to Deal with Starr Fallout, *CNN,* Mar. 14, 1998, available at cnn.com.
[64] Milbank.

- In Swidler v. Berlin,[65] Kavanaugh unsuccessfully argued for access to privileged communications between deceased Deputy White House Counsel Vince Foster and his attorney. The Supreme Court rejected Kavanaugh's arguments by a 6-3 vote, holding that attorney-client privilege does survive the death of the client. This disturing challenge to well-established common law proves how far Kavanaugh and Starr were willing to go in pursuit of truly privileged information.

- In In Re: Bruce Lindsey,[66] Kavanaugh successfully argued that that the President does not enjoy attorney-client privileges in his relationship with White House attorneys, despite evidence that White House legal work and Clinton's private attorneys' legal work frequently intersected.[67]

- In Rubin v. U.S.[68], Kavanaugh briefed the Special Prosecutor's position in an appeal of the D.C. Circuit's ruling that Secret Service agents could be forced to testify before grand juries concerning information they learned about the president while on the job. Kavanaugh advanced this point despite the very real danger that the ruling could cause future presidents to separate themselves from their protective detail during private or sensitive conversations – an act that would make the agents' jobs more difficult and put the president's life at risk. The Supreme Court denied certiorari, effectively upholding the appellate court's decision.[69]

Kavanaugh's role in these critically important privilege cases might suggest that Kavanaugh believes strongly in the right to obtain information about the government and government leaders, particularly the president. Since President Bush took office, however, Kavanaugh seems to have had a startling change of heart: He now uses his position to argue in favor of privilege and presidential secrecy at least as vehemently as he once argued against it.

In one of his first acts in the Bush White House, Kavanaugh served as a leading force in the development of the controversial Executive Order #13233, which effectively eviscerated the Presidential Records Act (PRA).[70] President Carter signed the PRA in the aftermath of Watergate to clarify that presidential records belong to the public and cannot be destroyed or controlled by a president after he has left office. It dictated that most presidential records would be available through Freedom of Information Act requests five years after the end of a president's administration. Other documents, including those

[65] 524 U.S. 399 (1998).
[66] 158 F.3d 1263 (D.C. Cir. 1998) *cert. denied*, Office of the President v. Office of Independent Counsel, 525 U.S. 996 (1998).
[67] Previously, Kavanaugh had taken a similar position in *In Re: Grand Jury*, when he co-wrote a brief arguing that the First Lady did not enjoy attorney-client privileges in her relationship with White House counsel. 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).
[68] 525 U.S. 990 (1998), *denying cert. to* In Re: Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998).
[69] Following Rubin v. U.S., there have been several attempts to use legislation to create a secret service privilege, (including a bi-partisan attempt in 1998), but none have been successful thus far. *See* Herbert L. Abrams, The Contemporary Presidency: Presidential Safety, Prosecutorial Zeal, and Judicial Blunders: The Protective Function Privilege, *Presidential Studies Quarterly*, June 1, 2001. *See also* S. 1360, 106th Cong. (1999); S.22, 108th Cong. (2003).
[70] Milbank.

containing confidential advice a president received from his advisors, known as "P-5" documents, would not be available until 12 years after an administration's end. At that time, the P-5 documents would be released unless the current or former president was able to successfully argue a "constitutionally based privilege" that would justify withholding the materials.[71]

President Ronald Reagan was to be the first president to have his P-5 documents released in January of 2001. Roughly 68,000 documents were to be available to scholars, researchers, and the general public for the first time. The Bush Administration was given 30 days notice to review the P-5 documents for information that could compromise national security before the documents would be released.[72]

However, the Administration took action far beyond merely evaluating the sensitivity of the documents. After receiving a series of 90-day extensions, the White House finally responded in November of 2001 by issuing executive order #13233, reportedly written by Kavanaugh.[73] The controversial order gave both the sitting president *and* the former president or his designees the right to refuse the release of any P-5 document without cause and apparently in perpetuity.[74] Many speculated that the motivation behind the order was to protect Bush advisors, many of whom served under President Reagan, from embarrassing revelations about advice they gave the former president. A researcher's only recourse would be to bring a lawsuit against the objecting president or presidents. This would be a daunting task for most academic researchers, who would not only be pitted against one, possibly two presidents, but also forced to retain counsel to file suit, even with limited funding.[75]

Kavanaugh was given the task of defending the order before a group of presidential scholars invited to the White House shortly after the executive order was issued. He attempted to assure the group that the researchers would be "happy with the [new] procedures" once they were in place. On the contrary, the researchers raised serious concerns. Robert Spitzer, president of the Presidency Research Group of the American Political Science Association, noted that "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . [t]he situation continues to be deeply troubling."[76] Hugh Graham, Reagan historian and professor emeritus at Vanderbilt University, was also troubled by Kavanaugh's efforts. He described the executive order as being "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave."[77]

Other examples of Kavanaugh's sudden zeal for presidential secrecy abound. *The Nation* has reported that Kavanaugh was central to the White House's efforts to keep notes from Vice President Dick Cheney's energy task force meetings, which some

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[71] Cannon.
[72] *Id.*
[73] Milbank.
[74] Cannon.
[75] *Id.*
[76] *Id.*
[77] *Id.*

speculate contain proof that the White House acted to aid Enron prior to its collapse, secret from the Senate Governmental Affairs Committee.[78] The White House cited an interest in preserving "the ability of the president and vice president to receive unvarnished advice" as the reason for concealing the documents.[79] Likewise, Kavanaugh reportedly played a key role in preventing congressional access to documents pertaining to presidential pardons.[80] The *Washington Post* said that the Administration's claim of executive privilege over pardon documents, "represents a hard line the government has never taken" – namely that executive privilege extends beyond communications from presidential advisors in the White House to include "government papers he has never seen and officials he has never talked to, such as the sentencing judge in a particular case."[81] The *Post* noted that "[i]n the past, even pardon recommendations sent directly to the president from the Justice Department have been routinely made public by government archivists after several years."[82] The Bush Administration, by contrast, is even claiming privilege to keep secret pardon documents nearly 80 years old, asserting privilege over documents generated in considering the pardon of back-to-Africa movement leader Marcus Garvey, who was released from prison in 1927 after a fraud conviction.[83]

Such unprecedented claims of executive privilege serve as a sharp contrast to the insatiable appetite for access to presidential records and information exhibited by Kavanaugh during the Clinton administration. They suggest a view of the law that seriously threatens government openness and is of particular concern for a nominee to the D.C. Circuit, which often considers such issues. In addition, Kavanaugh's apparent willingness to shift his legal philosophy and twist legal theory so dramatically shows an enthusiasm for serving partisan political ends over the law that is extremely troubling for a nominee for a lifetime seat on the federal bench.

Religious Liberty and the Public Schools

Although Kavanaugh's legal work (other than for Kenneth Starr and the Bush White House) is scant, the legal position he advocated in one case on religious liberty and church-state separation raises additional concerns. In 1999, Kavanaugh authored an *amicus* brief on behalf of members of Congress that was submitted to the Supreme Court in the case of *Santa Fe Independent School District v. Doe*.[84] In that case, the school district argued that its "student-led" prayers over the school loudspeaker at public school

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[78] Newfield. John Nichols, Enron: What Dick Cheney Knew, *The Nation*, March 28, 2002.
[79] CNN, Cheney Defends Refusal to Hand Over Energy Task Force Notes, Jan. 27, 2002, *available at* http://cnn.allpolitics.com. The issue of whether Cheney will be allowed to keep all such documents secret from the public is to be partially addressed by the Supreme Court this spring. *See* Charles Lane, High Court Will Review Ruling on Cheney Task Force Records, *Washington Post*, Dec. 16, 2003. Kavanaugh's Judiciary Committee hearing was scheduled on the same day as the Supreme Court oral argument in that case.
[80] Milbank.
[81] George Lardner, Bush Seeks Secrecy for Pardon Discussions, *Washington Post*, Aug. 27, 2002.
[82] *Id.*
[83] *Id.*
[84] Brief of *amicus curiae* Congressmen Steve Largent and J.C. Watts in *Santa Fe Independent School District v. Doe*, 199 U.S. Briefs 62, Dec. 30, 1999. (hereinafter "Santa Fe Brief")

football games did not infringe on students' rights under the Establishment Clause of the First Amendment.

At issue in the case was a public school's policy of allowing the student body to elect a student representative each school year who would deliver an "invocation and/or message" over the school loudspeaker before football games.[85] In his brief, Kavanaugh argued that because the student body's chosen speaker was not specifically required to pray during the "invocation and/or message," any prayer offered by the speaker was essentially private religious speech, which is not only permissible under, but is also protected by, the First Amendment.[86] Kavanaugh claimed that the "sole question" raised in the case was "whether . . . the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer."[87] He further asserted that ruling against the school district in the case would force schools "to monitor and censor religious words."[88]

In a 6-3 decision, the Court squarely rejected Kavanaugh's claim, finding that prayer was both "explicitly and implicitly"[89] encouraged by the policy which "involve[d] both perceived and actual endorsement of religion."[90] The Court noted that while the speaker was not explicitly required to pray, an "invocation" was the only type of message expressly endorsed by the school and prayer is the most obvious means of "solemnizing the event," one of the purposes of the invocation acknowledged by Kavanaugh's brief.[91] Pointing out that its decision does nothing to inhibit truly voluntary religious practice, as Kavanaugh appeared to argue, the Court explained that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[92]

In sum, the Court wholly rejected Kavanaugh's arguments, finding that an invocation on school property, at school-sponsored events, "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer . . . is not properly characterized as 'private' speech."[93] The Court's clear and unequivocal opinion, and the fact that Kavanaugh failed to even properly frame the question before the Court in his brief, raises serious questions about both his legal philosophy and his skill as a lawyer. If given the opportunity to advocate these same views from the federal bench, the right of schoolchildren to be free from religious coercion and school-sponsored promotion of religion at school could be in jeopardy.

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[85] *Id.* at 2.
[86] *Id.* at 3 – 5.
[87] *Id.* at 5.
[88] *Id.* at 4.
[89] *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) at 301.
[90] *Id.* at 305.
[91] *Id.* at 306 – 307.
[92] *Id.* at 313.
[93] *Id.* at 310.

Conclusion

Brett Kavanaugh is an unsuitable candidate for a lifetime appointment to the D.C. Circuit bench, the second highest court in the nation. While Kavanaugh's scant legal resume does not reveal much about his legal skills, the highly charged partisan items that it does contain tell a great deal about his loyalties, ideology, and legal philosophy. Kavanaugh has eagerly allied himself with the highly questionable tactics of former Special Prosecutor Ken Starr. He has proven himself willing to change his view of the law to bend with the political winds. He has recently argued for extensive presidential and governmental secrecy and privilege that would severely undermine the rights of the public and Congress, particularly if implemented from a powerful lifetime position on the D.C. Circuit. Kavanaugh has played a key role in the Bush Administration's judicial nominations policy, and the judicial nominees that Kavanaugh had a hand in selecting and promoting have too often been extremists who would strip Congress of much of its power and remove the American people from much of Congress' protection. Throughout most of his career, Kavanaugh has shown a dedication to extreme right wing ideas that undermine the freedoms and liberties that most Americans cherish. A lifetime appointment to a powerful federal appellate court should not become a political reward for a highly partisan political warrior. The nomination of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit should be rejected.

	DOB	Date of Nomination	Age @ Nomination
Anthony Kennedy		3/3/1975	38 yrs. 7 months
Harry Edwards		12/6/1979	39 yrs. 1 month
Stephanie Seymour		8/28/1979	38 yrs 11 months
Mary Schroeder		5/3/1979	38 yrs. 6 months
Alex Kozinski		6/5/1985	34 yrs. 11 months
Frank Easterbrook	(b)(6)	2/25/1985	36 yrs. 5 months
Deanell Tacha		10/31/1985	39 yrs. 10 months
J.Harvie Wilkinson		1/30/1984	39 yrs. 4 months
Michael Luttig		4/23/1991	36 yrs. 10 months
Samuel Alito		2/20/1990	39 yrs. 10 months
Walter Stapleton		9/22/1970	36 yrs. 3 months

Ganter, Jonathan F.

From: Sampson, Kyle
Sent: Tuesday, July 29, 2003 8:52 AM
To: Ganter, Jonathan F.
Subject: cofirm stats

Could you -- ASAP -- check the ages of the various judges listed below; the key, obviously, is their age at the time they were nominated, not at the time they were appointed. Thanks.

Allegation: Kavanaugh is only 38 and has no judicial experience.

Response:

· Six of the nine judges currently on the D.C. Circuit had no prior judicial experience when they were appointed to that court. Indeed, several modern Supreme Court appointees, such as Byron White, William Rehnquist, and Lewis Powell, had no prior judicial experience when they were appointed to the Supreme Court.

· A number of America's best appeals court judges were nominated in their late 30s. They include:

(b)(6)

o Anthony Kennedy (38), who was nominated by President Ford;
o Harry Edwards (39), Stephanie Seymour (39), and Mary Schroeder (38), who were nominated by President Carter;
o Alex Kozinski (34), Frank Easterbrook (36), Deanell Tacha (39), and J. Harvie Wilkinson (39), who were nominated by President Reagan; and
o Michael Luttig (36) and Samuel Alito (39), who were nominated by President Bush.

· Indeed, Kavanaugh is as old or older than were all three of the judges for whom he clerked when they were first nominated to the federal bench: Anthony Kennedy (38), Alex Kozinski (35), and Walter Stapleton (35).

· Kavanaugh has a broad range of experience that well qualifies him for the court of appeals. His substantial experience includes working as:

o A law clerk for three appeals court judges, including for Justice Kennedy on the Supreme Court.
o An appellate lawyer in the Solicitor General's office at the Department of Justice.
o An associate counsel in a high-profile and difficult independent counsel investigation and earned the respect of opposing counsel for his integrity and intellect.
o A partner at a major national law firm representing significant firm clients on critical litigation matters. He has argued important and closely watched cases before the Supreme Court and the D.C. Circuit.
o A senior associate counsel for President Bush.
o A senior White House staffer for President Bush in the position of Staff Secretary, where he is responsible for staffing, clearing, and presenting all paper for the President.

Ganter, Jonathan F.

From: Sheila.Joy@usdoj.gov
Sent: Tuesday, July 29, 2003 11:57 AM
To: Ganter, Jonathan F.
Subject: RE: Judge Bio Info

Seymour (b)(6) Tacha (b)(6) Wilkinson (b)(6) (Stapleton (b)(6)

-----Original Message-----
From: Jonathan_F._Ganter@who.eop.gov [mailto:Jonathan_F._Ganter@who.eop.gov]
Sent: Tuesday, July 29, 2003 10:03 AM
To: Joy, Sheila
Subject: Judge Bio Info

Sheila,
I am looking for the birthdates for a couple appeals court judges. The FJC website only gives years, not months and days. I have also run google searches on these judges but haven't come accross precise birthdates. Do you have this anywhere?

Stephanie Seymour

Deanell Tacha

J. Harvie Wilkinson

Walter Stapleton

Thanks,

Jon

Stapleton, Walter King

Born 1934 in Cuthbert, GA

Federal Judicial Service:
U. S. District Court, District of Delaware
Nominated by Richard M. Nixon on September 22, 1970, to a seat vacated by Edwin D. Steel , Jr.; Confirmed by the Senate on October 8, 1970, and received commission on October 14, 1970. Served as chief judge, 1983-1985. Service terminated on May 8, 1985, due to appointment to another judicial position.

U. S. Court of Appeals for the Third Circuit
Nominated by Ronald Reagan on March 27, 1985, to a new seat created by 98 Stat. 333; Confirmed by the Senate on April 3, 1985, and received commission on April 4, 1985. Assumed senior status on June 2, 1999.

Education:
Princeton University, A.B., 1956

Harvard Law School, LL.B., 1959

University of Virginia School of Law, LL.M., 1984

Professional Career:
Private practice, Wilmington, Delaware, 1959-1970
Deputy attorney general of Delaware, 1963-1964

Race or Ethnicity: White

Gender: Male

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
10167

OA Num.:
6324

NARA Num.:
6125

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Brett M. Kavanaugh

Birth:	February 12, 1965	Washington, D.C.
Legal Residence:	District of Columbia	
Marital Status:	Single	
Education:	1983 - 1987	Yale College B.A. degree, *cum laude*
	1987 - 1990	Yale Law School J.D. degree
Bar:	1990 1992	Maryland District of Columbia
Experience:	1990	Williams & Connolly Summer Associate
	1990 - 1991	Law Clerk to the Honorable Walter K. Stapleton United States Court of Appeals for the Third Circuit
	1991 - 1992	Law Clerk to the Honorable Alex Kozinski United States Court of Appeals for the Ninth Circuit
	1992	Munger Tolles & Olson Summer Associate
	1992 - 1993	United States Department of Justice Office of the Solicitor General Attorney
	1993 - 1994	Law Clerk to the Honorable Anthony M. Kennedy Supreme Court of the United States
	1994 - 1997 1998	Office of Independent Counsel Kenneth W. Starr Associate Counsel
	1997 - 1998 1999 - 2001	Kirkland & Ellis Partner
	2001 - present	President George W. Bush Associate Counsel to the President, 2001 -2003 Senior Associate Counsel to the President, 2003 Staff Secretary, 2003-present
Office:	Eisenhower Executive Office Building	

Washington, D.C. 20502
202-456-2702

To be United States Circuit Judge for the District of Columbia Circuit

Home:	3633 M Street Washington, D.C. 20007 301-951-8956
Ethnic Group:	Caucasian
Salary:	$164,000

Circuit Judges Appointed Before or at the Age of 40

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

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List	[List of Questions]	1	N.D.	P5;

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SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
10167

OA Num.:
6324

NARA Num.:
6125

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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THE WHITE HOUSE
WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

FACSIMILE COVER SHEET

Date April 21, 2004

To: Kristi Remington

Fax: (202) 514-5715

From: Charles Duggan

Phone: (202) 456-2318 Fax: (202) 456-5813

Number of Pages (including cover sheet):
Message:

Some thoughts on the Judicial Nominees page, for you to consider; feel absolutely free to Disregard them if they don't strike you as worthwhile.

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Draft	Brett Kavanaugh - Judicial Nominees	1	N.D.	P5;

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Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
10167

OA Num.:
6324

NARA Num.:
6125

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

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RESULT	OK

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the unsuccessful nominations of Miguel Estrada and Priscilla Owen.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinsky of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- **Only 3 of the 18 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

- ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

➢ In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

- ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

- ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

- ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

➢ **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996
Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997

Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh

1. Independent Counsel
   a. Vince Foster investigation
   b. Privilege arguments v. work in Bush White House (E.O. 13233 PRA)
   c. IC referral/impeachment (his role, release of salacious details)
   d. Law review article on IC Law
   e. Op-eds on Starr/general defense of Starr

2. Elian Gonzales

3. First Amendment Religion Cases (check out McConnell tps)
   a. Good News Club v. Milford (exclusion of relig. orgs. from use of facilities)
   b. Santa Fe Indep. School Dist. v. Doe (prayer at h.s. football game)
   c. Bush v. Holmes (Florida school vouchers)

4. Affirmative Action/Race – Rice v. Cayetano (representation & op-ed)

5. Anti-Consumer
   a. Lewis v. Brunswick (product liab)
   b. Geier v. Honda (product liab)
   c. Green v. GM (product liab)
   d. Broussard v. Meineke (class action) (might not be important)

6. Bush White House activities
   a. Document production in Enron, (may cross over w/ 1b above)
   b. Work on judicial nominations
   c. Tort reform

7. Experience

8. General Right Wing Affiliations (Fed Soc; Starr; Bush White House, etc…)

U.S. Department of Justice

Office of Legal Policy

950 Pennsylvania Avenue, NW
Washington, DC 20530

DATE: April 21, 2004

TO: ~~Dabney Friedrich~~ Charles Duggan

FAX: 456-~~7528~~ 5813

PAGES: 19 (excluding cover)

FROM: Kristi L. Remington

VOICE: 202/ 514- 8356

FAX: 202/ 514-5715

MESSAGE: Brett's vet.

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
10167

OA Num.:
6324

NARA Num.:
6125

FOIA IDs and Segments:
2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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FOIA Marker

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Counsel's Office, White House

Rao, Neomi

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W	20	24	4	1	10167	23030	6125	6324

Folder Title:

CADC (Court of Appeals DC Circuit) Kavanaugh [3]

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	List	[Draft Answers to Senators Questions]	4	07/14/2004	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [3]

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RESTRICTION CODES

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Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

- Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court. Mr. Kavanaugh was asked to work on the case by an associate in his law firm who had been contacted.

- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he was returned.

  - ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States . . . may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

  - ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

  > "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

"The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.
  - ✓ The federal courts agreed with Mr. Kavanaugh's position in those cases.
  - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
  - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges**. *See* Section 2(b).
  - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
  - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings." *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J.

2133, 2171 (1998). *Id.* at 2171. Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.*

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinsky of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

- **Only 3 of the 18 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

- ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

➢ In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

- ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

- ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

- ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

➢ **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
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Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney's energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are completely consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**

  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2162 (1998).

  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." *Id.* at 2171. Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.*

  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.

- **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

  - ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

  - ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

➢ **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**

- ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. Kavanaugh, 86 Geo. L.J. at 2157.

Brett Kavanaugh – *Good News Club v. Milford Central School*

Allegation: In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Facts:

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations**. It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Products Liability

Allegation: In *Geier v. American Honda Motor Company*, Mr. Kavanaugh filed an amicus brief on behalf of the Alliance of Automobile Manufacturers to preclude a woman who received serious injuries in a car accident from recovering damages from the car manufacturer. The car manufacturer had not installed airbags in the car even though Washington, D.C. law required such airbags. 529 U.S. 861 (2000).

Facts:

- **In an opinion written by Justice Breyer, the U.S. Supreme Court agreed with a position taken by Mr. Kavanaugh's client in its brief.**
  - ✓ The Supreme Court held that safety standards promulgated by the Department of Transportation, pursuant to an Act of Congress, preempted the D.C. law requiring airbags, and that therefore the plaintiff could not bring an action under the D.C. law. *Geier v. American Honda Motor Company*, 529 U.S. 861, 875 (2000).
  - ✓ The Federal Motor Vehicle Safety Standard (FMVSS) 208 required that auto manufacturers equip some but not all of their 1987 vehicles with passive restraints.
  - ✓ Because a universal airbag requirement like that in place in D.C. would directly conflict with the safety purposes behind enactment of FMVSS 208, the long-standing principle of preemption applied and the D.C. requirement could not be enforced.
  - ✓ The plaintiff's car in this case contained a restraint system explicitly authorized by Standard 208, and thus was in full compliance with the Federal regulation.
- **All of the circuit courts to consider the issue, including the 9th Circuit, agreed with either the implied or express preemption arguments set forth in the brief Mr. Kavanaugh filed on behalf of his client.**
  - ✓ Judge William Bryant, appointed by President Johnson, granted American Honda summary judgment in this case based on the express preemption argument later set forth in the brief.
  - ✓ The D.C. Court of Appeals affirmed the lower court decision on implied preemption grounds in a unanimous opinion written by Clinton appointee Judge Judith Rogers.
  - ✓ Four other circuits came to the same conclusion as the D.C. Circuit.

- ✓ The 9th Circuit adopted the express preemption argument set forth in the brief submitted by Mr. Kavanaugh, that the Motor Vehicle Safety Act expressly preempted state tort suits brought on the basis of a lack of an airbag.

- ➢ **The Clinton Administration, through the office of Solicitor General, also argued in its brief that the state law claims were impliedly preempted by the federal standards promulgated by the Department of Transportation.**

Brett Kavanaugh – Product Liability

Allegation: In *Green v. General Motors Corp.*, Mr. Kavanaugh once again represented big business attempting to overturn a jury verdict in favor of a 24-year-old who became a quadriplegic due to the defective design of the car manufactured by defendant.

Facts:

- Relying on a recent Third Circuit opinion, Mr. Kavanaugh argued that the judge had improperly instructed the jury not to consider evidence of accident severity and speed in determining liability for collapse of the rear roof on the T-Top Camaro.
  - ✓ The defendant argued that the jury should have been able to consider the plaintiff's own negligence in speeding, which was conceded by the defendant.
  - ✓ The defense urged the Superior Court of New Jersey to accept a Third Circuit holding that juries had to be allowed to consider factors such as speed and the plaintiff's driving. *Huddell v. Levin*, 537 F.2d 726, 741 (3rd Cir. 1976).
  - ✓ Ultimately, the Superior Court of New Jersey "respectfully disagreed" with the Third Circuit's speed analysis. *Green v. General Motors Corp.*, 310 N.J. Super. 507, 523 (1998).
- The court ruled in favor of Mr. Kavanaugh's clients, General Motors, on a number of issues that were argued on appeal.
  - ✓ The appellate court agreed with Mr. Kavanaugh's client's position that the trial court had wrongly awarded prejudgment interest on future medical expenses and lost earnings. This amount had exceeded $8.5 million. *Id.* at 533.
- As a member of the appellate team, Mr. Kavanaugh had a duty to zealously advance his client's positions.
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Product Liability

Allegation: Mr. Kavanaugh took the side of big business by filing an amicus brief before the Supreme Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1998), in an attempt to deny recovery to a family who lost its daughter when she fell off a boat and was killed by the propeller.

Facts:

- **The amicus brief filed by Mr. Kavanaugh's client, General Motors Corporation, was consistent with the unanimous opinion of the court below – the Eleventh Circuit – and with the decisions of many other courts across the country.**
  - ✓ The Eleventh Circuit held that the Georgia law was impliedly preempted because the Coast Guard – which had exclusive authority in boat and equipment safety standards – determined that propeller guards should not be required because their use could actually increase the danger to boaters.
- Numerous courts, both state and federal, already had adopted the position taken by Mr. Kavanaugh in the amicus brief – that state common law claims for negligence or product liability were either expressly or impliedly preempted by the Federal Boat Safety Act.
  - ✓ At the time the amicus brief was submitted, courts in California, Georgia, Connecticut, Ohio, Illinois, and Michigan had come to the conclusion argued in the brief filed by Mr. Kavanaugh.
  - ✓ The district court judge in *Lewis v. Brunswick*, Carter appointee Judge Dudley Bowen, also came to the conclusion that the plaintiff's negligence and strict liability claims based on the lack of a propeller guard were preempted by the Boat Safety Act.
  - ✓ The U.S. Supreme Court did not decide the case because the parties settled the claims before a decision was issued.
- Mr. Kavanaugh's client was interested in the case only because it manufactured vehicles subject to the Motor Vehicle Safety Act, which included language identical to the Boat Safety Act preemption language at issue in *Lewis v. Brunswick*.
  - ✓ Congress, in the legislative history of the Boat Safety Act, explained that the preemption provision "also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." *Id.* at 1503 (citing S.Rep. No. 92-248).
- Although nearly four years later the Supreme Court did effectively overrule this Eleventh Circuit decision in another case, *Sprietsma v. Mercury Marine*, 537 U.S. 52 (2002), the

Court did state that the arguments made by Mr. Kavanaugh's clients in the *Lewis* case - that such claims are implicitly preempted by the statute and by the Coast Guard decision not to regulate propeller guards - "[b]oth are viable pre-emption theories." *Id.* at 64.

Brett Kavanaugh – Race

Allegation: In a friend of the court brief, Kavanaugh joined Robert Bork in opposing a voting scheme that was intended to assist native Hawaiians by ensuring that only they could vote for board members overseeing a trust for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495 (2000). Before the case was heard, he was quoted as saying that "this case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of the government." Warren Richey, *New Case May Clarify Court's Stand on Race*, THE CHRISTIAN SCIENCE MONITOR (Oct. 6, 1999).

Facts:

- The Supreme Court agreed with the position taken by Mr. Kavanaugh's client, that limiting voting for candidates to a statewide office that disbursed state and federal funds based on racial ancestry violated the Constitution. The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any other State on account of race, color, or previous condition of servitude." U.S. CONST. Amend. XV § 1.
  - ✓ In a 7 to 2 decision, with the majority including Justices Breyer, Souter, and O'Connor, the Court reaffirmed the basic premise upon which the brief was based: that "[t]he National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race." *Rice*, 120 S. Ct. at 1054.
  - ✓ The Court explained, "The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Rice* at 523.
  - ✓ The Court added, "Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others." *Id.*
- The brief submitted by Mr. Kavanaugh on behalf of his clients sought to enforce the Fifteenth Amendment against a state law that prohibited citizens from voting in a statewide election based on their race.
  - ✓ When Hawaii was admitted as the 50th State of the Union in 1959, the state adopted the Hawaiian Homes Commission Act, passed by Congress, as part of its Constitution. The Act set aside 200,000 acres of public lands and granted the state over 1.2 million additional acres of land to be held "as a public trust."

- The proceeds and income from the lands were to be used for one or more of five purposes: (1) support of public schools and other public educational institutions, (2) betterment of native Hawaiians, (3) development of farm and home ownership, (4) public improvements, and (5) provisions of land for public use.

✓ In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer special trust revenues "for the betterment of the conditions of native Hawaiians," and any appropriations that were made for the benefit of "native Hawaiians" and/or "Hawaiians."

- The term "native Hawaiian" and "Hawaiian" are defined as descendants of aboriginal peoples or races inhabiting the Hawaiian Islands previous to 1778.

✓ The Hawaii Constitution limited membership on the OHA board of trustees to "Hawaiians," and explicitly provided that the trustees shall be "elected by … Hawaiians."

✓ Although petitioner was a citizen of Hawaii, and his ancestors were residents of the Hawaiian Islands prior to U.S. annexation in 1959, he did not meet the statutory definitions and was thus precluded from voting.

➢ The racial qualification in the Hawaiian law categorically excluded members of certain racial minorities, such as African-Americans and Japanese-Americans, who were members of groups historically discriminated against in the U.S.

➢ One of Mr. Kavanaugh's clients on the brief was the New York Civil Rights Coalition, a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste or discrimination.

➢ In *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), where the Supreme Court upheld the University of Michigan Law School's race-conscious admissions policy, Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
  - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents.**
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools**. A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials.** *See Bush v. Holmes*, 767 So. 2d 668 (2000). **All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision.
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Defense of Ken Starr

Allegation: Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr "an American hero," written that Starr's "record is one of extraordinary accomplishment and integrity," and praised Starr for "consistently perform[ing] with the highest skill and integrity." This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh's right-wing views.

Facts:

➢ **Mr. Kavanaugh's defense of Starr was an appropriate response to and supported by the public record of vicious and unwarranted public criticism directed at Independent Counsel Kenneth Starr.**

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr's integrity were belied by the fact that President Clinton's attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

- Rotunda stated: "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself." *Id.*

✓ In a prescient editorial published shortly after Judge Starr's appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: "If Starr's investigation turns up no evidence of wrongdoing, he may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution." Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*, PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➢ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.**

✓ The Washington Post editorial page said, upon Judge Starr's appointment, "he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno's own short list of likely candidates for independent counsel when she picked Mr. Fiske." Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr's appointment as Independent Counsel, Mark Gitenstein, chief Democratic counsel to the Senate Judiciary Committee when Judge Starr was appointed to the federal bench, said: "Starr was a good, fair judge, and I think he will be fair in this proceeding." Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

- ✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative ... but he's wholly undevious and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.

- ✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.

➢ **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**

- ✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.

- ✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

➢ **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**

- ✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:

  - the creation of a "protective function privilege" that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998);

  - the claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997); and,

  - the claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

➢ **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- ✓ The Independent Counsel's report detailed substantial and credible information that might constitute grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.

➢ **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

- ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

- ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

- ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

- ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel's Ken Starr's lurid report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.**

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

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  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.
- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **The U.S. Senate has already confirmed judicial nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.
- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002 by a voice vote.
- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.

- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of the Independent Counsel's report on Vince Foster's death.
  - ✓ **In the report prepared by Mr. Kavanaugh, the Office of the Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
  - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious." See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➢ **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➢ **The U.S. Senate has confirmed judicial nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

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P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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Testimony
United States Senate Committee on the Judiciary
Executive Business Meeting
March 4, 2004

Miranda Issue

The Computer Report

REPORT ON
THE INVESTIGATION INTO IMPROPER ACCESS TO THE SENATE JUDICIARY COMMITTEE'S COMPUTER SYSTEM

Prepared by:
Sergeant at Arms
U.S. Senate

TABLE OF CONTENTS

I. The Scope and Methodology of the Investigation 1

A. Events Preceding the Investigation 1
B. The Beginning of the Investigation 2
C. Investigative Resources 4

II. Overview of Findings 6

III. The Judiciary Committee Computer Network 13

A. Organizational Background 13
B. History of the Judiciary Committee's Network and System Administrators 14
C. The Architecture of the Judiciary Committee Network 16

IV. The Documents Disclosed to the Press Resided on the Judiciary Committee Computer Network 19

V. A Judiciary Committee Staff Member Accessed the Computer Files of the Documents' Authors 21

A. Mr._____'s Initial Access 21
B. Mr. _____ Possession of Democratic Documents 23
C. The Scope of Access 24

VI. Forensic Verification and Analysis 27
A. Limitation of Analysis 27

B. Open Permissions 28
C. Pattern of Open Permissions 30

VII. Other Individuals Identified as Having Knowledge 32

A. Ms. _____ and Mr. _____ in the Fall of 2001 32
B. Nominations Unit Staff 34
C. Other Judiciary Committee Staff 38

VIII. A Possible Source of the Disclosure to the Press 40

IX. Analysis of Other Possible Methods of Access to Documents from the Judiciary Committee Computer System 49

A. Hacking from the Outside is Unlikely 49
B. PcAnywhere Presented a Security Risk 51
C. The Anthrax Incident did not Result in Relaxed Security 52
D. Poor Physical and Computer Security Controls 53

X. Recommendations for the Future 56
A. Referrals for Sanctions 56
B. Immediate Steps to Enhance Computer Security for the Committee 62
C. Measures to Enhance the Security of Computer Networks Senate-Wide 64

XI. Conclusion 64

ATTACHMENTS

A Wall Street Journal, November 14, 2003, and Washington Times, November 15, 2003
B Material from Coalition for a Fair Judiciary website
C Letter from Senator Durbin, November 17, 2003
D Letter from Senators Leahy, Kennedy, and Durbin, November 17, 2003
E Letter from Chairman Hatch, November 20, 3003
F List of interviews
G System Administrator Time Line
H Diagram of the Judiciary Committee's Local Area Network
I Detailed Explanation of Network Drives
J Memos in Question Analysis Chart
K Screen Printout from _____
L Folder Permissions Analysis Chart
M H: Drive Permissions Analysis Including Start/Creation Dates
N Diagram of Senate's Layered Security Approach

I. The Scope and Methodology of the Investigation

A. Events Preceding the Investigation

On Friday, November 14, 2003, a Wall Street Journal editorial set forth excerpts of five documents that the Journal described as Democratic "staff strategy memos." The following day the Washington Times reported that it had obtained 14 internal Democratic staff memoranda. The article specifically states the 14 documents "did not come from a Senate staffer." (The two articles are attached to this report as Attachment "A.") On Tuesday, November 18, 2003, 28 pages of material represented to be "the Democrat [sic] memos on judicial nominations," including those referenced in the Wall Street Journal and Washington Times articles over the weekend, were posted on the Coalition for a Fair Judiciary's website at www.fairjudiciary.com. (The 19 relevant documents from the website are attached to this report at Attachment "B.")

On Saturday, November 15, 2003, the Deputy Sergeant at Arms was first notified by Senator Kennedy's Chief Counsel for the Subcommittee on Immigration, Border Security and Citizenship, Mr. _____, that there was a potential security problem with the Judiciary Committee computer system. At the request of Mr. _____, the Deputy Sergeant at Arms arranged for a member of the Assistant Sergeant at Arms - Chief Information Officer's staff to meet Mr. _____ at his office to provide him technical assistance in assessing the situation.

Later that weekend, in consultation with the Deputy Sergeant at Arms, the Majority and Minority Staff Directors for the Committee agreed to place the Committee's server backup tapes in the custody of the United States Capitol Police (USCP) for preservation. The Committee's System Administrator gathered the backup tapes and just after midnight on Sunday, November 16, 2003, the USCP took into custody a box containing 20 tapes, two access cards that allow users to remotely access the network, and an envelope containing 3 pieces of paper with what appeared system administrator passwords noted. At this time, the door to the Committee's computer room, SD 222, was sealed with police tape.

B. The Beginning of the Investigation

The Sergeant at Arms initiated this investigation after receiving requests to do so from Senate Judiciary Committee Chairman Hatch and Senators Leahy, Kennedy, and Durbin of the Committee. Specifically, a letter dated November 17, 2003, from Senator Durbin asked that the Sergeant at Arms, as the Senate's "chief law enforcement officer and also the principal administrative manager for most support services in the Senate, including oversight of computer systems" investigate the "circumstances surrounding the theft of these documents and their distribution" beyond members of his staff. (Attachment "C.") A subsequent letter that same date from Senators Leahy, Kennedy, and Durbin asked the Sergeant at Arms to have an independent computer forensics and security expert help identify who retrieved and released the Democratic documents, assess weaknesses in the Committee's computer network, and make recommendations to help prevent unauthorized access from occurring in the future. (Attachment "D.") On November 20, 2003, a letter from Chairman Hatch authorized the investigation into whether there was any unauthorized access to the Committee documents referenced in the Wall Street Journal and Washington Times. Chairman Hatch also specifically requested: (1) the continued safekeeping of daily backup tapes; (2) a description of the accounts on the system and of the privileges these accounts and security groups have - or had - to network resources from January 1, 2001, to the present; (3) the retrieval of the old hard drives of the servers that were recently replaced; and, (4) replacement of the hard drives of the current servers and establishment of separate local area networks for majority and minority staffs. Chairman Hatch also indicated that he had directed his staff to interview all majority staff, "to determine whether they have

any knowledge of actual or potential transgressions related to these documents." (Attachment "E.")
The Sergeant at Arms, having consulted with Majority Leader Frist and Democratic Leader Daschle and receiving their approval, immediately commenced an investigation. The USCP continued to take custody of the Committee's daily backup tapes for safekeeping. Additionally, SAA staff determined that the "old hard drives" of the servers were still being used and could not be taken into custody without shutting down the Committee's computer system.
On Friday, November 21, 2003, staff for Chairman Hatch who had been conducting interviews of all majority staff on the Committee advised the Sergeant at Arms that a clerk in the Nominations Unit - Mr. _____ - had admitted to them that day that he had accessed Democratic files over the Committee's computer system. Mr. _____'s desktop computer was immediately taken into custody. Mr. _____'s desktop computer in the office of Majority Leader Frist was also taken into custody for analysis.
Also on November 21, 2003, Chairman Hatch gave the SAA permission to take the Committee's servers' hard drives. SAA staff conducted a site survey to ascertain the physical and logical layout of the Committee's servers and over the weekend of November 22-23, 2003, the four Committee servers were disconnected, their hard drives removed and preserved, and the Committee's data was restored to new hard drives.
On December 3, 2003, the file server from the Majority Leader's office was imaged and the copy secured for forensic analysis. A backup tape of that office's e-mail server from November 17, 2003, was provided to investigators, but proved to be blank. Subsequently, the System Administrator provided backup tapes from September 29, 2003, and January 12, 2004. These tapes were readable and analyzed by the forensic experts.
C. Investigative Resources
The request for the Sergeant at Arms to conduct this investigation was, as best can be determined, unprecedented. To ensure a thorough investigation, the Sergeant at Arms supplemented his staff's resources with an independent computer forensics firm and additional investigators.
The services of a qualified, outside computer forensics company were obtained pursuant to an existing contract the SAA had in place for Information Technology Support. The Statement of Work for the analysis asked for: (1) a matrix of access permissions assigned to security groups, and individual accounts and the network resources to which they had access, as can best be reconstructed, back to January 2001; (2) an audit of all available and reconstructed logs to look for anomalies in login failures, account logins compared to machine names, file access, and copying, with special emphasis on the documents identified as being from the Judiciary Committee computer system; and, (3) an analysis of probable methods by which these files could have been obtained by other than permitted users. Each of the company's employees who worked on this analysis was required to sign a non-disclosure certification. The work of the forensics analysis and recovery team was overseen by the SAA's lead investigator, the Assistant Sergeant at Arms for Police Operations.
In addition to the forensics analysis of the Judiciary Committee servers, available backup tapes, and the desktops of relevant staff members, this investigation consisted primarily of interviews of those individuals who had access to the Judiciary Committee server. Over 160 interviews were conducted of current and former Judiciary Committee staff members and other individuals who were identified during interviews as possibly having information relating to the investigation. Employees of the SAA technology staffs were also interviewed. Four agents from the United States Secret Service were detailed to the SAA to assist in this investigation. They reported to the SAA lead investigator.
All of those interviewed were asked a standard set of questions as well as individualized questions based on the investigation to date, or as follow up to their answers to the standard questions. Interviewees were allowed to have counsel during the interviews; six individuals chose to have attorneys present.
It would not have been possible to conduct this investigation without the cooperation of the majority and minority Members of the Judiciary Committee and their staffs. Since the inception of the

investigation, Chairman Hatch and Senator Leahy have encouraged their staffs to cooperate with the SAA. Staff Directors Mr. _____ and Mr. _____ have been invaluable in providing information and helping with the logistics of locating former employees and arranging interviews. The original copy of the final version of this report and the work product of this investigation will be kept by the Sergeant at Arms. Copies of this report have been made and distributed to the Chairman and Ranking Minority Member of the Committee.

II. Overview of Findings

Investigators interviewed over 160 individuals, primarily those who had access to the Judiciary Committee computer system. In addition, five servers, four workstations and multiple e-mail backup tapes from the Judiciary Committee and Majority Leader Frist's office were analyzed by forensic experts. Individuals who were interviewed did so voluntarily and were advised that this was an administrative, fact-finding inquiry. This report presents the findings of the investigation.

The report begins by outlining the structure of the Judiciary Committee's computer network then addresses whether the Democratic documents disclosed in the press were from the Committee's computer system. It then outlines the admissions of two former Committee staff members who accessed Democratic files, including the scope of that access, and sets forth the forensic verification of how they were able to access other users' files over an extended period of time. The report also examines the statements of other individuals who were identified as knowing that access to Democratic documents was available, addresses a possible source of the disclosures to the press, analyzes other possible means of access to the computer system, and finally, makes recommendations for the future.

Investigators were provided critical information early in the investigation (Friday, November 21, 2003) when staff for Chairman Hatch who had been conducting interviews of majority staff on the Committee advised the Sergeant at Arms that a clerk in the Nominations Unit had admitted to them that day that he had accessed Democratic files over the Committee's computer system. His desktop computer was immediately taken into custody by the SAA.

The forensic review confirmed that 18 of the documents at issue resided on the Nominations Unit clerk's desktop. The documents in question were found within a large, password protected compressed file with either the exact name, or a close approximation. The documents at issue were also found on the Judiciary Committee server in the authors' folders, or the folders of other Democratic staff members to whom the author sent the document.

The Nomination Unit clerk was interviewed on November 23, 2003, as part of this investigation and subsequently re-interviewed twice, with counsel present, later in the investigation. His version of events remained consistent each time he was interviewed and the investigation verified much of what he told investigators. He and his counsel remained cooperative throughout the investigation.

The clerk first became aware that he could access the files of Democratic staff some time in October or November of 2001. He made this discovery after watching the Committee's Systems Administrator perform some work on his computer. An admittedly curious person, the clerk attempted to duplicate what the System Administrator had done. In so doing, he was able to observe all of the network's other users' home directories. He then clicked on different folders to see which ones he could access; he was able to access some folders, but not others. The folders that he could access, he stated, belonged to both Republican and Democratic staff.

The Nominations Unit clerk reported that he had access to the home directories of other users shortly after beginning his employment in the fall of 2001 until the spring of 2003. Initially he printed approximately 100-200 pages of documents pertaining to Judge Pickering's nomination and gave them to one of his supervisors. Two days later that supervisor and another admonished him not to use the Democratic documents and those that he had given his supervisor were shredded.

Mr. _____joined the staff of the Judiciary Committee in December 2001. A short time after Mr. _____ was hired, the clerk showed him how he could access Democratic files. The clerk who initially discovered how to access the files told investigators that he was not sure what to look for in the files,

so Mr. _____ would guide him as to what information was helpful. Mr. _____ would often suggest which directories he should concentrate on and would sometimes tell him that there was something new in a particular folder and ask the clerk to print it for him. Mr. _____ admitted accessing the computer files of Democratic staff himself on one or two occasions.

The Nominations Unit clerk explained that he frequently searched the folders of some Democratic staff on an almost daily basis while working on the nomination of Judge Priscilla Owen. In fact, over the course of accessing other users' files for approximately 18 months, the clerk downloaded thousands of documents. Forensics analysis of a compressed zip folder from his workstation where he kept these documents identified 4,670 files, the majority of which appeared to be from folders belonging to Democratic staff. During the approximately 18 months the clerk accessed other users' files, he stated that he had four or five different computers assigned to him and that regardless of the hardware he used he was able to access this information.

In January 2003, Mr. _____ left the Judiciary Committee and took a position in the office of Majority Leader Frist. The Nominations Unit clerk and Mr. _____ both admitted that the clerk continued to provide Democratic - and also Republican - documents to Mr. _____ after he left the Judiciary Committee. Forensic analysis of the e-mail traffic between the two confirms this. In March or April 2003, the clerk was re-assigned to another Unit in the Judiciary Committee. About the same time (April 2003) the Committee's server was upgraded and the clerk believed that prevented him from being able to access other users' files on the server.

While there was extensive analysis of servers and individual workstations in this investigation, the results were limited due to the absence of proactive security auditing on the Committee's computers. The fact that not all security events were audited significantly inhibited this investigation because permission changes could not be analyzed on any computer.

Because the Committee was not auditing permission changes, the forensic review was not able to provide a history of who had access to the files containing the Democratic documents at issue.

The forensic review of the Judiciary Committee servers that was conducted is consistent with the clerk's explanation of how he was able to access democratic files. The forensic analysis provided investigators with two "snapshots" of the network's permission settings - one from July 2003 (when a file copied from the older server in April was deleted) and one from November 2003 when the server was imaged for this investigation.

The forensic analysis indicated that a majority of the files and folders on the server were accessible to all users on the network. Any user on the network could read, create, modify, or delete any of the files or folders within these folders. The investigation revealed that users whose network profiles were established prior to August 2001- when a new System Administrator was hired by the Committee - were generally established correctly and had strict permissions; those established after the date were "open." The investigators do not believe that the Committee's System Administrator acted maliciously, or that he himself inappropriately accessed any user's files. Rather, this significant security vulnerability appears to have been caused by the System Administrator's inexperience, and a lack of training and oversight. This System Administrator left the Committee in July 2003, but permissions remained "open." Forensic analysis of the Judiciary Committee server when this investigation began in November 2003 indicates that the system was even more open to all users on the network at that time.

Despite this significant lack of security, the investigation did not reveal any evidence that users continued to access other users' files after the Nominations Unit clerk stopped doing so in April 2003. Other than the Democratic documents in question, no one who was interviewed brought forth any other documents that they believed had been compromised from the computer system.

The investigation did not identify any individuals, other than the clerk and Mr. _____, who were accessing other users' files on the Judiciary Committee computer network. While the clerk admitted to accessing and printing approximately 100-200 pages of documents and providing them to his supervisor in October or November of 2001, they did not know how he had obtained the documents or

that he continued to access additional Democratic documents. Additionally, the supervisors did not bring the matter to the attention of the Staff Director. A forensic analysis of the hard drives of both supervisors was conducted and none of the Democratic documents at issue resided on either drive.
The Nominations Unit clerk identified other Judiciary Committee staff members within the Nominations Unit whom he believed knew Democratic computer files were accessible. Investigators interviewed all of those individuals that were identified as having knowledge about access to Democratic files. Of those interviewed, only one - the Committee's former System Administrator who was working part-time on developing a database for the majority - knew that any users' folders were inappropriately open to others. This individual did not know the extent of the problem and thought the System Administrator was just "sloppy" with setting some users' permissions. He did not advise the System Administrator of his discovery.
In the interviews that were conducted, to date no other individuals on either the Republican or Democratic staffs admitted that they knew that access could be obtained to the other's files. There was speculation among those interviewed that if Mr. _____ learned how to get access to Democratic files, others on the Committee were probably doing the same thing. The Democratic staff working on judicial nominations clearly did not know there was a vulnerability. If they had, presumably they would have protected their files.
Members of the press and the Coalitions who had possession of the document at issue declined to be interviewed. Without their cooperation, the investigation faced a significant impediment to identifying the source of the disclosure. Several individuals who were interviewed, both Republicans and Democrats, implicated Mr. _____. While there is no definitive evidence pointing to Mr. _____ as the individual who gave the documents to the press, or a party outside of the Senate, there is circumstantial evidence implicating him.
When the Nomination Unit clerk, who considered Mr. _____ a friend, was asked how the Democratic documents were disclosed to the press, he identified Mr. _____ as the likely source. He described a conversation with Mr. _____ shortly after the documents were excerpted in the press where he understood Mr. _____ to acknowledge giving the documents to a third party who then gave them to the press.
The report does not make any recommendation for referral of individuals for Senate or legal ethics or criminal violations. It does set forth some of the options the Judiciary Committee may be considering. It also recommends immediate steps that the Committee should take to enhance its computer security and sets forth measures the SAA will be recommending to the Senate leadership to enhance the computer security network-wide.
III. The Judiciary Committee Computer Network
A. Organizational Background
The SAA provides Information Technology support to the entire Senate, including Committees. Office Automation support is accomplished via the current SAA contractor, Signal Solutions.
The SAA provides Senate offices with a variety of computer hardware and software, including networks, workstations, peripherals and all products associated with a computer system connected to a Local Area Network (LAN), including software such as Operating Systems (usually a variant of Windows NT) and other functional packages and office suites. Software setup and Operating System configuration is usually conducted by SAA staff following configuration specifications requested by the office's System Administrator.
Almost all Senate offices, including Committees, employ their own Systems Administrator. These individuals have a broad range of technical skills, ranging from the bare minimum to advanced technical understanding. The SAA provides training (through the Joint Office of Education and Training), guidance, and/or direct support to Systems Administrators when requested to do so.
B. History of the Judiciary Committee's Network and Systems Administrators
It was determined from interviews of SAA employees that the Judiciary Committee migrated from a mini-computer system to a Local Area Network prior to October 31st, 1991. The specific date is not

known, nor is the name of the Systems Administrator at the time.

On August 14th, 1995, the Judiciary Committee computer software system was upgraded from Microsoft (MS) LAN Manager Version 1.1 to MS Windows NT Server 3.51. In December 1999, another upgrade was completed resulting in the software installation of MS Windows NT Server 4.0. In July 1999, Mr. _____ left the Judiciary Committee after serving as its Systems Administrator. According to SAA staff, Mr. _____ was very independent and rarely used their customer support. In August 1999, an SAA team installed new Y2K-compliant workstations within the Committee. This caused a number of network issues to surface as a result of the System Administrator's nonstandard configurations on the servers and customized, non-standard, individual logon script files. In late 1999, the Judiciary Committee requested assistance from the SAA to bring its computer network back to a standard configuration and into Y2K compliance. An SAA contractor assisted the Committee for approximately 2 months during the transition to a new Systems Administrator, Mr. _____.

SAA Service Center tickets which track service requests to the Help Desk show that in December 1999 Mr. _____ requested specific assistance from the SAA Help Desk with regard to the Judiciary computer server upgrade. According to these records, Mr. _____ "successfully changed and synchronized server passwords for proper security measures."

On June 21, 2001, Mr. _____ resigned as the Committee's System Administrator and Mr. _____, the System Administrator for Senator Leahy's personal office, performed those duties "unofficially" for the Committee until Mr. _____ was hired on July 17, 2001. This position was first job after obtaining his college degree.

The Committee received new computer hardware ordered by Mr. _____ on February 20, 2003. (Service Center ticket 92377). The service ticket's notes indicate that Mr. _____ declined to schedule a pre-installation meeting with SAA staff and declined the SAA's offer to configure the system. He requested that the equipment be delivered in the original boxes and indicated that he would handle the installation himself. After this installation Mr. _____ called the SAA Help Desk on April 18, 2003, with questions about how to copy files from one server to another. He was advised of the proper procedures and, according to the Help Desk report, was able to copy the files successfully. Three days later Mr. _____ called the Help Desk regarding problems associated with the new Windows 2000 server he had built to use as a file server. He reported encountering login problems on workstations when users attempted to connect to the server and contacted the SAA Help Desk for assistance. The SAA provided technical assistance and on April 30, 2003, Mr. _____ advised the Help Desk staff that he was not having any further difficulties.

On May 29, 2003, Mr. _____ assumed the System Administrator position for the Committee. He remains in this position today. Mr. _____ left the Committee on July 21, 2003. A timeline reflecting the tenure of the Committee's recent System Administrators is attached at "G."

Like some other Senate offices, the Judiciary Committee has historically been staffed with Systems Administrators who preferred to perform most computer-related tasks themselves. This has been true even if they had only minimal technical experience before becoming the Committee's System Administrator. There is no minimum level of proficiency required to obtain a System Administrator position, and there was a considerable variance in the proficiency levels of the Committee's different system administrators. Notably, the records of the Senate Joint Office of Education and Training reflect that Mr. _____ only attended two technical training classes during his tenure, neither relating to the NT Administration.

C. The Architecture of the Judiciary Committee Network

The Judiciary Committee Computer network, when it was imaged at the beginning of this investigation, consisted of a Primary Domain Controller (PDC) Server known as "JUDAK," a Backup Domain Controller (BDC), a Print Server known as "JUDPT," and a File Server which is referred to as "JUDFS01". Collectively, these servers are simply known as the Judiciary Committee File and Print Servers. The network configuration also included an e-mail server that was not taken into custody because backup tapes were available. A diagram of the Judiciary Committee Local Area

Network as of November 2003 is attached as "H."
The "JUDAK" server was the primary domain controller (PDC) for the Committee. The server ran the Windows NT 4.0 Operating System and controlled all servers, computer workstations, users, printers, scanners and other computer hardware on the network. PDCs are considered critical infrastructure machines and act as the central management point for the entire network and all its users.
The print server "JUDPT" was the central managing point for all printers and computers that printed. This connected all servers and workstations to all printers and managed the printing of all documents.
The file server "JUDFS01" acted as the central file repository point for all users on the network. The file server allowed users to save and retrieve their files and folders from a central location. This central location offered a large amount of hard drive space (over 200 gigabytes) for data storage by the over 140 user accounts. Administrators generally backup the entire file server periodically as a single entity providing for the recovery of lost data.
The Committee's servers were configured in a way that a Local drive/partition contains the Server Operating System and related utilities, this is known as the server "C:" drive. There also exists a server "E:" drive. This particular local drive/partition contains data files, such as user home directories and shared directories. The System Administrator is responsible for security settings or permissions on the various folders on this drive or partition to allow (or not allow) them to be "shared" with users on the network. The practice in the Judiciary Committee is to "share" certain files among staff working for the same Senator. Users access the folders by mapping them to a drive letter (e.g., H: or S:) that they use just like a drive on their individual workstations.
Specific to each user's desk workstation is a Local "C:" drive that contains the workstation Operating System, applications, and data files. Additionally, the "H:" drive (as stated above) is also seen and is "mapped" to a user's home directory on the file/print server. An "S:" drive is also "mapped" to the shared folder on the file/print server.
Each user should have exclusive access to his or her own directory. As the name implies, more than one user typically has access to any shared folders on the server. Access to home directories and shared folders is controlled by permissions set by the system administrator.
The diagram below reflects the Committee's server and desktop configurations.

A detailed explanation of each drive is attached at "I."

IV. The Documents Disclosed to the Press Resided on the Judiciary Committee Computer Network

The Democratic staff documents excerpted in the press and published on the internet appeared initially to have been taken from the Judiciary Committee's computer system. Specifically, one of the authors of a memorandum to Senator Kennedy advised investigators that the document posted on the public website was not the final version of the memorandum printed and disseminated. Likewise, the author of the document that does not have a heading (the first page posted on the website with an "02" in the upper right corner) indicated that it was typed as an outline of thoughts, not intended to be read by anyone else and, therefore, never printed.

The forensic review confirmed that 18 of the documents at issue resided on the Judiciary Committee server. The one document that was not found was identified to investigators as written by Mr. _____, Counsel for Senator Biden, and was posted on the website with "p.20" in the upper right corner. The forensic review searched all files and folders - even those that had been deleted - on all of the servers and workstations taken into custody. Printed copies and, in some cases filenames, of the Democratic staff documents that were provided to the forensic consultants. Additionally, unique mathematical computations for each file were created by the forensic experts and used to search for the documents. All of the found documents resided on desktop. The documents in question were found within a large, password protected compressed file with either the exact name of the original document, or a close approximation. The documents were also found on the Judiciary Committee server in the authors' home directories, or the home directories of other Democratic staff members to whom the author sent the document. A list of the folders where the documents were found is attached at "J" (Memos in Question Analysis).

The forensic analysis revealed no matches for the documents in question on any of the other computer analyzed.

V. A Judiciary Committee Staff Member Accessed the Computer Files of the Documents' Authors

A. Mr. _____ Initial Access

As noted earlier in this report, counsel for Senator Hatch who were conducting interviews the week of November 17th brought to the attention of the Sergeant at Arms that Mr. _____, a nominations clerk for the Senate Judiciary Committee, had acknowledged accessing Democratic files on the Judiciary Committee's computer system. Mr. _____ was interviewed on November 24, 2003, as part of this investigation and subsequently re-interviewed, with counsel present, later in the investigation. His version of events remained consistent each time he was interviewed and the investigation verified much of what he told investigators. Importantly, prior to the initial media reports referencing the Democratic documents at issue, Mr. _____ had already been accepted to graduate school in accounting in Texas and was planning on leaving employment with the Judiciary Committee. He was put on administrative leave the day of his admission to Senator Hatch's counsel and left for Texas on January 7, 2004.

Mr. _____ began working for the majority in the Nominations Unit of the Judiciary Committee on September 19, 2001. He was interviewed and hired by Mr. _____, the Republican Staff Director for

the Committee at that time. Mr. _____'s responsibilities involved the handling and processing of nominations paperwork. Later he was given additional responsibilities, including researching for the Committee's attorneys and speaking with the Department of Justice's Legislative Affairs and Legal Policy representatives. He stated that he worked for Ms. _____ and Mr. _____.

According to Mr. _____, he became aware that he could access the files of Democratic staff some time in October or November of 2001. He made this discovery after watching the Committee's Systems Administrator, Mr. _____, perform some work on his computer. An admittedly curious person, Mr. _____ attempted to duplicate what the System Administrator had done after Mr. _____ left his workspace. According to Mr. _____, he accessed "My Network Places/Entire Network/Judak." In so doing, he was able to observe all of the users' home directories. He then clicked on different folders to see which ones he could access; he was able to access some folders, but not others. The folders that he could access, he stated, belonged to both Republican and Democratic staff.

Mr. _____ reported that he had access to other users' home directories shortly after beginning his employment in the fall of 2001 until the spring of 2003. Mr. _____ recalled that the nomination of Judge Charles Pickering to a seat on the Fifth Circuit was the "hot topic" within the Judiciary Committee in the fall of 2001. As a result, he began navigating the server and searching for information about Judge Pickering. He printed approximately 100-200 pages of documents pertaining to Judge Pickering's nomination and gave them to Ms. _____ in an attempt to get on good terms with her. According to Mr. _____, Ms. _____ appeared pleased with the information and thanked him. He reported that two days later Mr. _____ and Ms. _____ admonished him not to use the Democratic documents and Ms. _____ shredded the materials he had given her.

B. Mr. _____'s Possession of Democratic Documents

In December of 2001 Mr. _____ joined the Judiciary Committee as a counsel for the Nominations Unit. Mr. _____ stated that a short time after Mr. _____ was hired, he showed Mr. _____ how to access Democratic staff files and explained that Mr. _____ and Ms. _____ had instructed him not to use Democratic materials. Mr. _____'s response, according to Mr. _____, was that everyone knew about the open access and that he did not have to follow the directions given by Mr. _____ and Ms. _____. Furthermore, Mr. _____ recalled that Mr. _____ told him that Senator Hatch wanted the staff to use any means necessary to support President Bush's nominees.

According to Mr. _____, he was not sure what to look for in the files, so Mr. _____ would guide him as to what information was helpful. Mr. _____ explained that Mr. _____ would often suggest which directories he should concentrate on and would sometimes tell him that there was something new in a particular folder and request that Mr. _____ print it out for him. When Mr. _____ printed out documents, he would either hand them to Mr. _____ or leave them in Mr. _____'s top desk drawer. He recalled specifically leaving documents in the desk drawer without a handle.

In his second interview, Mr. _____ explained that Mr. _____ was his supervisor, (a relationship not corroborated by anyone else, including Mr. _____), and when asked by Mr. _____ to look for specific Democratic information he believed he was being directed to do so by his supervisor. Mr. _____ believed that Mr. _____'s instructions superseded those he had been given earlier by Ms. _____ and Mr. _____. Mr. _____ also stated that Mr. _____ told him there was nothing wrong, or illegal with accessing the Democratic files.

In January 2003, Mr. _____ left the Judiciary Committee and took a position in the office of Majority Leader Frist. He continued to have access to the Judiciary Committee server until at least February 12, 2003, when he e-mailed himself (from his Judiciary Committee account to his account on the Frist server) more than 45 documents over three days. Mr. _____ and Mr. _____ both admitted that Mr. _____ continued to provide Democratic - and also Republican - documents to Mr. _____ after he left the Judiciary Committee. E-mail traffic between Mr. _____ and Mr. _____ confirms this. For example, on February 24, 2003, Mr. _____ replied to an e-mail from Mr. _____ with the subject matter "please send asap" by attaching over 30 documents to Mr. _____. And, a March 3, 2003 e-mail

from Mr. _____ to Mr. _____ with the subject "lots of chatter" attaches ten documents, the majority of which appear to be written by Democratic staff.

C. The Scope of Access

Mr. _____ explained that he frequently searched the folders of Mr. _____ (Sen. Kennedy), Mr. _____ (Sen. Durbin), Mr. _____ (Sen. Feinstein), Ms. _____ (Sen. Leahy), Mr. _____ (Sen. Biden), Mr. _____ (Sen. Feingold), and Ms. _____ (Sen. Leahy). He acknowledged that most of the documents he accessed were from the files of Ms. _____ and Mr. _____. He admitted accessing these files on an almost daily basis while working on the nomination of Texas Supreme Court Judge Priscilla Owens to the District Court. He stated he accessed the files much less frequently after October 2002 when his mother was murdered. Mr. _____ provided investigators with a two-page printout of a computer screen with Judiciary Committee staff folders and indicated which folders he could access and those he could not. (Attachment "K.")

According to Mr. _____, when he learned of the vulnerability of the computer server he took steps to safeguard his own files. He did this by contacting a friend outside the Senate, whom he thought to be very good in computer security issues. This individual guided Mr. _____ through the necessary steps at his desktop. An interview with this individual confirmed that Mr. _____ advised him that others could read his files and asked for assistance in preventing this access. Mr. _____'s friend helped him "right click on properties" and establish permissions on his files. Mr. _____ stated that he also secured the files of Mr. _____ and Mr. _____, another member of the Nominations Unit, from their workstations.

In March or April 2003, about the same time Mr. _____ left the Nominations Unit and moved to the Civil Division, the server was upgraded and Mr. _____ believes that prevented him from being able to access other users' files on the server. During the approximately 18 months Mr. _____ accessed other users' files, he stated that he had four or five different computers assigned to him and that regardless of the hardware he used he was able to access this information.

The investigation revealed that over the course of accessing other users' files for approximately 18 months, Mr. _____ downloaded thousands of documents. He stated that he created a password protected "zip folder" on his desktop computer once he realized there was going to be an investigation and moved the relevant documents to that folder. He provided investigators with the password for the folder. The forensics analysis revealed that the compressed zip folder contained 4, 670 files, the majority of which appeared to be from folders belonging to Democratic staff. Over 2,000 of these files appear to belong to one individual, a former counsel for Senator Durbin. Mr. _____ told investigators that the only copy of these documents that he possessed other than those found on his workstation was given to his attorneys. Mr. _____'s counsel provided investigators with two discs which included the contents of Mr. _____'s H: drive, including the zipped files. The attorneys also provided investigators with approximately 500 pages of documents including Democratic documents, Republican talking points and issue papers on judicial nominations, and press and website reports about judicial nominees and this investigation. They represented this to be the complete results of Mr. _____'s production to them of any documents he had in his possession relating to this investigation. Mr. _____ confirmed that he had given everything over to his counsel.

VI. Forensic Verification and Analysis

A. Limitation of Analysis

While there was extensive forensic analysis of servers and individual workstations in this investigation, the results were limited due to the absence of proactive security auditing. Each server and workstation contains three main logs; an application log which tracks programs and what they are doing on the network, a system log which tracks any remarkable system, operating system events, and a security log which tracks successful and failed access attempts to system resources. System Administrators can use the security log to apply both reactive and proactive measures to potential and

actual security incidents. The security log can audit successful and failed log ons and log offs, file accesses, user rights, security policy changes and computer restarts.
Prior to the Committee's server upgrade in April 2003, only failed log-on and log-offs were audited. As a result, the forensic review was unable to determine whether any users changed their user rights, attempted to access files to which they did not have access to, or the exact date and time of each log on and log off.
The fact that not all security events were audited significantly inhibited this investigation because permission changes could not be analyzed on any computer. When a user account is created, the System Administrator assigns that user access to certain privileges and resources on the network. If the system is not properly configured, users may be able to change their level of access and privileges. Because the System Administrators were not auditing permission changes, the forensic review was unable to produce a history of who had access to the files containing the Democratic documents at issue. This trend of not fully logging security events began before the the Committee's server upgrade in April of 2003. When the Committee migrated from Windows NT to Windows 2000 in April 2003, the same log settings were preserved and, as a result, the logging continued to be inadequate for a comprehensive security audit.
B. Open Permissions
The forensic review of the Judiciary Committee servers is consistent with Mr. _____'s explanation of how he was able to access files that were owned by Democrat staff of the Committee. The files on the Committee's server (JUDAK) were copied to the new server (JUDIC-FS01) on April 18, 2003 and deleted in July 2003. Forensic experts were able to recover most of these deleted files and analyze file permissions as they were set at the time of deletion.
The forensic analysis indicated that a majority of the files and folders on the server were accessible to all users on the network. Specifically, in 84 out of 144 of the home directories analyzed, the permission assignment was "open," indicating that the "EVERYONE" group had full control. This means that any user on the network could read, create, modify, or delete any of the files or folders within these folders. The remaining folders had a "strict" permission assignment, which meant that a specific user(s) were assigned to the folder, typically the owner of the home directory and the System Administrator. The folder permission analysis is attached to this report at "L".
The folder permission analysis verified Mr. _____'s statements that he was able to access the home directories, or H: drives, of Ms. _____, Mr. _____, Ms. _____, Mr. _____, Ms. _____, and Mr. _____. These files were among those open to everyone on the Judiciary Committee server. Additionally, the forensic review confirmed that access was restricted to the files belonging to Mr. _____, Mr. _____, and Mr. _____ . This finding is consistent with Mr. _____'s report that he took steps to protect these users' files.
The Windows 2000 operating System is built on Windows NT technology and has similar security. As a result, the open permission settings that existed before the Judiciary Committee's server upgrade in April 2003 were inherited by the new server unless the System Administrator took specific steps to change them. Nevertheless, the conversion to the Windows 2000 Operating System left Mr. _____ unable to navigate access to other users' files. Part of the explanation for this is that the Windows 2000 server has a setting (unlike the previously used
Windows NT) that does not show the list of all users' folders. As a result, while the Democratic files Mr. _____ had been accessing were still technically open, the path to get to them had changed and it appeared to him that access was no longer available.
C. Pattern of Open Permissions
Our investigation revealed that some user home directories were set to "open" permissions and other home directories were set to "strict" permission. This appears to be a result of the Judiciary Committee Network having two System Administrators during the time frame in question. One System Administrator had very strict account policies in place and the other did not. An analysis of the creation date and permissions of various user accounts was performed and supports this. (Attached

at "M" is a chart H: Drive Permissions Analysis Including Start/Creation Dates).
Users accounts created prior to August 2001 were generally created with "strict" permissions; those established after that date were "open." Of the 126 users whose folders were available for forensic analysis, there were only nine exceptions to this general pattern. Four of these exceptions were Nominations Unit staff whose files Mr. _____ admitted protecting. Of the remaining five exceptions, only two had strict permissions that should have, according to the pattern, been open –Ms. _____, counsel for Senator Kyl since August 2003 (formerly counsel for Senator Sessions from August 2002 - August 2003) and counsel for Senator Brownback. Judiciary Committee leave records indicate that Mr. _____ was on leave when Ms. _____ and Mr. _____ began their employment with the Committee. It is likely that their user profiles were established by Mr. _____ in Mr. _____'s absence. They both were interviewed and denied any knowledge of being able to access other user files, or of the Democratic documents in question.
The Committee's recent System Administrators were interviewed on multiple occasions. Mr. _____ was the Committee's System Administrator from December 1999 to June 21, 2001. At that time Mr. _____, the System Administrator from Senator Leahy's personal office took over the duties unofficially until Mr. _____ began on July 17, 2001. Mr. _____ remained in the position until Mr. _____ assumed the duties on May 29, 2003.
Investigators interviewed Mr. _____ in person early in the investigation and had subsequent telephone and e-mail conversations with him. After explaining to investigators how he set up a user profile, Mr. _____ called to correct his response and subsequently sent an e-mail on February 18, 2003, which stated, in part:
In the final step of the process, [sic] I said I would go into the newly created user folder, enable the share, and restrict permission to full access by the particular user. I want to clarify that this was only done under the system I put in place in Spring 2003.

In conversations I've had with Mr. _____ since we spoke, it has come to light that I was not instructed to set such user permissions on each folder under the old system. This was an oversight in teaching me how to set up the accounts. My assumption was that these permissions were restricted by some other means, and as I was taking over an already functioning system, I did not think to double check this area of security.

This statement explains why permissions were open for users who came to work for the Judiciary Committee after July 2001. The investigators do not believe that Mr. _____ acted maliciously, or that he himself inappropriately accessed any user's files. Rather, this significant security vulnerability appears to have been caused by Mr. _____'s inexperience, and a lack of training and oversight. Despite Mr. _____'s assertions that he properly set permissions after April 2003, forensic analysis of the Judiciary Committee server when this investigation began in November 2003 indicates that the system was even more open to all users on the network at that time. Two-thirds of the folders analyzed were created on April 18, 2003, when they were copied from the old server (JUDAK) to the new server. The majority of the folders on the new server (JUDIC-FS01) have no permissions set. Access to these files would require a user to manually map to another user's drive (as opposed to clicking on folders as Mr. _____ did).
Because the servers in the Judiciary Committee Network remained open from August 2001 through November 2003 it is plausible to assume that additional users may have escalated their privileges, and therefore would have been able to view files belonging to other users. Despite this significant lack of security, the investigation did not reveal any evidence that users continued to access other users' files after Mr. _____ stopped doing so in April 2003. Other than the Democratic documents in question, no one who was interviewed brought forth any documents that had been improperly acquired from the computer systems in question. The next section of this report will address the knowledge of the individuals identified by Mr. _____ as having knowledge of the ability to access Democratic files.

VII. Other Individuals Identified as Having Knowledge

A. Ms. _____ and Mr. _____ in the Fall of 2001

As previously discussed in this report, Mr. _____ admitted to accessing and printing approximately 100-200 pages of documents and providing them to Ms. _____ and Mr. _____ in October, or November of 2001. Ms. _____ and Mr. _____ confirmed that Mr. _____ brought them a stack of documents that appeared to be written by Democratic staff. Ms. _____ stated that she did not know how Mr. _____ had received these documents, but that her impression at that time was that they came from a computer that Mr. _____ inherited from a former Democratic staffer. She remembers recognizing that one of the documents was an internal Democratic memorandum at which point she decided not to do anything with them and placed them in her top desk drawer. The next day she shredded the documents and told Mr. _____ to shred every copy he made and admonished him that it was not appropriate to read them - "this is not the way they do things here."

Mr. _____'s account of receiving the documents is very similar to that of Ms. _____. Mr. _____ recounts that it was late in the day when Mr. _____ presented a manila folder of documents that appeared to be written by Democratic staff. Mr. _____ did not know that Mr. _____ had access to the files. He stated that later in the evening as he thought about the documents, he concluded that it was wrong to have or use them. The next day he told Ms. _____, "I don't think it's right, we need to get rid of them." They then asked Mr. _____ into Ms. _____'s office and told him to destroy any hard copies that he had and advised him to delete the files if they were on his computer.

Ms. _____ and Mr. _____ both stated that they thought they had resolved the problem and did not feel it was necessary to bring the matter to the attention of their supervisor, Staff Director, Mr. _____. Mr. _____ is no longer a Senate employee, but was interviewed for this investigation. He denies having access to Democratic files or knowing that anyone else had access. The investigation also revealed that is unlikely that Mr. _____ shared with Mr. _____ the fact that he could access Democratic files. Interviews revealed that the two gentlemen did not have a close or friendly working relationship.

The forensics analysis of both Ms. _____'s and Mr. _____'s Judiciary Committee hard drives was conducted. This analysis revealed that none of the Democratic documents at issue resided on either drive. Furthermore, the analysis determined that neither Ms. _____, nor Mr. _____ altered the manner in which they saved their documents, which they might have done if they understood that Mr. _____ and others could access files through the Judiciary Committee server.

Investigators found Ms. _____ and Mr. _____ to be credible and cooperative in this investigation. In fact, on February 23, 2004, Ms. _____ called investigators after she discovered one of the Democratic documents at issue in her possession when she was unpacking her files at a new job. She told investigators she had received the document from Mr. _____, counsel for Majority Whip McConnell, in February or March of 2003. She does not remember the exact conversation, but she had the impression the document came from Mr. _____. When Mr. _____ was re-interviewed he indicated Mr. _____ may have shown him an "opposition document" early in the year, but denied any recollection of the giving the specific document to Ms. _____; although, he acknowledged that it was possible he did so.

B. Nominations Unit Staff

Mr. _____ was questioned by investigators about whether he was aware of anyone else who knew that Democratic files were accessible. He initially stated that, "Everybody knew," but when questioned further he named only several Judiciary Committee staff within the Nominations Unit, specifically, Ms. _____,Mr. _____, Mr. _____, and Mr. _____. Mr. _____ indicated that he was also able to access these files from Ms. _____'s computer. Mr. _____ stated that the other individuals he named had knowledge of being able to access Democratic files because Mr. _____, a former System Administrator for the Committee who was re-hired in November 2001 to develop a database for the majority, demonstrated how access could be obtained. The investigators interviewed all of those individuals that were identified by Mr. _____ as having knowledge about access to Democratic files.

Ms. _____ was employed by the Judiciary Committee in July 1998 as a legislative correspondent

and later its nominations clerk. After a break in service she returned to the Committee from August 2001 through September 2003, first as the Nominations Unit investigator and later as a counsel in the Unit. In her first interview, Ms. _____ recalled overhearing a conversation between Ms. _____, Mr. _____, and Mr. _____, in which she heard Mr. _____ say that he could access Democratic files. She believed this was possible because he had inherited a computer previously used by Democratic staff. She further stated that if Mr. _____ had shown colleagues how to access files, it was only because he was shocked or startled that it was possible; he was not showing them so that they could access the files.

When Ms._____ was re-interviewed she was asked again about the "demonstration" Mr. _____ told investigators that Mr. _____ had conducted and her knowledge of Mr. _____'s ability to access Democratic files. Ms._____ recollection of events is not clear. She initially stated during the second interview that Mr. _____ told her directly that he could access other individual's files on the server and at one point had shown her how he could do it, using his own workstation. She later indicated that it could have been that Mr. _____ showed her on her own computer. Ms._____ also stated that she does not have specific recollection of a demonstration by System Administrator. She stated that it is possible that it happened and that she does not remember it because she did not think it was significant at that time. Overall, Ms._____ was not helpful in determining whether others within the Nominations Unit knew that access was available to Democratic files. She acknowledged that events "could have happened" the way Mr. _____ described them to investigators, but had no specific recollection. Mr. _____, conversely, is certain that Ms. _____knew how to access Democratic files, but had no specific knowledge that she had ever done so.

When Mr. _____ was the Committee's System Administrator from December 1999 to June 2001 he stated that he was meticulous about security permission. Investigators interviewed Mr. _____ three times. While he was nervous and guarded with investigators initially he eventually was forthcoming and essentially confirmed Mr. _____'s recollection of events. He denied accessing Democratic files and had never seen the documents at issue.

When Mr. _____ returned to the Committee in November 2001 to create a database he remembers discovering that Mr. _____, then the Committee's System Administrator, was being "sloppy with permissions." Mr. _____ denies ever giving a "demonstration" as Mr. _____ reported, but does recall that when he was working on Ms. _____'s computer (she did not have an H: drive and was helping her fix that problem) he was able to view folders belonging to other Judiciary Committee staff. He remembers trying to open "a couple" folders and that they were only "Hatch stuff." He recalls that Ms. _____, Mr. _____, and Mr. were present at the time and that he may have said something like, "I can't believe he left it open." This discovery occurred while he was working on Ms. _____'s computer. When asked whether he thought Ms. _____ might have been able to remember the steps he had taken to access other users' folders he stated, "If _____ could remember steps, I'd give you a hundred dollars. She is the most technologically illiterate person I know."

Mr. _____ does not recall ever notifying Mr. _____ of the fact that he was able to access folders that should have been closed. During this investigation Mr. _____, still a Senate employee, sent an e-mail to Senator Hatch's counsel responding to a Boston Globe report that a Republican "computer technician informed his Democratic counterpart of the glitch, but Democrats did nothing to fix the problem" by stating:

... my firmest recollection is that I did not have a conversation with Mr. _____ about what, at the time, I could only have deemed him as being sloppy with some permission and not some problem that of which others would take advantage. What I can remember is leaving him a message to call me about a concern and he didn't return my call.

The only individual interviewed who alleged that Mr. _____ told the Committee's System Administrator about open access to user files was Mr. _____. He claimed to have learned about this from Mr. _____. However, Mr. _____ denied telling Mr. _____ this and stated he did not know

whether Mr. _____ was apprised of the situation.

Mr. _____, a law clerk for the Committee in the summer of 2002 and currently Investigations Counsel, initially told investigators that he had never been shown how to access Democratic files. In a second interview focusing on the "demonstration" Mr. _____ said took place, Mr. _____ stated that he had no recollection of a "demonstration" by Mr. _____, but that it could have happened. Mr. _____ thought it was possible that he could have been present while Mr. _____ was showing something on the computer, and he may not have known what was going on. Mr. _____ denies accessing the files of Democratic staff.

Mr. _____, also a law clerk for the Committee in the summer of 2002 and no longer employed by the Senate, was interviewed telephonically and denied accessing Democratic files. He stated that he was not aware that the possibility of doing so existed; it was not common knowledge in the office. He also denied being present at a "demonstration" by Mr. _____.

Testimony
United States Senate Committee on the Judiciary
Executive Business Meeting
March 4, 2004

Computer Report #2

C. Other Judiciary Committee Staff
In the interviews that were conducted, no other individuals on either the Republican, or Democratic staffs admitted that they knew that access could be obtained to the other's files. There is speculation among those interviewed that if Mr. _____ learned how to get access to Democratic files, others on the Committee were probably doing the same thing. The Democratic staff working on judicial nominations clearly did not know there was a vulnerability. If they had, presumably they would have protected their files.
Other than the supposed "demonstration" by Mr. _____, neither Mr. _____, nor Mr. _____ identified anyone who they thought knew about accessing Democratic files. It is believable that they would not have told others. Notably, excerpts from e-mails between the two men set forth later in this report indicate their desire to keep secret the fact they had access to these documents. Mr. _____ was thought of by his peers as having "a mole" on the other side and would smile when he was asked how he knew what appeared to be insider Democratic information.
There was speculation, by Republican staff that were interviewed, that the Democrats had been reading their memoranda. Each time this was mentioned, the investigators asked the person being interviewed to identify documents that he/she thought had been compromised and none was ever identified.
Unfortunately, forensic analysis cannot determine which users accessed specific files and/or folders. As explained earlier in this report, the audit logs that would show this were not turned on in the Judiciary Committee system. While the system has this type of tracking capability, in the Senate it is typically used only as an incident response and it is standard procedure to leave the logs off during normal operation. For this same reason, forensics cannot tell us whether a user was successful or unsuccessful in attempting to access something he/she was not authorized to access.

VIII. A Possible Source of the Disclosure to the Press
During the investigation several individuals acknowledged having seen hard copies of the Democratic documents. Investigators spoke with anyone that was identified as having a copy of the documents to ascertain how they came into their possession. Most individuals who had hard copies had downloaded them from the Coalition for a Fair Judiciary website. The one exception to this was Mr. _____, counsel for Senator Kyl, who told investigators that he received the documents from Mr. _____ of the Wall Street Journal on November 14, 2003.
Counsel for the Wall Street Journal declined to make Mr. _____, or Ms. _____, available for interviews. Mr. _____, the author of the Washington Times article on November 15, 2003, stated that he received the documents in hard copy, but not from a staff person on the Hill. He declined to name his source.
Ms. _____, President of the Coalition for a Fair Judiciary, whose website initially posted the documents, also declined to be interviewed citing the Sergeant at Arms' lack of "jurisdiction" over her, or the Coalition. Mr. _____, Executive Director for the Committee for Justice, who Mr. _____ believed to be the middle-man between Mr. _____ and the press, declined to be interviewed after investigators refused to give him a list of questions in advance. He also returned investigators' call to interview Mr. _____, Chairman of the Committee for Justice, reporting that Mr. _____ declined to be interviewed.
Without the press, or Coalitions being willing to reveal their source of the Democratic documents, the

investigation faced a significant impediment to identifying the source of the disclosure. Additionally, because this was a fact-finding, administration investigation, law enforcement tools such as grand jury subpoenas to compel testimony and offers of prosecutorial immunity were not available to investigators. However, several individuals who were interviewed, both Republican and Democratic, implicated Mr. _____. While there is no definitive evidence pointing to Mr. _____ as the individual who gave the documents to the press, or a party outside of the Senate, there is a substantial amount of circumstantial evidence implicating him. Additionally, Mr. _____'s statements contradicted forensic evidence on two occasions and at other times were inconsistent with the recollection of other, reliable individuals.

Mr. _____ has admitted to accessing Democratic files on his computer. Initially he told investigators that Mr. _____ has tried to demonstrate this to him, but he was unsuccessful because he was not very computer savvy. Later, he admitted to accessing the files from his workstation on two occasions. In his press statement the day he resigned, Mr. _____ stated, "Although I came to learn how to access two or three of these files easily enough, I did so few times and initially to ascertain that Democrats could access Republican files as well."

When the Democratic documents first appeared on the Coalition for a Fair Judiciary website on November 18, 2003, the last document that was posted was an e-mail containing the directory path of Mr. _____ at the bottom. A forensic review helped determine this document was an e-mail from a web page that was viewed and printed by Mr. _____ with Internet Explorer. Mr. _____ could not offer an explanation for this, other than noting that the document was not a Democratic staff memorandum. When he was advised his directory path was on a document on the website, he called and asked that it be removed and a new version without his directory path was subsequently posted.

When Mr. _____ was asked how the Democratic documents were disclosed to the press, he identified Mr. _____ as the likely source. Mr. _____ stated that he met Mr. _____ in the Senate Chef (an eatery in the Dirksen building) early in the week of November 17, 2003, shortly after the story broke. Mr. _____ stated that he specifically asked Mr. _____ if he had leaked the documents to the press and that Mr. _____ said "No." Mr. _____ told investigators that he then asked Mr. _____ whether he gave them to Mr. _____ who gave them to the press. Mr. _____'s response, according to Mr. _____, was to nod his head affirmatively.

When investigators presented Mr. _____ with this information, he confirmed meeting Mr. _____ in the Senate Chef, but denied giving the documents to Mr. _____, or indicating to Mr. _____ that he did so.

Mr. _____ recalled having seen nine of the Democratic documents that were posted on the website before they were made public. He may have seen the others, but stated that he did not specifically recall them. He denied giving the documents to the press in his initial interview and when asked in his second interview whether he had ever given them to anyone else, he answered "no - not to my recollection." In his third interview, Mr. _____ continued to deny giving the documents to the press and had no specific recollection of giving them to anyone else, although he admitted he often shared "opposition information" with colleagues and could not say for sure whether he had given them to anyone else.

Also in his second interview, Mr. _____ told investigators that most of the documents Mr. _____ printed for him were useless and he would just throw them out. The ones he thought might be useful he kept in a folder that he later lost. He speculated this might have happened when he moved from the Judiciary Committee to the Majority Leader's offices. In his third interview he indicated he believes he lost the folder in the Majority Leader's office.

In Mr. _____'s interview with investigators on January 15, 2004, he admitted to receiving memoranda while in the Senate Majority Leader's office, but denied actively soliciting it. The e-mail traffic below directly contradicts Mr. _____'s statement to investigators:

From: _____, _____ (Frist)

Sent: Wednesday, April 09, 2003 3:27 pm
To: _____, _____ (Judiciary)
Subject: anything

On what Feinstein is doing re: Owen. Info on meeting she has had. Her Tps?[sic]

From: _____, _____
Sent: Wednesday, April 09, 2003 3:40 PM
To: _____, _____ (Frist)
Subject: RE: anything

This all I could find (most of it from __).

Mr. _____ asserted to investigators that his conduct in accessing Democratic files was not unauthorized and that it was appropriate to make these documents public because they were left available to others by the Democrats. He does not believe that he has committed any wrongdoing. A review of the e-mail traffic between Mr. _____ and Mr. _____, however, indicates that they actively sought to keep what they were doing from others and acted covertly. For example, in the e-mail exchange between the two set forth below in March 2003 regarding a set of Republican documents referred to as the "Amex binder," Mr. _____ does instruct Mr. _____ to send documents to a third party.
From: _____, _____ (Frist)
Sent: Thursday, March 06, 2003 10:48 AM
To: _____, _____ (Judiciary)
Subject: Am Ex
Importance: High

_____,

Can I ask you to undertake a discreet mission. Mr. _____ should get a complete relpcate [sic]of the Ame Ex binder. He needs to get up to speed with outr [sic] best info as he build [sic] relationships with the press.

Let me know how soon...assuming you accept, Mr.Phelps.

_____

From: _____, _____ (Judiciary)
Sent: Thursday, March 06, 2003 11:09 AM
To: _____, _____ (Frist)
Subject: Am Ex
Importance: High

_____,

Of course I would be happy to assist in this covert action. The question is: exactly how much should I

provide? You know, we have loads on [sic] information.

From: _____, _____ (Frist)
Sent: Saturday, March 08, 2003 3:50 PM
To: _____, _____ (Judiciary)
Subject: Am Ex
Importance: High

Whatever is in the binder and whatever gives him a sense of the facts in rebuttal to the recurring themes.

From: _____, _____ (Judiciary)
Subject: Follow up on previous e-mail
Date: Fri, 07 March 2003 15:20
To: _____, _____ (Frist)

As is the usual practice, please don't let anyone here know that I know all this.

On March 21, 2003, Mr. _____ e-mailed Mr. _____ 169 documents represented to be the "Am Ex" folder.
Another example of Mr. _____ taking steps to protect others from finding out that he had accessed Democratic files occurred when he left the Judiciary Committee.
From: _____, _____ (Judiciary)
Subject: Old Files
Date: Wednesday, March 5, 2003 4:20 PM
To: _____, _____ (Frist)

It seems_____ has removed your old file folders you didn't want others to see-which is good because people here have started to access your old files. You should check the e-mail I just bcc'd you on because_____ and _____asked for the Dear Colleague letter. I had no choice but to forward it to them. Good luck with everything!

Another example from earlier that same date:

From: _____, _____ (Judiciary)
Sent: Wednesday, March 5, 2003 2:42 PM
To: _____, _____ (Frist)
Subject: FILES

You may need to e-mail_____ separately (just bcc: me on it) and instruct him to permanently remove the personal, confidential files from the system contained in the folders named "Rose" and "Personal." Everyone now has access to these files. I have already copies [sic] these onto my computer as your backup just in case. If there is anything else you need off of there before he deletes

any more files, let me know and I'll get you taken care of. But you should probably express your concern that you don't want your private files available to everyone and just ask him to delete those two folders. I'll monitor the situation and let you know what happens.

_____

Six minutes later Mr. _____ e-mails Mr. _____:
From: _____, _____ (Frist)
Sent: Wednesday, March 05, 2003 2:48 PM
To: _____, _____ (Judiciary)
Subject: Files

Please delete my personal files from the stored files. They are in folders marked 'Personal" and "Rose" and "fillib".

_____
_____responds:
From:_____, _____ (Judiciary)
Sent: Wednesday, March 05, 2003 2:51 PM
To: _____, _____ (Frist)
Subject: RE: Files

No problem _____. I've deleted them.

_____
Mr. _____ advised investigators that "Rose" was the folder where Mr. _____ put the Democratic documents that Mr. _____ e-mailed to him. A review of the contents of this folder confirmed it contained Democratic documents. The e-mail exchange set forth above indicates that after Mr. _____ left the Judiciary Committee the System Administrator followed the Committee's usual practice and moved the documents from a former staff member's home directory into a folder in the shared directory. When this was discovered, Mr. _____ had the System Administrator delete the folder containing Democratic documents. In his last interview, Mr. _____ denied that he had ever downloaded any of the Democratic documents from Democratic folders, or Mr. _____'s e-mails to him. Instead, he stated that "Rose" contained possibly scanned copies of Democratic files he received from Mr. _____, or notes he made about those documents. The contents of "Rose" contradict Mr. _____'s statement.
After the Wall Street Journal article appeared on November 14, 2003, and the documents were posted on the public website, Mr. _____, Chief of Staff to Majority Leader Frist, called Mr. _____ into his office where Mr. _____ stated that he had accessed Democratic files in the past, but that he had not accessed anything since he had come to the Majority Leader's office.
As outlined by the e-mails set forth above, Mr. _____ continued to receive Democratic documents from Mr. _____ after he left the Judiciary Committee even though he was not able to access the files himself after he was taken off the Judiciary Committee's computer network. According to Mr._____, Mr. _____ during that meeting said, "I made a mistake." Mr. _____ denies this.
In his final interview Mr. _____ mentioned for the first time that a backup disc, made while he was at the Majority Leader's office, had just come into his possession. He told investigators that a friend of his from outside the Senate had made a backup disc for him and had recently reminded him of that. He declined to give investigators the name of the friend stating that he did not want to prolong this investigation. He also refused to give investigators the names of his White House legislative contacts for the same reason. The existence of this backup disc and the lost file of Democratic documents leaves open the possibility that Mr. _____ has Democratic documents in his possession.
IX. Analysis of Other Possible Methods of Access to Documents from the Judiciary Committee

Computer System.

While it is clear to investigators that the Democratic documents disclosed to the press in this case originated with Mr. _____'s accessing the files of Democratic staff who had open permissions, the investigation revealed other possible theories of how these documents might have become public. This section of the report addresses several of those theories and starting with the premise that the documents were, at least initially, taken from the computer system, presents several possible methods through which access could have been gained. This section of the report addresses some of the possible ways this might have occurred.

A. Hacking Into the System From the Outside

The SAA employs a number of technical, management and operational controls at the boundaries of the Senate network. These controls are designed to:

- Prevent unauthorized access to computers located inside the SAA;
- Allow controlled remote access by authorized Senate employees and vendors;
- Prevent interconnection between offices; and,
- Detect anomalies which may be indicative of potential security events.

The controls are both preventive and detective in nature. Multiple technologies provide these controls and they are deployed according to an overall "defense in depth" strategy. A diagram of the Senate's layered information security approach is attached at "N."

Some technical controls are monitored by network operations staff and some are monitored by an outside information technology security contractor. When potential security events are noted by either party, SAA staff is alerted. Despite not detecting any failure in these controls, the SAA periodically engages outside parties to evaluate their efficiency and effectiveness.

Remote access is provided only to authorized personnel upon request. Technical controls used for remote access include a two-factor authentication consisting of a time synch physical token (SecurID) and a personal identification number. These tokens are issued to Senate office representatives, who are then responsible for distributing and tracking them within their offices. Remote users are routed to their office subnet only. These remote connections are also monitored by the SAA's enterprise-wide detective controls. When anomalous behavior is detected (such as when a remote user's computer or laptop is believed to be infected with a virus or computer worm), the SAA identifies the user ID attached to the remote connection and notifies the proper System Administrator.

The SAA has not encountered any incident where unauthorized access by an outside intruder occurred to a Senate computer within its network boundaries.

B. PcAnywhere presented a security risk.

When the Committee's servers were being imaged for this investigation, pcAnywhere started up on the Primary Domain Controller. This led investigators to question whether this software was in any way involved in giving unauthorized users access to the Judiciary Committee network.

PcAnywhere is part of the standard SAA template installed on desktop workstations and laptop computers, primarily to allow the System Administrator, or the SAA Help Desk, to access the machines for troubleshooting purposes. As part of the standard installation, it is configured to require the workstation owner's express permission each time a System Administrator, or the Help Desk needs access. It is common to see pcAnywhere on a Senate user's workstation and the Judiciary Committee did allow the SAA's Help Desk to assist its staff by utilizing this application. PcAnywhere was most likely installed by the Committee's System Administrator because the servers were delivered by the SAA without software and the SAA does not have any records indicating that it subsequently installed the application.

The forensic explanation of why the pcAnywhere application automatically started during imaging of the Judiciary Committee server is that it was most likely part of a start-up routine established by the System Administrator, or a process that was set to start up at a specific time. The application was

running silently in the background and was scheduled to be activated and begin "listening" for remote connections at the time it started up.

While it is not likely that pcAnywhere contributed to the disclosures in this case, the forensic review notes that it did present a vulnerability for the Judiciary Committee network. The program requires strict rules for obvious security reasons and the application on the Judiciary Committee server was explicitly configured less secure and contrary to its producer's recommendations. Unfortunately, because pcAnywhere did not log any user or program information, there was no way to determine if an unauthorized user attempted to break into the server.

C. The Anthrax Incident in October 2001

Some of those who were interviewed for this investigation speculated that the involvement of the SAA during the anthrax incident in October 2001 may have resulted in the relaxation of security controls for the Committee. According to the ASAA-CIO, the Judiciary Committee computer systems were unaffected by the Anthrax incident on October 15, 2001. During the temporary relocation of some Judiciary Committee staff to the Postal Square Building from November 2001 through January 2002, the SAA provided access to the Judiciary Committee network from Postal Square to accommodate workstations that were set up there for the use of the Judiciary Committee staff. This involved setting up a separate subnet for the Committee's workstations in Postal Square and then giving that subnet access through the Senate network routers to the Judiciary Committee subnet. The setup did not include, or require any changes to the host-based security on the Judiciary Committee servers. Anyone who wanted to access a resource on the Judiciary Committee network still had to log on to the server with a valid user name and password and have the appropriate permissions.

It is also important to note that the Nominations Unit, located at this time in the Dirksen building, did not require relocation. Mr. _____ worked at his same workstation throughout the incident. Additionally, because the Committee's servers were located in the Dirksen Building, the System Administrator still had physical access to the server to perform whatever administrative tasks needed to be done.

D. Poor Physical Security/Computer Security Controls

Throughout the course of this investigation, several systemic flaws in both the physical security and computer security practices within the Judiciary Committee were identified as potential compromise points for sensitive documents. While the investigation has revealed that these vulnerabilities did or currently do exist, in no way did the investigation reveal that they contributed to the particular accessing and compromise of the documents in this case. Nevertheless, this report will note the security deficiencies identified in interviews of current and former Judiciary Committee staff to advise the Committee of potential vulnerabilities.

The Committee has never had documented computer security rules. While the Sergeant at Arms offers training and recommendations to the Systems Administrators assigned to Senate offices, there is no requirement that a Systems Administrator abide by those recommendations, or attend training.

One of the consistent computer security problems identified was the issuance and maintenance of passwords needed to access the Judiciary Committee server. Interviews with numerous Committee staff members revealed that many of them were issued predictable passwords that were identical to their username. For example, a staff member named John Doe would be issued a username of "JohnD," and his password would also be "JohnD." The individual would never be prompted to change, or customize his password. Interviews revealed that, while some staff members took it upon themselves to change their passwords, many did not (even as this inquiry was ongoing). In contrast, access to the e-mail server set up by the SAA staff requires a more stringent alphanumeric password, and the system forces the user to change his/her password after a preset number of days.

Another common password weakness identified was the issuance of generic and predictable passwords for interns, such as "intern1," "intern2," etc. Finally, there seemed to be a pattern of staff members sharing passwords. An administrative assistant for one subcommittee kept a list of user names and passwords for all staff members who worked for one Senator. Other staff members said

that they would sometimes share their passwords with co-workers for various reasons, while others indicated that they would leave their passwords on, or near their workstation.

Another common computer security flaw identified was staff members not logging off the Judiciary Committee server, or not turning off their computers when leaving their workstations. The majority of staff members interviewed said they did not regularly turn off their computers upon leaving their workstations, including when they left work at the end of the day. This is particularly problematic because, unlike many current system configurations, the Judiciary Committee server does not automatically log a user off the system after a predetermined period of inactivity.

When this investigation commenced the Committee did not have an up-to-date list of which staff members had access to the network through remote access via SecureID. SAA records indicated the Committee had 16 active remote access cards, but the SAA does not track the names of individuals within the Committee who are given the cards. When this investigation began, the Committee's System Administrator was unable to account for all of the active remote access cards. While this is a potential vulnerability, users with remote access still need a valid username and password to access the network so it is unlikely the lack of inventory control contributed to access by an unauthorized person.

Another security vulnerability identified was that, upon leaving for other jobs, staff members would sometimes download several, if not all, of their files onto compact discs, or other types of storage media. At least one of the authors of the compromised memoranda posted on the internet in this case had done so, although the author said the compact disc containing the questioned files was accounted for.

Several vulnerabilities were also identified in terms of physical security of documents within the Judiciary Committee offices. Interviews revealed that most offices did not have a system for disposing of sensitive documents. Most documents (draft copies of memos, etc.) were just thrown in the regular trash. Other than classified material such as FBI files, no distinction was made in the sensitivity of other documents. There was no regular practice of using locking waste bins, burn bags, shredders, or any other devices to enhance operational security. In fact, many of those interviewed indicated that sensitive documents were regularly left out on desks. Additionally, several staff reported that office doors were left unlocked at night.

X. Recommendations for the Future

A. Referral for Sanctions

Upon receipt and review of this report the Committee will have before it decisions to make about whether to refer individuals identified in this report for disciplinary, or criminal sanctions. The Chairman's letter authorizing the Sergeant at Arms to conduct this investigation requested only fact-finding and it is beyond the scope of this report to recommend any particular sanction for individuals identified in this report as having access to Democratic files. However, it is clear that one of the considerations before the Committee is what steps should be taken next. The Chairman and Senator Leahy have specifically asked whether a crime has been committed. Accordingly, this section of the report will address the criteria for possible referrals for disciplinary action and for criminal prosecution to the Department of Justice. It should be noted that any referral to a non-Senate entity - whether made by an individual, the Committee, or the Senate - could be problematic if that outside entity decides to conduct further investigation, or inquiry in a manner deemed inappropriate by Members.

1. Possible Ethics Committee Referral

Rule 29.5 of the Standing Rules of the Senate provides:

Any Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees and offices of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.

When this Rule was amended in 1992 by Sen. Res. 363 to include the protection of business of committees, Senator Mitchell outlined the reasons why the protections afforded confidential business, or proceedings of the Senate should be expanded to cover committees, subcommittees, and offices. He stated:
...candid discussions among Members depend upon a trust that is based, in part, on a willingness of all Members to abide by the practices of the Senate. Those practices place responsibility for certain decisions, such as the decision whether to release confidential information, in the hands of the Senate as a whole, or in committees of the Senate, rather than in individual Senators. The unilateral decision by a Member or employee to release confidential committee information is inconsistent with the Senate's practice of making such decisions openly and collectively. Arrogation of this responsibility by individuals can destroy mutual trust among Members and be harmful to the institution. Congressional Record, October 8, 1992, p. 17836.

The legislative history of this amendment also explains that while the Select Committee on Ethics would have jurisdiction to consider an allegation of Rule 29.5, "[almost always, questions about leaks should be addressed first by Members or committees or offices themselves." Id.
The Select Committee on Ethics also investigates unethical and improper conduct which may reflect upon the Senate, even though that conduct does not violate a written law, Senate rule, or regulation. S. Res. 338, 88th Cong., 2d. Sess. (1964), as amended by S. Res. 110, 95th Cong., 1st Sess. (1977). The Ethics Committee procedures may provide the Judiciary Committee with an avenue for determining whether a criminal referral to the Justice Department is appropriate. While it would not be able to exercise jurisdiction over former Senate employees, it may be willing to consider reviewing the report of this investigation for possible criminal referral.
2. State Bar Attorney Disciplinary Boards
Model Rule 8.4 of the American Bar Association's Model Rules of Professional Conduct states that it is professional misconduct for a lawyer to, among other things, "(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The comments to this Rule are instructive:
(2)...a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

This investigation did not identify the states where any of the attorneys interviewed are licensed to practice law. The Committee may decide to refer attorneys subject to a rule similar to 8.4 to the attorney disciplinary boards where they are licensed to practice law. One significant note of caution in considering type of referral is that it may open doors to state disciplinary boards asserting jurisdiction over Senate attorneys where in the past they have not. Additionally, the Committee would be expected to cooperate in any subsequent investigation, the details and avenues of which may be beyond what it originally anticipated.
3. The Justice Department
If the Committee were to refer this report to the Justice Department, prosecution might be considered under the Computer Fraud and Abuse Act. The provision of this law most likely to apply in this case is 18 U.S.C. section 1030(a)(2)(B). It provides:
(a) Whoever -
(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains -
(B) information from any department or agency of the United States;
shall be punished under subsection (c) of this section.

For purposes of 18 U.S.C. section 1030:

- the term "exceeds unauthorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the access-er is not entitled so to obtain or alter; 18 U.S.C. section 1030(e)(6).

- the term "department of the United States" means the legislative, or judicial branch of the Government, or one of the executive departments enumerated in section 101 of title 5; 18 U.S.C. section 1030(e)(7).

When Congress amended 18 U.S.C. section 1030 in 1996 by adding section (a)(2)(B), it meant to address a gap in the law's coverage. The legislative history states:
The second gap is the significant limitation on the privacy protection given to information held on Federal Government computers. Specifically, the prohibition only applies to outsiders who gain unauthorized access to Federal Government computers, and not to Government employees who abuse their computer access privileges to obtain Government information that may be sensitive and confidential. Senate Report 104-357, 104th Cong., 2d Sess., August 27, 1996, p. 4.

The legislative history also indicates that section (2)(B) was meant to cover government employees who "obtain information" by merely reading it. Id.
18 U.S. C. section 1030(a)(2)(B) is a misdemeanor punishable by a fine and/or not more than one year imprisonment. A referral to the Department of Justice could be made by either contacting the United States Attorneys' office for the District of Columbia or the Criminal Division's Computer Crimes and Intellectual Property Section. A prosecution under this section could result in litigation involving the article I, section 6 of the Constitution (speech and debate), the First Amendment (freedom of the press issues), the Fourth Amendment (issues relating to the search of computer records), and the definition of "unauthorized access' under the statute. And, while a criminal investigation could commence upon referral to the Department of Justice, a Senate Resolution would be needed to introduce documents or testimony into a Grand Jury or at trial. See Senate Rule 11.
In informal briefings prior to the issuance of this report, Committee Members asked about the possibility of pursuing a false statement case against Mr. _____ for being untruthful with investigators. The relevant statute, 18 U.S.C. section 1001, provides:
(A) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(2) makes any false, fictitious, or fraudulent statement or representation;
shall be fined under this title or imprisoned not more than 5 years, or both.

The statue specifically addresses false statements in the context of legislative investigations:
(C) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to –
(2)any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission, or office of the Congress, consistent with applicable rules of the House or Senate.

Members have also inquired about whether persons who received copies of the Democratic documents violated the law by receiving stolen property. The relevant statute under which prosecution might be considered provides:
Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $1000, he shall be fined under this title or imprisoned not more than one year, or both. 18 U.S.C. section 641.

In addition to the statutes set forth above, a referral for prosecution may raise issues of whether any laws of the District of Columbia were violated in this matter. While this report does not intend to present an exhaustive consideration of all possibly applicable criminal statutes, the District's prohibition against taking property without right is another statute that local prosecutors might consider. It provides:
A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property without right shall be fined not more than $300 or imprisoned not more than 90 days, or both. DC ST 22-3216 (1981).

A prosecution under a District of Columbia or any federal statute would implicate many of the same issues outlined above as likely to be presented by a prosecution under 18 U.S.C. section 1030. In deciding whether to pursue a prosecution arising from the facts of this investigation, prosecutors will apply the usual standard of review in considering whether to pursue or decline the case: whether there is evidence of a prima facie case and a reasonable probability of conviction, i.e, whether the admissible evidence will probably be sufficient to obtain and sustain a conviction. Other considerations influencing prosecution include whether there is a substantial federal interest affected and if there exists an adequate, noncriminal alternative to prosecution. United States Attorney Manual, section 9-27.220.
B. Immediate Steps to Enhance Computer Security for the Committee
Separate servers were provided to the Judiciary Committee during the pendency of this investigation. The Committee now has two System Administrators - one for the Republican staff and one for the Democratic staff. This will eliminate any concern that users' files have open permissions allowing those of the other party to view their documents. It does not, however, ensure that permissions are set properly to secure users' home directories from the view of other users on the same server, or that other vulnerabilities addressed in this report will not recur. To ensure the future security of the Committee's computer system, the SAA recommends additional training, enhanced security practices and a complete, prospective security audit.
The Committee leadership should require that its System Administrators' enroll in additional training programs with an emphasis on security policies. This training is provided on a regular basis by the Senate's Joint Office of Education and Training Office. Additionally, the Committee should require mandatory and recurring user training also with an emphasis on security policies and best practices. Users generally did not understand the difference between their home directories, shared folders, and their local hard drives, how to protect their passwords, or the importance of not leaving their computer running when away from their desks. This training could be provided by the System Administrator's or through the Joint Office of Education and Training. The Committee should also consider incorporating ethics training into an orientation program for new employees to ensure they understand the Senate's expectations for ethical conduct that meets the highest professional standards.
There are several security practices that should be implemented by the Committee immediately if it has not already done so:
• Review permissions setting to ensure proper restrictions;
• Establish and enforce strict password policies;

• Ensure that operating system logs are capturing the required security information;
• Start a Security Awareness Campaign to educate users; and
Develop a tracking system for inventory of hardware, remote access cards and other computer-related assets.

Regardless of the efforts of the Committee to enhance security since the beginning of this investigation, the SAA strongly recommends a prospective audit of the network by a party outside of the Committee. The audit would be focused on security and compromise protection. It will provide an assessment of the efficiency and effectiveness of current physical and logical controls over the computerized information systems and recommendations for improvement. The SAA believes this proactive review is necessary for the Committee to maintain a consistently available network with efficiency and security in mind. The audit could be conducted by the SAA, the General Accounting Office, or a private contractor. On February 20, 2004, the Chairman and Ranking Member sent a letter to the General Accounting Office to commence this important audit.

C. Measures to Enhance the Security of Computer Networks Senate-Wide

It is incumbent upon the SAA to take all steps necessary to ensure that the vulnerabilities identified during this review of the Judiciary Committee do not exist elsewhere among the Senate offices. As a result of the lessons learned during this investigation, the SAA will ask the leadership of the Senate to consider the following:

• Establishment of a technical skills assessment and certification program for current System Administrators
• A continuing technical education requirement for System Administrators
• Minimal qualification standards for new System Administrators A Computer Security Best Practices Manual for the Senate developed by the Sergeant at Arms in conjunction with the Committee on Rules and Administration
• Mandatory Ethics and Professional Responsibility training for all new employees
• Mandatory Computer Security Training for all new employees

XI. Conclusion

This investigation depended entirely on the voluntary cooperation of those who were asked to be interviewed. While investigators followed leads and interviewed many individuals as a result of learning their names during interviews, it remains possible that there are other current or former members of the Senate community who have knowledge of the open nature of the Judicary Committee computer system who have not come forward or been identified. This was evidenced most recently in press reports on March 2, 2003, when a former Grassley intern was reported to have knowledge of Committee computer security system vulnerabilities. His name was not been provided to investigators when they asked for all employees (paid, interns, and detailees) who worked for the Committee from June 2002 to the present. There are likely to be other individuals who had access to the Committee's computer system whose were not provided to investigators.

The tremendous amount of computer data in this case also leaves open the possibility that additional evidence could be discovered by investing substantially more time and money in analyzing individual workstations, print logs, and e-mails.

Starr: A Reassessment (2002)

By Benjamin Wittes

commonly imagined. Starr was certainly sincere in his efforts to assemble a staff whose range of experience could approximate that of the Justice Department, and he hired many respected career prosecutors who could reasonably be expected to advance that goal. Indeed, the Justice Department itself would have been proud to have done much of their work, particularly the prosecution of Arkansas Governor Jim Guy Tucker and the Clintons' former business partners, James and Susan McDougal. Unlike Fiske, however, Starr also brought in people who pushed the investigation toward a more open-ended inquest. The most important of these hires was W. Hickman Ewing Jr.

Ewing became, over the course of the Starr investigation, a particular target of Starr's critics. This was partly because he was a central-casting stereotype of a prosecutor working for Starr: born-again Christian, conservative, and displaying a charming—if somewhat alarming—candor in acknowledging that he was not approaching the investigation with a presumption that the Clintons were innocent of wrongdoing. "After you've been doing this kind of work for ten, fifteen, twenty years," writer Jeffrey Toobin quotes him as saying, "it doesn't take too long to determine whether somebody has committed a crime. You draw your preliminary conclusions, and then you shut this down or you proceed. We proceeded."[9] For Clinton's defenders, Ewing came to embody the culture-war dimension of the fight the White House was waging against Starr's office. White House aide Sidney Blumenthal once called him a "religious fanatic"—a remark for which he later had to apologize.[10] For many of Starr's foes, Ewing symbolized Starr's inner redneck; appropriately nicknamed "Hick," he was the unpolished zealot beneath Starr's own presentable exterior.

More interesting than the fire it drew from Clinton's defenders, Ewing's approach as Starr's deputy in Little Rock was

highly controversial within Starr's office itself. Ex-staffers described him to me with radically differing levels of sympathy, and some even suspected him of political motivation. Several of Starr's staff reported feeling anxious about the scope and aggressiveness of his approach. Still others defended him strongly. In almost all of the descriptions, however, certain common themes emerged. Ewing, his former colleagues said, did not believe in focusing investigations narrowly on specific criminal allegations but in casting a wide net and keeping investigations open. As former Starr prosecutor Brett Kavanaugh described it, Ewing had learned "from long experience that you had cases where things just turn up if you keep at it long enough."[11] John Bates, who served as Starr's Washington deputy, added that Ewing's approach was to "look broadly, to keep things open, to look for the interconnected aspects, to keep one thing open beyond what the facts would warrant because of the possibility that it might interconnect" with another allegation.[12] Another former Starr prosecutor summarized Ewing's philosophy a touch less generously: "Everyone's guilty until proven innocent. In order to maintain pressure, never close anything until the last day" on which a case could be brought. Noted this source with evident disgust, Ewing – who played football in high school and had planned to be a coach like his father – "used to draw football diagrams on the wall with everyone close to the Clintons as layers of defenses."[13]

Simply dismissing Ewing as a Clinton hater is probably too simplistic. Both Bates and Kavanaugh, for example, disputed the contention that Ewing's approach flowed out of hatred of the president. Bates described Ewing's hard-charging style as "his fundamental perspective as a prosecutor."[14] Ewing, unsurprisingly, denied that he began the probe with animus toward the president, though he acknowledged that

relevant to Mr. Foster's state of mind," Bond wrote. "If we are to believe Special Counsel Fiske, Whitewater issues were not a significant factor in Mr. Foster's suicide. The special counsel's report, however, raises significant questions regarding this issue."[42]

To Starr, who took over the probe as the debate over the Fiske report was raging, that questions had arisen about the suicide was alone enough to justify reopening the matter. Starr took up the Foster death both because he felt obliged to address every issue Fiske had examined and because, in his judgment, the attacks on the Fiske report demanded a response. Starr described the Fiske report respectfully, saying that it "well stated a conclusion and a process."[43] On reading the report, he said, "I talked to Rod[erick] Lankler, the principal author of the report, . . . and I was satisfied that it had been done in a professional way."[44] Starr also noted, however, that Fiske's report "did not go through an elaborate, deeply detailed, fact-based, rigorous analysis."[45] Criticisms of the report, consequently, "were cascading in, . . . extraordinarily direct assaults on it." It is worth stressing that Starr himself was never conspiracy-minded about Foster's death. He said he had "no reason to doubt [Fiske's] ultimate conclusion."[46] He described the furor that followed its release, moreover, as composed of "all kinds of outlandish, unfounded allegations."[47] Kavanaugh, the prosecutor responsible for actually conducting much of the Foster investigation under Starr, said he "tried to keep an open mind" about how Foster died, but he saw the probe's purpose as "ruling out a crime." The bottom line, he said, is that "you have a dead person with a gun in his hand and a wound in his head. You have a presumption that it is a suicide but you're looking at it as though it could be something else."[48] Ewing, who also participated in the investigation, likewise said he was convinced "pretty early on"

that Foster killed himself.[49] Had Starr been trying to prove a murder, he presumably would have shown more tolerance for the work of Miquel Rodriguez, a civil rights prosecutor in the office who, as Starr put it, "just was convinced that something had, in fact, happened." Rodriguez, whose hiring Starr described as "an unfortunate start" to the Foster investigation, found no sympathy, however. After he insinuated to a grand jury that one of the Park Police officers may have been involved in Foster's death, then–Washington deputy Mark Tuohey III quickly reined him in and Rodriguez left the office shortly thereafter.[50]

But if conspiracy-mongering was not driving the Foster death investigation, neither was any prosecutorial instinct. Starr believed he had to settle the outstanding historical questions for the sake of posterity, however unlikely those questions were to result in criminal prosecutions. In his view, public doubts about the suicide were "corrosive" in the face of "the potential historical significance of the death of an individual so close to the president and first lady," an event he saw as the "most significant death in office since that of [Truman administration Defense] Secretary James Forrestal."[51] Because of the seriousness of the matter and the "withering scrutiny" he knew his own work would face, Starr believed that he "had to have this absolutely air-tight." His role, he believed, "was [to] put this to rest to the fullest extent possible." He regarded this role, which he likened to that of the Warren Commission's investigation of John F. Kennedy's assassination, as "very important for the well-being of the country" and flowing out of "the uniqueness of the independent counsel, who is sort of a blue-ribbon grand jury kind of person who issues reports on issues of public moment."[52]

John Bates, the Washington deputy who oversaw the latter part of the Foster death probe, acknowledged that the

decision to use the inquiry to settle historical questions made it exceptionally difficult to close. "A reasonable decision was made that it had to be reexplored. There were some forensic questions that really required some independent examination by this independent counsel," Bates told me. The persistence of conspiracy theorizing among "the fringe elements convinced [Starr] that he had to issue a thorough, exhaustive report that would settle the questions." Starr, he said, "realized that this was not the traditional role of a prosecutor, as did some of us in the office, and we were frustrated that the case put us in that position." Starr, however, "felt that it was incumbent upon him to come out with a thorough and dispositive report."[53] As such, said Kavanaugh, speed was not the priority that it had been for Fiske. Starr's "goals in the investigation were to not worry about carping that this was taking too long but to produce something we could be proud of ten, twenty years later. To do that, he felt we had to take all steps within reason."[54]

"All steps within reason" took nearly three years. By the autumn of 1995, Kavanaugh said, the office had conducted a much broader set of interviews than Fiske had done, including interviews with Foster's children and his mother. At that point, he and Tuohey assessed their progress and gave Starr a status report. Starr, however, "was still not satisfied in terms of going the extra mile," Kavanaugh recalled. In response, they went back and conducted an ultra-thorough search of Fort Marcy Park for the bullet that killed Foster (which they never found). They did carpet-fiber tests, and the office brought in its own outside forensic specialist.[55] Ewing recounted that Starr even went so far as to suggest, on the advice of the late Republican Representative Steve Schiff, that he interview Foster conspiracy theorists Christopher Ruddy, Ambrose Evans-Pritchard, and Reed Irvine.[56] This led to what Ewing

all of the issues the case presented before leaving Starr's employment near the end of 1996. According to John Bates, Dubelier's memo represented a "close-to-final" write-up of the matter.[134] Yet the office proved unable to finish the investigation for years to come.

Various factors kept the investigation alive. An entire appendix of Ray's report is devoted to White House noncooperation with the investigation.[135] But this does not suffice to explain the additional three years. According to Bates, the Travel Office matter was kept open, in part, because other matters pending before the office related to the first lady's truthfulness under oath, matters including Whitewater, the disappearance of the billing records, and the handling of materials from Foster's office. It was, he said, "difficult for [Starr] to close out the Travel Office when these other things were still open." The issues were "to some extent interrelated [and] involv[ed] the same high-level person." The "major explanation" for the delay, Bates said, is that this reluctance on Starr's part lengthened even further the office's "thorough and lengthy process" of vetting the Dubelier memorandum. Bates suggested that the slowness was less the mark of the truth commission instinct than the result of "certain inefficiencies" combined with "a laudable care" on Starr's part for getting things right. Starr, he said, "is a very careful person in every respect, including his conduct as a prosecutor."[136]

This analysis certainly tells a significant component of the story. When Dubelier left, the work was picked up by other prosecutors—Solomon Wisenberg, in particular—who felt they had to satisfy themselves that his analysis held water. Some of the delay resulted less from the need to get at some deeper level of truth than from the need for new people to get up to speed and become sufficiently familiar with the case to make their own judgments about its merits. Given the stakes

in a high-profile investigation of the first lady, the impulse to be thorough, even within a traditional prosecutorial framework, is understandable. However strong Dubelier's work may have been—and it was uniformly admired among the Starr prosecutors I spoke with—it may ask too much to expect that those prosecutors who inherited Dubelier's memorandum would simply have adopted his conclusions as their own. Particularly since the memo suggested that no cases be brought in a matter that the office had previously regarded as potentially leading to Mrs. Clinton's indictment, there was a strong impulse to reassess the evidence carefully to determine its amenability to a different reading.

The impulse to prosecutorial thoroughness, however, explains only so much, and Bates conceded that Starr's truth-seeking instinct was evident in aspects of the delay as well. During the investigation, he recalled, "substantial issues" arose as to the veracity of "some witnesses." Bates said there were different perspectives within the office regarding how serious a problem this was: "Some might feel that a prosecutor has to stand up for the prosecutorial process and that people should be prosecuted for lies to the investigation. Others say that you can't have an investigation without people lying." Starr, Bates said, "was very concerned about [lies to the investigation] and he took that very seriously."[137] Starr's view, according to Kavanaugh, was that "it was within [his] mandate and he was offended by lying and perjury. Some prosecutors might be more instrumental regarding the little fish."[138] Another prosecutor in the office put it more bluntly: "A lot of people were not telling the truth, and that drove Starr out of his mind."[139] The office, therefore, ended up spending a fair bit of energy considering whether or not to prosecute ancillary figures in the case, even though their purported misstatements had little bearing on the underlying case, or

lack thereof, against Watkins or Hillary Clinton. Once again, Starr's focus on truth caused him to fixate on the interaction of witnesses with the investigation, even at the expense of resolving the big questions in a timely fashion.

The Travel Office investigation bore another, more public, signature of the truth commission: the decision to litigate all the way to the Supreme Court the question of whether the attorney-client privilege survives the death of the client. Foster had, shortly before killing himself, met with a lawyer named James Hamilton concerning the various investigations of the Travel Office firings, in which Foster had been involved. In the course of the meeting, Starr's office later learned, Hamilton had taken three pages of notes. Starr's interest in these notes originally grew not out of the Travel Office case but out of his investigation of how Foster's office and papers were handled after his death.[140] Indeed, the grand jury subpoena for the notes was issued in December 1995, weeks before the Watkins memorandum was finally delivered.[141] Yet the notes understandably acquired a certain importance once Starr had assumed jurisdiction over the Travel Office. To be sure, investigators did not know what those notes said, though they developed "several hypotheses," according to Kavanaugh, who argued the Supreme Court case.[142] Moreover, any evidence they contained would almost surely have been deemed inadmissible hearsay. The notes nonetheless presented a body of evidence, albeit a small one, that Starr believed he should not ignore. After all, if a depressed Foster were going to reveal that he had been covering up Hillary Clinton's having given a direct order to fire the Travel Office employees, his prospective lawyer was an obvious person to tell. The office was also aware that Foster had been, in his final days, deeply anxious about the Travel Office matter. The notes were, therefore, legitimately tantalizing. Making them all the more tantalizing was the fact

Ted,

Here are the articles I found. Most of them are from the *Washington Post* and speak very highly of Kegan. She is mentioned most often in connection with the Estrada nomination as an example of a Republican failure to confirm Clinton's nominees. There were also quite a few articles announcing her appointment as dean of Harvard Law. I did not include these because they essentially just short news blurbs.

Tim

Michael J. Gerhardt. **The Washington Post**. Washington, D.C.: Mar 2, 2003. pg. B.01

Full Text (1695 words)

Copyright The Washington Post Company Mar 2, 2003

I do not know Miguel Estrada. Nor do Democratic senators. Many were confounded when President George W. Bush first nominated Estrada in May 2001 to the nation's second-most powerful court, the U.S. Court of Appeals for the District of Columbia Circuit. Estrada, nominated at the tender age of 39, had practiced law for less than a decade. At his confirmations hearings, he said little about his judicial philosophy. After his appointment languished in the Democratic-controlled Senate and Bush renominated him this year, Estrada appeared again before the Judiciary Committee and failed to dispel the mystery surrounding his views.

Estrada has been singled out by Senate Democrats, who are filibustering to block a vote on his nomination. Yet in other respects, Estrada is not unique. Like many of Bush's other appellate court nominees, he is relatively young. Like many of these younger nominees, he has left virtually no paper trail, making it difficult to attack his record in confirmation hearings.

Statistics show the growing importance of younger nominees in the selection of judges for the nation's federal courts of appeal. In the modern era, the average age of a circuit court nominee at the time of confirmation has gone from a high of 55.9 years under President Dwight D. Eisenhower to a low of 48.7 years under the first President Bush. The average age of President George W. Bush's confirmed circuit court nominees was 50.5 during the 107th Congress, but his more recent choices show that he wants to follow his father's example. His circuit court nominees include not only Estrada, but Jeffrey S. Sutton (40 when first nominated to the U.S. Court of Appeals for the Sixth Circuit), Steve Colloton (39 when nominated to the Eighth Circuit) and Priscilla Owen (46 when first nominated to the Fifth Circuit). The average age of the nominees awaiting confirmation to appellate seats is 50.1.

Relative youth is not the only virtue the Bush administration is seeking in its nominees. The people counseling Bush on judicial appointments are convinced that his father erred in appointing some judges, notably David Souter, who has become a reliable vote for the Supreme Court's moderate wing and cast a pivotal vote for reaffirming Roe v. Wade. Consequently, Bush's counselors conduct extensive interviews with prospective nominees about their judicial philosophies. Many of the nominees have been active members of the Federalist Society, established in the early 1980s to organize, cultivate and sharpen conservative thinking about the Constitution. Activity within the Federalist Society constitutes important -- and sometimes the only -- evidence of a young conservative's ideological commitment.

Armed with that commitment, a young judge might help Bush establish a conservative legacy that could outlast his presidency by decades. Yet with Republicans now in control of the Senate, judicial

nominees have no incentive to testify openly about their views before the Judiciary Committee.

Democrats have seen other nominees display reticence in talking about judicial ideology, such as during the Supreme Court confirmation hearings for staunch conservatives Antonin Scalia and Clarence Thomas. Since Bush mentioned during the 2000 presidential campaign that Scalia and Thomas would be his models if he were to appoint a Supreme Court justice, Democrats worry that Estrada, and many of his fellow nominees, would share the hostility those justices have shown toward abortion rights, affirmative action, strict separation of church and state, and broad federal power to regulate the economy.

Democrats have cried foul, accusing the administration and Republican lawmakers of pursuing an ideological agenda that they never openly defend. Republicans have pointed to Estrada's sterling resume and accused Democrats of making the Honduran immigrant -- who graduated at the top of his classes at Columbia University and Harvard Law School, clerked for Justice Anthony Kennedy and served as an assistant in the solicitor general's office -- the latest victim of a vicious cycle of payback.

Some trace that cycle back to Republican senators who believed that President Jimmy Carter packed the lower federal courts with women who would use their judicial power to advance liberal social policies. Others believe President Ronald Reagan poisoned the process by pledging to appoint judges and justices who would overturn liberal decisions on abortion rights and federalism -- the balance between federal and state authority. Some view the then- Democratic Senate's rejection of Robert Bork's nomination to the Supreme Court as a watershed event for which the Republicans have sought revenge.

In fact, the cycle of payback and ideological agendas can be traced to the earliest days of the nation. Every national leader has cared about the likely ideologies of nominees to the federal bench. The only way to ensure that nomines will perform satisfactorily is to adopt reliable selection criteria, because, once confirmed, federal judges serve for life, wield enormous power and are immune to political retaliation for their decisions. President George Washington selected Supreme Court nominees based on their fidelity to the new Constitution and broad interpretations of federal power. President Andrew Jackson based his choices on nominees' political fealty and strong support for state sovereignty. President Franklin D. Roosevelt sought commitment to upholding the New Deal's constitutional foundations, and President Lyndon B. Johnson wanted support for the vigorous protection of civil rights. Presidents Reagan and George H.W. Bush based their judicial selections in large part on nominees' variance with liberal opinions and devotion to the use of original intent as a primary source of constitutional meaning.

In every era, senators have checked presidents' efforts to shape the composition and direction of the federal courts. After Republicans had forced Abe Fortas off the Supreme Court because of ethical improprieties, Democrats scuttled his would-be replacement, President Richard M. Nixon's nominee Clement Haynsworth, for his own ethical lapses. Republicans blocked dozens of President Bill Clinton's judicial nominees, including **Elena Kagan**, a Harvard law professor nominated to the same court to which Bush has nominated Estrada. One Clinton nominee, Michigan state judge Helene White, waited four years without ever getting a hearing before the Judiciary Committee. Clinton's nominees were opposed because of concerns about their propensity to read their personal policy preferences into the law. Republican senators blocked Clinton's nominees with procedural tactics. Democrats at that time complained that every judicial nominee was entitled to a final vote on the Senate floor. Republicans responded that the Senate's failures to take final action on nominations were expressions of its constitutional obligation to give its "advice and consent" on them. They also claimed that the rules of the game had been constant for decades. For instance, President Reagan had nominated Jeff Sessions - - now a senator from Alabama -- to a federal district judgeship, but the Judiciary Committee rejected his nomination and never forwarded it to the full Senate.

Over the past two decades, the judicial selection process and confirmation battles have become more public. Interest groups now mount campaigns on judicial nominations, as some groups are doing by running television ads for and against Estrada's appointment. Bush courts Hispanic voters by chastising Democrats for opposing Estrada, while few Democrats believe that Bush genuinely cares about diversifying the federal judiciary.

Estrada's reticence raises anew the questions of what senators are entitled to know about the views of a judicial nominee and how they can find out. Estrada and others argue that judicial canons of ethics preclude them from giving answers that would indicate how they would rule in cases likely to come before them as judges. The ethical rules protect judicial independence and guard against judges' pre-judging matters likely to come before them. Senators have largely (but not always) shown their respect for judicial independence by framing their questions to elicit information about nominees' ideologies and approaches, but not how they would rule in particular cases.

It is hard to see how the questions Estrada has declined to answer would jeopardize his independence. He would not identify a single Supreme Court case with which he disagreed, and initially wouldn't even name judges he admires (though he cited three in writing later). Other Bush judicial nominees have answered such questions. Reagan and Bush White House officials asked them of people under consideration for nomination. Republican senators have quizzed numerous Democratic nominees about the Supreme Court precedents with which they disagree. Democratic senators are now asking judicial nominees the same questions.

There are non-controversial answers to the question of which precedents nominees support or question. The high court's unanimous 1954 decision in Brown v. Board of Education, striking down state- mandated segregation in public education, is an obvious choice as a case to admire, while one obviously wrong decision was Korematsu v. United States, in which the court upheld the forced internment of Japanese Americans on the West Coast after the attack on Pearl Harbor.

Judicial philosophy -- or ideology -- matters, and nominees should be asked their preferred approaches to constitutional interpretation and the criteria they would employ for construing Supreme Court precedent and determining errors in earlier decisions that might call for new rulings. The Bush administration is correct (and amply supported by many former Democratic officials) in refusing to supply internal memoranda from the Justice Department. But no one is entitled to be a federal judge simply because he or she overcame adversity, attended a fine law school and collected some solid work experience. Senators have the legitimate authority to weigh the judgment of a nominee who, if confirmed, will for years be entrusted with the final word on many of the important regulatory and constitutional questions that routinely come before the nation's second-most powerful court.

Estrada brings a golden resume. Rather than make its nominee's philosophy a matter of public record, the administration has sought to make it a matter of guesswork. In the Estrada case, the administration has chosen not to engage in the ideological fray, but to simply avoid it. In the elusive youthful Estrada, Bush has found the model judicial candidate for an era in which ideology matters deeply, so deeply that it can't be revealed. Michael Gerhardt teaches constitutional law at the College of William and Mary, and is the author of "The Federal Appointments Process: A Constitutional and Historical Analysis," a revised edition of which is

They Started It:[FINAL Edition]

E. J. Dionne Jr.. The Washington Post. Washington, D.C.: Feb 21, 2003. pg. A.27

Full Text (770 words)

Copyright The Washington Post Company Feb 21, 2003

So why are Senate Democrats filibustering President Bush's nomination of Miguel Estrada to one of the nation's most important courts?

Certainly Estrada has lived an admirable life. He came to the United States from Honduras at age 17, graduated from Harvard Law School and clerked for Supreme Court Justice Anthony Kennedy. He was an assistant U.S. attorney, served as an assistant solicitor general under President Clinton and went on to a distinguished law firm.

To say the guy is no slouch is an understatement. But the fight over Estrada's nomination to the U.S. Court of Appeals for the District of Columbia Circuit is not simply about him. It is about a concerted effort to pack our courts with representatives of a single point of view. If Democrats just rolled over on Bush's judicial nominations, they would be guilty of oppositional malpractice.

To understand this battle, you could go back to Richard Nixon's campaign against liberal judges. But let's just look at what happened to Bill Clinton's effort to get two highly qualified nominees onto the D.C. Circuit.

Elena Kagan, who served in the Clinton White House, graduated at the top of her class at Estrada's law school and now teaches there, saw her nomination languish in the Republican Senate for 18 months. Allen Snyder clerked for that well-known left-winger, U.S. Chief Justice William Rehnquist, and was also at the top at Harvard Law School. His nomination languished for 15 months.

If Republicans believe in voting for quality -- their argument for Estrada -- why didn't they confirm Kagan and Snyder? The answer is obvious: We have before us, sadly, a fierce political struggle for control of the courts.

It's not good enough to say that the way out of this politicized process is for Democrats to ignore the past and cave in to the Republicans. To do that would be to reward a determined conservative effort to control the courts for a generation. Stage One involved obstructing Clinton's nominees. Stage Two involves using any means necessary -- including outrageous charges of ethnic bias -- to ram conservative choices through.

The stakes go beyond any single nominee. Do we want courts entirely dominated by one side, or do we want a fair and balanced judiciary?

Consider these statistics, gathered by the Democratic staff of the Senate Judiciary Committee. There are 13 circuits: 11 regional plus the D.C. Circuit and the federal court that handles specialized cases. If all of Clinton's nominees had been approved, the circuits would have been evenly balanced in partisan terms by the time he left office. Six would have had majorities appointed by Democratic presidents, six by Republicans, and one would have been evenly split.

But if Bush succeeds in filling every open seat, some of them vacant because Clinton nominees were blocked, 11 of the 13 circuits will have Republican-appointed majorities. In eight of the 13, Republican nominees would have majorities of 2 to 1 or more. Is that a formula for careful, balanced decision-

making?

To push attention away from this fundamental question, Republicans who say they don't want a politicized nominating process -- and who regularly accuse Democrats of "playing the race card" -- are doing all they can to turn the Estrada fight into an ethnic imbroglio.

"If we deny Mr. Estrada the position on the D.C. Circuit, it would be to shut the door on the American dream of Hispanic Americans everywhere," Sen. Chuck Grassley (R-Iowa) said in January. Last year, Republican Sen. Trent Lott of Mississippi said of the Democrats: "They don't want Miguel Estrada because he's Hispanic."

Never mind that eight of the 10 Hispanic appellate judges were appointed by Clinton. And never mind that Republicans had no problem blocking such Hispanic Clinton nominees as Enrique Moreno, Jorge Rangel and Christine Arguello.

But the Democrats will not win this argument if they just focus their opposition on individual nominees. The point of filibusters should be to seek a solution involving consultation across party lines. The goal would be moderate judges that both sides could agree on or, failing that, balanced slates of judges who could guard the country against a judiciary utterly dominated by one party.

Orrin Hatch, the Republican chairman of the Senate Judiciary Committee, is frustrated by what the Democrats are doing. "The system's going to be irreparably damaged if we allow this to go on," he said recently. A fair point, except that the system was damaged long ago, and the solution isn't to ram through Republican nominees. It's to seek compromise, balance and moderation. Then someone like Miguel Estrada might get though without any fighting at all.

Too Smart to Be a Judge:[FINAL Edition]

Benjamin Wittes. The Washington Post. Washington, D.C.: Jun 11, 2002. pg. A.25

Full Text (786 words)

Copyright The Washington Post Company Jun 11, 2002

Judge David Tatel has a dubious distinction: Confirmed in 1994, he is the last nominee to the D.C. Circuit Court of Appeals to have moved through the Senate quickly and without significant controversy.

Since Judge Tatel's appointment, Presidents Clinton and Bush have nominated five people to the court that is often called the second most important in the land. All have been qualified, most overwhelmingly so. Yet of the five, only Merrick Garland actually sits on the court, and he waited 17 months to be confirmed. Two of the others, Clinton nominees Allen Snyder and **Elena Kagan**, saw their nominations die with Clinton's presidency. And the other two, Bush nominees John Roberts and Miguel Estrada, are currently waiting -- and waiting -- for hearings.

The fact that neither party can predictably get its qualified people on the courts of appeals suggests that the problem of judicial nominations is more institutional than is acknowledged by partisans who play the blame game over judges. The Senate has long been expected simply to confirm lower-court nominees who are qualified and honest, but it has recently been asserting a more robust role in the process. The expectation that the president will get wide leeway has given way under bipartisan agreement to an expectation that he will get that leeway only if his party controls the Senate. When he is not so lucky, judicial nominations -- like the budget and legislative matters -- become a fair subject for partisan warfare.

And in a partisan war, the other side's talent is to be feared. The result, as Chief Judge J. Harvie Wilkinson of the 4th Circuit has put it, is that "we have reached the point in the confirmation process where both sides of the aisle consider intellectual distinction a threatening characteristic in a judicial nominee." The last five D.C. Circuit nominees provide a particularly instructive example.

Consider, first, the Clinton nominees. There was no plausible case to be made against the universally admired Garland, so Republicans didn't directly oppose him. They claimed instead that new judges weren't needed on the court at all and produced 23 "no" votes following a protracted fight.

Snyder wasn't so lucky. Also highly regarded, he had committed the unpardonable crime of having once represented White House aide Bruce Lindsey. Between that and the workload issue, he never got a vote. Meanwhile, nobody even talked about **Kagan**, so remote were the chances she would ever be considered.

Now Democrats have turned the tables and are attacking Roberts and Estrada as right-wing fanatics itching to impose a conservative agenda from the bench. The public career of neither man seems to support the caricatures. Both have histories of taking on surprising clients given their supposedly rigid conservative ideologies. Estrada represented a Virginia death row inmate before the Supreme Court. And when Roberts -- among the city's preeminent appellate lawyers -- was nominated, an environmental lawyer in town joked to me that he hoped Sen. Patrick Leahy "would hold him up long enough for him to argue Tahoe-Sierra" -- an important Supreme Court case that Roberts recently handled on the environmentalist side. Sen. Leahy obliged, and Roberts delivered what this lawyer describes as one of the environmental community's "most important victories before the Supreme Court in two decades."

The irony of the war on quality is that the courts of appeals are not nearly as riven as the partisans seem to believe. The high- profile cases in which right-left splits represent the salient fault lines in fact paint a highly distorted picture and in any event, are the very cases most likely to be reviewed by the Supreme Court.

Between 1995 and 2001, for example, the D.C. Circuit has never had more than 3 percent of its cases produce dissents in any one year, and they are growing rarer: Last year less than 1 percent of cases produced dissents.

A court once famous for its ideological divisions has become a love fest. As the partisans have been yelling about abortion, affirmative action and whether Bruce Lindsey has a right to counsel, its judges have been quietly discussing such questions as whether federal energy regulations are arbitrary and capricious -- and they are overwhelmingly agreeing about the answers.

There is an alternative, in short, to Jacobin opposition to high- quality nominees of the other party: treating the courts with a presumption that excellence in law can and must transcend political differences. Both sides pay lip service to this notion, but these days both regard it as naive. Unless that cynicism can be overcome, we are bound to make the courts into exactly the political battlegrounds we already imagine them to be.

The writer is a member of the editorial page staff.

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Christian Science Monitor (Boston, MA)

April 15, 2003, Tuesday

SECTION: FEATURES; LEARNING; Pg. 12

LENGTH: 365 words

HEADLINE: Fifty years after admitting women, law school hires woman dean

BYLINE: By Seth Stern

BODY:

The federal court's loss is Harvard Law School's gain. Two years after the US Senate let **Elena Kagan's** nomination to a federal circuit court lapse, the law school has selected her as its first female dean.

Few are more pleasantly surprised by the appointment than the handful of women who graduated in the first class that accepted women exactly 50 years ago.

"It sends a real message," says Charlotte Armstrong, who was among the first batch of women to attend the school.

During their orientation in 1953, Harvard Law's dean asked why the women bothered showing up. More than a decade later, certain professors would only recognize women students on Ladies' Day, recalls Mary Mullarkey, who went on to serve as chief justice of the Colorado Supreme Court after graduating from Harvard Law in 1968.

Yet Ms. Armstrong says that

Ms. **Kagan**'s gender is far from her best qualification. "She's brilliant, she's energetic, she's focused, and she's passionate about the law school," Armstrong says.

Even at a school famous for churning out overachievers, Kagan's resume stands out.

Just 20 years after graduating, **Kagan** clerked for Supreme Court Justice Thurgood Marshall, served as President Clinton's second-highest ranking domestic policy adviser, and taught at both the University of Chicago and Harvard, where she became a visiting professor in 1999.

On taking over her new post, **Kagan** pledges to continue cutting first-year class sizes and increasing faculty-student interaction as current dean Robert Clark has done. In the process, the school has begun to shed its reputation as cut-throat and impersonal.

Moving plans may also top her agenda if Harvard's president Lawrence Summers decides to shift Harvard Law across the Charles River into Boston.

If approved, though, Kagan says that the move itself wouldn't happen until after she has already stepped down.

Some lawyers may consider a seat on the federal bench the pinnacle of their career, but **Kagan** says she is grateful the Senate Judiciary Committee let her nomination expire.

"There's no place I'd rather be," she says, "and no job that I'd rather have."

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001	Agenda	Judicial and U.S. Marshal Selection Meeting with the President	1	05/16/2003	P2; P5; P6/b6;
002	Information Sheet	Brett M. Kavanaugh [page 1]	1	N.D.	P6/b6;
003	Briefing	Brett M. Kavanaugh	2	N.D.	P5;
004	Information Sheet	Janice R. Brown [page 1]	1	N.D.	P6/b6;
005	Briefing	Janice R. Brown	2	N.D.	P5;
006	Information Sheet	F. Dennis Saylor IV [page 1]	1	N.D.	P6/b6;
007	Briefing	F. Dennis Saylor IV	2	N.D.	P5;

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008	Information Sheet	Kenneth M. Karas [page 1]	1	N.D.	P6/b6;
009	Briefing	Kenneth M. Karas	2	N.D.	P5;
010	Cover Sheet	[Divider 5 with attachments]	4	N.D.	P2; P5; P6/b6;
011	Cover Sheet	[Divider 6 with attachments]	6	N.D.	P2; P5; P6/b6;
012	Email	Janice Brown - To: Jennifer Brosnahan - From: Kyle Sampson	8	05/15/2003	P5;
013	Email	[No Subject] - To: Jennifer Brosnahan - From: Brett Kavanaugh	10	05/15/2003	P2; P5; P6/b6;

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Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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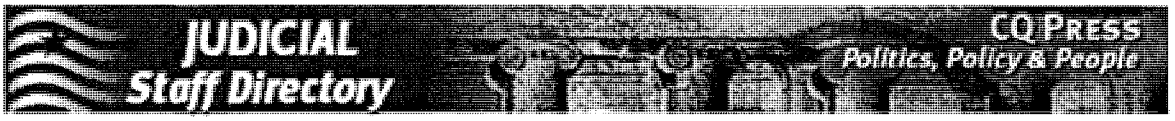

Williams, Stephen F.

Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Room 3818, E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington DC 20001. Nominated for appointment in 1986 by President Reagan (R). Confirmed by Senate; took Senior Status in 2001. Born Sept. 23, 1936 in New York, NY. Married June 11, 1966 to Faith Morrow. Five children.

Education: Yale University, New Haven, CT, 1958, B.A.; Harvard Law School, Cambridge, MA, 1961, J.D.

Military Service: entered active duty, U.S. Army in 1961; released in 1962

Career Record: 1962-66, Associate, Debevoise, Plimpton, Lyons and Gates, New York, NY; 1966-69, Asst. U.S. Attorney, Southern District of New York, Dept. of Justice; 1969-77, Asst. Professor, 1977-86, Professor of Law, University of Colorado; 1975-76, Visiting Professor, University of California at Los Angeles; 1979-80, Visiting Professor, Fellow in law and economics, University of Chicago; 1983-84, William L. Hutchison Visiting Professor, energy law, Southern Methodist University; 1974-76, consultant, Administrative Conference of the U.S. Admitted to New York State Bar, 1962; Colorado Bar, 1977

Member: Judicial Conference to Administrative Conference, liaison rep., 1991-96; American Law Institute.

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The Court
The Court Staff

(The Court sits at Washington, DC)

General Information: 202-216-7000
ABBS Registration: 800-676-6856
ABBS Connection (Opinions and Dockets): 800-426-3231
ABBS Connection (local): 202-219-9600
ABBS Access Fee: $.60 minute
AVIS Connection: 800-552-8621
AVIS Connection (local): 202-273-0926
Web PACER: http://pacer.cadc.uscourts.gov
Web PACER Access Fee: $0.07 per displayed page
Web Site: http://www.cadc.uscourts.gov
Fax on Demand: 202-216-7200

DC 1: E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, DC 20001

The Court

The Court Staff

Authorized Judgeships: 12
Vacancies: 4
Active Senior Judges: 2
Circuit Justice: William H. Rehnquist, Chief Justice

Douglas H. Ginsburg, Chief Judge; Harry T. Edwards, Judge; David B. Sentelle, Judge; Karen LeCraft Henderson, Judge; A. Raymond Randolph, Judge; Judith W. Rogers, Judge; David S. Tatel, Judge; Merrick B. Garland, Judge; Laurence H. Silberman, Senior Judge; Stephen F. Williams, Senior Judge

	Name/Phone	Title		Building	Room
1)	Douglas H. Ginsburg * R 202-216-7190	**Chief Judge**	Reagan	DC 1	5128
2)	Harry T. Edwards * D 202-216-7380	**Judge**	Carter	DC 1	5400
3)	Merrick B. Garland * D 202-216-7460	**Judge**	Clinton	DC 1	3836
4)	Karen LeCraft Henderson * R 202-216-7370	**Judge**	Bush 41	DC 1	3118
5)	A. Raymond Randolph * R 202-216-7425	**Judge**	Bush 41	DC 1	3108
6)	Judith W. Rogers * D 202-216-7260	**Judge**	Clinton	DC 1	5800
7)	David B. Sentelle * R 202-216-7330	**Judge**	Reagan	DC 1	5108
8)	David S. Tatel * D	**Judge**	Clinton	DC 1	3818
9)	John Roberts R		Bush 43		
10)	(Miguel Estrada)				

5 - R
4 - D

202-216-7160				
Laurence H. Silberman * R 202-216-7353	**Senior Judge** Reagan		DC 1	3400
Stephen F. Williams * R 202-216-7210	**Senior Judge** Reagan		DC 1	3800

The Court Staff

Name/Phone	Title	Building	Room
Jill Sayenga 202-216-7340	**Circuit Executive**	DC 1	4826
Mark J. Langer * 202-216-7300	**Clerk of Court**	DC 1	5409
Marilyn R. Sargent 202-216-7300	**Chief Deputy Clerk**	DC 1	5409
Martha J. Tomich 202-216-7500	**Director, Legal Division**	DC 1	3429
Nancy W. Padgett * 202-216-7400	**Circuit Librarian**	DC 1	5518
Theresa Santella 202-216-7400	**Deputy Librarian**	DC 1	3518

Back to top

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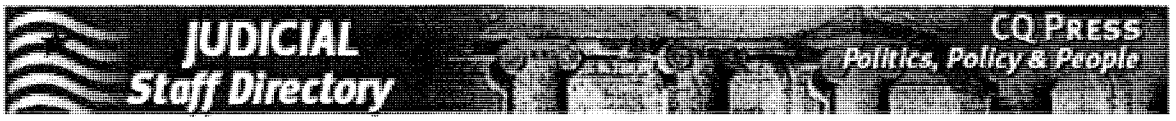

Silberman, Laurence H.

Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit and Judge, Foreign Intelligence Surveillance Court of Review, Room 3400, E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington DC 20001. Nominated for appointment in 1985 by President Reagan (R); took Senior Status Nov. 1, 2000. Born Oct. 12, 1935 in York, PA. Married April 28, 1957 to Rosalie G. Gaull. Three children.

Education: Dartmouth College, Hanover, NH, 1957, B.A.; Harvard Law School, Cambridge, MA, 1961, LL.B.

Military Service: U.S. Army

Career Record: 1961-67, Associate and Partner, Moore, Torkildson and Rice (later Moore, Silberman and Schulze), Honolulu, HI; 1967-69, attorney, Appellate Division, Natl. Labor Relations Board, Washington, DC; 1969-70, Solicitor, 1970-73, Under Secy., Dept. of Labor; 1973-74, Partner, Steptoe and Johnson; 1974-75, Deputy U.S. Attorney General; 1975-77, U.S. Ambassador to Yugoslavia; 1977-78, Senior Fellow, American Enterprise Institute; 1979-83, Executive V.P., Crocker Natl. Bank; 1981-85, Member, General Advisory Committee on Arms Control and Disarmament; 1978-79, 1983-85, Partner, Morrison and Foerster. Adjunct Professor of Law, Georgetown Law Center, Washington, DC, 1987-94, 1997, 1999-; New York University School of Law, 1995-96; Harvard University, 1998

Member: Association of Former U.S. Attorneys

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1. Brett M. Kavanaugh

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Brett M. Kavanaugh, of Maryland, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Laurence H. Silberman.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Judge Silberman 11th seat ~50 when appointed
Reagan appointee 1985
Senior status Nov. 2000, after 15 years on the bench
Now 67 years old.

Still on Foreign Intelligence Surveillance Court of Review

PREPARED BY: Jennifer Brosnahan

NAME:	Brett M. Kavanaugh						
NAME & STATE:	Brett Michael Kavanaugh of Maryland						
POSITION:	United States Court of Appeals for the District of Columbia Circuit						
TYPE: *(bold one)*	PAS	PA	SES	FT	PT	**TERM:**	LIFE
VICE:	Laurence H. Silberman			**GENDER:**	M	**DOB:**	2/12/1965
BIRTHPLACE:	Washington, D.C.			**PARTY:**	R	**SSN:**	(b)(6)
ETHNIC HERITAGE:	Caucasian				**RACE:**	Caucasian	
CHILDREN:					**SPOUSE:**		
VOTING CITY, STATE *(in 2000)*	Bethesda, MD				**HOME STATE:**	Maryland	
CURRENT HOME ADDRESS:	(b)(6)			**CURRENT POSITION AND WORK ADDRESS:**		Associate Counsel to the President The White House Washington, D.C. 20502	
HOME PHONE:	(b)(6)			**WORK PHONE:**		(202) 456-7984	
EDUCATION:	Yale Law School, J.D., 1990. Yale College, B.A., 1987.			**AWARDS:**			
PREVIOUS POSITIONS HELD:	Partner, Kirkland & Ellis, 1997-98, 1999-2001. Associate Independent Counsel, Office of Independent Counsel, 1994-97, 1998. Law Clerk, Hon. Anthony M. Kennedy, U.S. Supreme Court, 1993-94. Attorney, Office of Solicitor General, 1992-93. Law Clerk, Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, 1991-92. Law Clerk, Hon. Walter Stapleton, U.S. Court of Appeals for the Third Circuit, 1990-91.			**MILITARY SERVICE:**		None.	
PREVIOUS PRESIDENTIAL APPOINTMENTS:	Associate Counsel to the President						

President approved: _____

Security package sent: _____

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	Brett M. Kavanaugh	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

FOIA IDs and Segments:
2018-0009-P
2014-0108-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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2. Janice R. Brown

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Janice R. Brown, of California, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Stephen F. Williams.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Judge Stephen Williams 12th seat ~ 49 when appointed

Reagan appointee 1986
Senior status in 2001, after 15 years on the bench
Now 66 years old

PREPARED BY: Jennifer Brosnahan

NAME:	**Janice R. Brown**						
NAME & STATE:	**Janice Rogers Brown of California**						
POSITION:	**United States Court of Appeals for the District of Columbia Circuit**						
TYPE: ***(bold one)***	**PAS**	PA	SES	**FT**	PT	**TERM:**	**LIFE**
VICE:	**Stephen F. Williams**			**GENDER:**	**F**	**DOB:**	(b)(6)
BIRTHPLACE:	**Greenville, AL**			**PARTY:**	**R**	**SSN:**	
ETHNIC HERITAGE:	**African American**				**RACE:**	**Black**	
CHILDREN:	**Nathan**				**SPOUSE:**	**Duane Allen Parker**	
VOTING CITY, STATE ***(in 2000)***	**Sacramento, CA**				**HOME STATE:**	**California**	

CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	**Associate Justice California Supreme Court 350 McAllister Street San Francisco, CA 94102-4783**
HOME PHONE:		**WORK PHONE:**	**(415) 865-7000**
EDUCATION:	**UCLA Law School, J.D., 1977.** **California State University, B.A., 1974.**	**AWARDS:**	
PREVIOUS POSITIONS HELD:	**Associate Justice, California Court of Appeals for the Third District, 1994-96.** **Legal Affairs Secretary, Gov. Pete Wilson, 1991-94.** **Attorney, Nielsen Merksamer Parrinello Mueller & Naylor, 1990-91.** **Deputy Secretary & General Counsel, California Department of Business, Transportation, and Housing, 1987-90.** **Attorney, Office of California Attorney General, 1979-87.**	**MILITARY SERVICE:**	**None.**
PREVIOUS PRESIDENTIAL APPOINTMENTS:	**None.**		

President approved: _____

Security package sent: _____

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	Janice R. Brown	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

FOIA IDs and Segments:
2018-0009-P
2014-0108-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Freedom of Information Act - [5 U.S.C. 552(b)]

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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3. F. Dennis Saylor IV

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

F. Dennis Saylor, IV, of Massachusetts, to be United States District Judge for the District of Massachusetts, vice Robert E. Keeton.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

PREPARED BY: Ted Ullyot

NAME:	F. Dennis Saylor IV						
NAME & STATE:	Frank Dennis Saylor IV of Massachusetts						
POSITION:	United States District Judge for the District of Massachusetts						
TYPE: *(bold one)*	PAS	PA	SES	FT	PT	**TERM:**	LIFE
VICE:	Robert E. Keeton			**GENDER:**	M	**DOB:**	(b)(6)
BIRTHPLACE:	Royal Oak, Michigan			**PARTY:**		**SSN:**	
ETHNIC HERITAGE:	Anglo American					**RACE:**	White
CHILDREN:	Three (John, Charles, & Alex)					**SPOUSE:**	Catherine Adams Fisk
VOTING CITY, STATE *(in 2000)*	Weston, MA					**HOME STATE**	Massachusetts

CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	Partner, Goodwin, Procter & Hoar Exchange Place Boston, Massachusetts 02109-2881
HOME PHONE:		**WORK PHONE:**	(617) 570-1977
EDUCATION:	Harvard Law School, J.D., 1981. Northwestern University, Medill School of Journalism, B.S.J., 1977.	**AWARDS:**	Edmund Jennings Randolph Award for Outstanding Contributions to the DOJ, 1993. DOJ Special Achievement Award, 1991 & 1992. Internal Revenue Service Special Award
PREVIOUS POSITIONS HELD:	Chief of Staff to the Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1991-93. Special Counsel to the Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1990-91. Assistant U.S. Attorney, District of Massachusetts, 1987-90. Associate, Goodwin Procter & Hoar, 1981-87.	**MILITARY SERVICE:**	None.

PREVIOUS PRESIDENTIAL APPOINTMENTS:
President approved: _____

Security package sent: _____

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	F. Dennis Saylor IV	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

FOIA IDs and Segments:
2018-0009-P
2014-0108-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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Freedom of Information Act - [5 U.S.C. 552(b)]

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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4. Kenneth M. Karas

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Kenneth M. Karas, of New York, to be United States District Judge for the Eastern District of New York, vice Sterling Johnson, Jr.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

PREPARED BY: Jennifer Newstead

NAME:	**Kenneth M. Karas**				
NAME & STATE:	**Kenneth Michael Karas of New York**				
POSITION:	**United States District Judge for the Eastern District of New York**				
TYPE: ***(bold one)***	**PAS** PA SES	**FT** PT		**TERM:**	**LIFE**
VICE:	**Sterling Johnson, Jr.**	**GENDER:**	**M**	**DOB:**	(b)(6)
BIRTHPLACE:	**Colorado Springs, CO**	**PARTY:**		**SSN:**	
ETHNIC HERITAGE:	**European American**			**RACE:**	**White**
CHILDREN:	**One (Nathan)**			**SPOUSE:**	**Frances Bivens**
VOTING CITY, STATE ***(in 2000)***	**New York, New York**			**HOME STATE**	**New York**

CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	**Chief, Organized Crime and Terrorism Unit United States Attorney's Office, Southern District of New York One St. Andrews Plaza New York, NY 10007**
HOME PHONE:		**WORK PHONE:**	**212-637-1034**
EDUCATION:	**Columbia University School of Law, J.D., 1991.** **Georgetown University, B.A.,** ***magna cum laude,*** **1986.**	**AWARDS:**	**The Attorney General's Award for Distinguished Service, 2002.** **Federal Law Enforcement Association Prosecutor of the Year, 2001.** **The Attorney General's John Marshall Award for Outstanding Legal Achievement, 1995.**

PREVIOUS POSITIONS HELD:	**Member, Organized Crime and Terrorism Unit, United States Attorney's Office, Southern District of New York, 1996–present.** **Member, Narcotics, Asset Forfeitures and General Crimes Units, United States Attorney's Office, Southern District of New York, 1992-1996.** **Law Clerk, Honorable Reena Raggi, United States District Court, Eastern District of New York, 1991-92.** **Corporate Finance Analyst, Kidder Peabody & Co., 1986-88.**	**MILITARY SERVICE:**	**None.**

PREVIOUS PRESIDENTIAL APPOINTMENTS:
President approved: _____
Security package sent: _____

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	Kenneth M. Karas	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

FOIA IDs and Segments:

2018-0009-P

2014-0108-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Cover Sheet	[Divider 5 with attachments]	4	N.D.	P2; P5; P6/b6;

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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

FOIA IDs and Segments:
2018-0009-P
2014-0108-F

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99 YLJ 187
(**Cite as: 99 Yale L.J. 187**)

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Yale Law Journal
October, 1989

Note

*187 DEFENSE PRESENCE AND PARTICIPATION: A PROCEDURAL MINIMUM FOR BATSON v. KENTUCKY HEARINGS

Brett M. Kavanaugh

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"Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." [FN1]

In Batson v. Kentucky, [FN2] the Supreme Court held that a prosecutor's purposefully discriminatory use of peremptory challenges [FN3] against venirepersons of the same race as the defendant violated the equal protection clause of the Fourteenth Amendment. [FN4] Batson eased the difficult burden of proof that the Court had imposed on defendants in Swain v. Alabama. [FN5] Swain required a defendant challenging the prosecution's practices to prove repeated striking of blacks over a number of cases. In Batson the ***188** Court stated that this requirement had placed a "crippling burden of proof" [FN6] on defendants, rendering peremptory challenges "largely immune from constitutional scrutiny." [FN7]

To establish a prima facie case of purposeful discrimination under Batson, the defendant must show: (1) that he is a member of a cognizable racial group; (2) that peremptory challenges have been used to remove members of the defendant's race from the jury; [FN8] and (3) that the facts and other relevant circumstances raise an inference that the prosecutor used peremptories in a racially discriminatory manner. [FN9] In deciding whether a prima facie case has been raised, the trial judge [FN10] is to consider such circumstances as a pattern of strikes against black jurors and a prosecutor's voir dire questions and statements. [FN11]

After the defendant has made out a prima facie case, the prosecutor must explain the peremptory challenges in question. The prosecutor is not entitled to peremptorily challenge a juror on the assumption that because of shared race the juror would be partial to the defendant, nor may a prosecutor simply assert good faith performance of his duties. [FN12] Rather, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." [FN13]

One of the questions Batson left unanswered [FN14] is what procedure courts ***189** should use when inquiring into prosecutorial motives for peremptory challenges. Once the defense [FN15] makes out a prima facie case of purposeful discrimination, a court can hear the prosecutor's reasons for the peremptory challenges in question in one of four ways: (1) an ex parte, in camera hearing in which the prosecutor explains his peremptory challenges out of the defense's presence and the defense has no opportunity for rebuttal; (2) an open, non-adversarial hearing in which the defense is present but is not given an opportunity to rebut the prosecutor's reasons; [FN16] (3) an open, adversarial hearing allowing the defense to rebut the prosecutor's reasons and attempt to show them to be pretextual or openly discriminatory; or (4) a full- scale evidentiary hearing in which the prosecutor is a witness, testifies to the reasons for his peremptories, and is subjected to cross-examination by the defense counsel.

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The federal circuit courts have split on the question of Batson procedure. Some courts have allowed ex parte, in camera Batson hearings (the first option above) and thus the exclusion of the defense from listening to or rebutting the prosecutor's reasons, while other courts have stated that Batson hearings should be adversarial (the third option above). [FN17] No court has yet required full-scale evidentiary hearings (the fourth option above), [FN18] but no court has ruled that they are impermissible, either.

This Note argues, first, that the defense must be present to hear the prosecutor articulate his "neutral explanation" and, second, that the defense ***190** should have an opportunity to rebut the prosecutor's reasons before the trial judge decides whether to allow the prosecutor's peremptories.

Section I analyzes the Batson opinion and the procedures it requires or suggests, if any, and argues that Batson left the formulation of procedures to the lower courts. Section II considers the present split in the federal circuits and also examines state court decisions. Section III contends that a defendant's presence at a Batson hearing is a requirement of the due process clause of the Fifth Amendment. This Section also demonstrates that the general presumption in American criminal procedure is to allow the defendant to be present at all stages of the criminal prosecution.

Section IV argues that a standard in which the defense has the opportunity for rebuttal after the prosecution has articulated reasons for the peremptory challenges in question should be adopted as a floor of protection against the potential abuse of the jury selection process that still exists in the wake of Batson. Section V considers the fourth option above-full-scale evidentiary hearings-and concludes that they should be neither required nor forbidden. This option should fall completely within the discretion of the trial judge.

I. PROCEDURAL REQUIREMENTS OF Batson

In Batson, the Supreme Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." [FN19] The Court made "no attempt to instruct ... lower courts how best to implement" [FN20] the holding " i n light of the variety of jury selection practices followed in our state and federal trial courts." [FN21]

Despite this apparent refusal to construct a standard procedure, conflicting signals emerge from the language of the opinion, leading some courts to believe that the Court did in fact envision a particular procedure. One portion of Batson suggests that a Batson hearing should consist of three steps: (1) the defense makes out a prima facie case of purposeful discrimination; (2) the prosecutor gives reasons for the peremptory challenges in question; and (3) the trial court rules on the validity of those peremptories. [FN22]

At another point, however, the Court hinted that Batson hearings should be more extensive and follow the lead of Title VII proceedings, which would permit defense rebuttal of the prosecutor's reasons. In a footnote, the Court cited three Title VII cases [FN23] that "explained the operation ***191** of prima facie burden of proof rules. The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion." [FN24]

Some lower courts have read the Court's use of Title VII cases as evidence that a Title VII-type procedure is required in Batson hearings. [FN25] However, the footnote in which the Title VII cases were cited purported to explain the operation of prima facie burden of proof rules. In this way, the Title VII cases merely illustrate how the burden shifts to the prosecutor after the defendant has made out a prima facie case. It may not have been intended to specify the particular procedure to be followed, but rather to identify who carries the ultimate burden of proof. [FN26]

Courts that have attempted to "divine" a particular procedural mandate from Batson have missed the point. In spite of mixed signals in the opinion, the Court deliberately declined to formulate procedures, thus leaving lower

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courts room to experiment. This does not mean that courts should not find that Title VII provides an appropriate example for Batson hearings. However, to come to that conclusion merely by relying on language in Batson is to misread that decision.

II. CASE LAW IN THE FEDERAL CIRCUITS AND THE STATES

This Section considers the present split in the federal circuits over the question whether a trial court must allow the defense to be present to hear and rebut the prosecutor's presentation of reasons for his peremptory challenges. This Section also considers state court cases that have addressed this issue.

A. Federal Cases

In the first case to address this question, United States v. Davis, [FN27] the Sixth Circuit held that neither the Constitution nor Rule 43(a) of the Federal Rules of Criminal Procedure [FN28] requires the presence of the defense at a Batson hearing. At trial the prosecution had exercised seven of its peremptory challenges to remove seven of the nine black venirepersons; ***192** the other two black persons were removed for cause. The trial court decided, over the strenuous objection of the defense, to hear the prosecution's reasons for its challenges in camera. After hearing those reasons and denying the defense's motion to disallow the peremptories, the court declined to reveal any of the hearing's record to the defense. [FN29]

In affirming the trial court's decision, the Sixth Circuit relied on the lack of mandatory procedural standards in either Batson or Booker v. Jabe, [FN30] and on Snyder v. Massachusetts, [FN31] which held that a defendant's right to be present at a particular stage of trial was a fact- specific determination. The court in Davis also based part of its decision on the defense's opportunity to present its arguments in open court before the court held the in camera hearing. [FN32]

In United States v. Tucker, [FN33] the trial court had conducted an ex parte, in camera hearing after the prosecution exercised four of its seven peremptory challenges to exclude all four blacks on the thirty-six person panel. The Seventh Circuit upheld the proceeding, [FN34] agreeing with the SixthCircuit that "Batson neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing." [FN35]

In the interim between these two cases, a divided panel of the Ninth Circuit in United States v. Thompson [FN36] disagreed with Davis. The prosecution had exercised its peremptory challenges to remove all four blacks from the venire. After hearing the prosecutor's reasons ex parte and in camera, the trial judge allowed the peremptories without revealing any of the proffered reasons [FN37] to the defendant. [FN38]

In overturning the district court, the Ninth Circuit rejected the government's ***193** argument that defense counsel could contribute nothing to the proceeding by being present and participating. The court also questioned the government's administrative burden argument, stating that "[w]e would be surprised ... if these proceedings were to involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel ...." [FN39]

In United States v. Garrison, [FN40] the Fourth Circuit adopted the Ninth Circuit's standard, concluding that "the important rights guaranteed by Batson deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown." [FN41] In United States v. Roan Eagle, [FN42] the Eighth Circuit agreed with the Fourth and Ninth Circuits that the defense should have an opportunity to rebut the prosecution, but it refused to require a full evidentiary hearing.

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B. State Cases

State courts have also confronted the issue of the most appropriate procedure for conducting a Batson inquiry into prosecutorial motives for peremptory challenges. These courts have either read the Title VII language in Batson as mandating the framework for deciding a claim of discriminatory peremptory challenges [FN43] or assumed that the defendant must be allowed to rebut the prosecutor's reasons. [FN44]

III. REQUIRING THE PRESENCE OF DEFENDANTS AT Batson HEARINGS

This Section addresses the importance of allowing the defendant to be present at a Batson hearing. It argues that: (1) the due process clause of the Fifth Amendment and Federal Rule of Criminal Procedure 43(a) require***194** the defendant's presence at a Batson hearing; and (2) an examination of the few situations in the criminal process where the defense is excluded argues against exclusion from Batson hearings.

A. Constitutional Right to Presence

1. Gagnon and Stincer

The confrontation clause of the Sixth Amendment [FN45] is the source of a criminal defendant's right to be present at every stage of the trial. [FN46] The right applies in state as well as federal proceedings. [FN47] Even in situations where the defendant is not actually confronting witnesses or evidence-and, therefore, not implicating the literal provisions of the Sixth Amendment [FN48]-the defendant's right to be present is protected by the due process clauses of the Fifth and Fourteenth Amendments. [FN49] Federal Rule of Criminal Procedure 43(a) codifies this constitutional requirement. [FN50]

The starting point for analyzing a defendant's claim to be present at a Batson hearing is the Supreme Court's pronouncement that a "leading principle ... [pervading] the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." ***195**[FN51] Two recent Supreme Court cases have outlined the standards for determining whether a defendant has a right to be present at a particular trial-related proceeding.

In United States v. Gagnon, [FN52] the Supreme Court stated that a defendant has a due process right to be present when the defendant's presence has "a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." [FN53] In Kentucky v. Stincer, [FN54] the Court reiterated and refined the Gagnon standard, stating that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." [FN55]

***196** 2. Application to Batson Hearings

A defendant's absence at a Batson hearing would violate the Gagnon standard because a Batson hearing has a reasonably substantial relationship to a defendant's opportunity to defend against the ultimate charge. The defendant's right to be present applies to jury selection, including that phase involving the exercise of peremptory challenges. [FN56] Since a Batson hearing is an integral part of the jury selection process, the right to be present should also apply to that proceeding. A fair and just hearing is thwarted by the defendant's absence since the defendant will not witness the determination of the group that will decide his guilt or innocence.

Unlike Gagnon, in which a defendant's presence at an in camera conference was considered counterproductive, [FN57] a defendant could both gain from and contribute to a Batson hearing. By being present to hear the

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prosecutor's reasons, a defendant could gain the sense of fairness that the Supreme Court has recognized as an important element of the criminal justice system. By rebutting a prosecutor's reasons, the defense could also contribute to the search for the true reasons behind the prosecutor's peremptory challenges. The defendant's presence at a Batson hearing could not be counterproductive as in Gagnon, since the issue is not the impartiality of a fearful juror but the prosecutor's reasons for her peremptory challenges. Further, unlike Gagnon, where none of the defendants objected at trial, the defense has generally objected when a Batson hearing has been held ex parte and in camera. [FN58]

A Batson hearing also would meet the "critical to the outcome" and the "contribution to fairness" elements of the Stincer standard. There is little doubt that the composition of juries is and has been treated as critical to the ultimate verdict. Numerous Supreme Court pronouncements have confirmed the importance of the jury's composition. [FN59] The very existence of peremptory challenges and the extraordinary amount of time spent on voir dire [FN60] demonstrate the perceived importance of the jury selection procedure in the outcome of the trial.

***197** In addition, the presence of the defendant would meet the second part of the Stincer standard since it contributes both to the actual fairness of the procedure and to the appearance of fairness. As the Court stated in In re Murchison, [FN61] " f airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." [FN62] Thus, "due process is denied by circumstances that create the likelihood or the appearance of bias." [FN63] Excluding the defendant from a hearing that determines who will sit on the jury, besides presenting opportunities for actual bias, certainly creates the appearance of bias.

B. Total Exclusion of the Defense

The rarity of instances where criminal proceedings are permissible in the absence of defense presence further argues against holding a Batson hearing without the defense. Courts exclude the defense when determining whether evidence possessed by the prosecution is discoverable by the defense. [FN64] Similarly, prosecutors reveal the identities of informers to the court in camera because disclosing their identities might cause harm to the informers. [FN65] The use of an in camera hearing enables the court to weigh the balance of interests between the accused and the government without revealing the information unnecessarily and irretrievably.

The general rule that emerges from these examples is that hearings are held without any defense presence only when the court must initially decide if a compelling justification exists for the government not to reveal certain evidence. The defense is precluded from receiving the information only after a court makes this initial determination.

IV. ALLOWING DEFENSE REBUTTAL OF THE PROSECUTION'S REASONS

The previous Section argued that a defendant's right to be present to hear the prosecutor's reasons for his peremptory challenges is a requirement of both the Constitution and Rule 43(a), and is consistent with the presumption of presence at all stages of the criminal process. This Section argues that, once defense presence is established as a right, policy reasons ***198** favor allowing the defense to rebut the prosecution's reasons before the court decides whether to allow the peremptory challenge in question.

A. Detection of Discrimination

1. Batson

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The process of determining whether a prosecutor has exercised her peremptory challenges in a racially discriminatory manner places an enormous burden on the trial court judge. [FN66] Since purposeful racial discrimination is difficult to detect, [FN67] defense rebuttal of the prosecution's reasons for challenging certain venirepersons can assist the judge in his determination by pointing out how the prosecution's explanations do not conform to the facts. For example, the defense counsel could show that white jurors who are similarly situated to the challenged blacks were not challenged. [FN68]

Participation by the defense also would help guard against "outright prevarication," [FN69] " a prosecutor's own conscious or unconscious racism," [FN70] or " a judge's own conscious or unconscious racism." [FN71] Justice Marshall feared that these factors could limit the effort to rid the jury selection process of racial discrimination. Because of this possibility, his concurrence in Batson argued that the only way to end racial discrimination in the jury selection process is to eliminate peremptory challenges entirely. [FN72]

Justice Powell's majority opinion answered Justice Marshall's skepticism about prosecutorial and judicial enforcement of Batson by stating somewhat conclusorily that there was "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate***199** purposes," [FN73] and that "trial judges, in supervising voir dire ... will be alert to identify a prima facie case of purposeful discrimination." [FN74]

If this were true, Batson never would have been necessary. In Swain v. Alabama, the Court stated that prosecutors could not deny blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." [FN75] Yet discrimination in the exercise of peremptory challenges remained widespread after Swain. [FN76] The language in Swain prohibiting discrimination obviously did not succeed; reliance solely on the good faith of prosecutors is misguided in light of the history of peremptory challenges in the period between Swain and Batson.

The problem with detection of racial discrimination in the jury selection process extends beyond discovering overt racism. [FN77] Examples of subtle stereotyping and racism point out the need to require defense rebuttal of the prosecution's reasons, since arguably much racism and racial stereotyping is lodged in the subconscious and will stay there unless forced into the open. [FN78]

The assistance of the defense is also necessary because Batson does not prescribe a result but rather proscribes disriminatory purpose. Some courts have had difficulty finding a Batson prima facie case when a black remains on the petit jury despite evidence that a disproportionate number of peremptory challenges were used to strike blacks from the venire. [FN79] This is an incorrect reading of Batson. A court may not simply ensure that an adequate number of blacks remain on the petit jury; rather, the judge must look into the circumstances of each peremptory challenge. [FN80] ***200** Because Batson mandates this difficult inquiry into purpose, the role of the trial judge is better suited to allowing the defense to rebut the prosecution before the judge decides whether to allow a particular peremptory challenge than it is to acting as the sole questioner of the prosecution, as must occur when the judge is without the aid of the defense. [FN81]

2. Sixth Amendment Analysis

To prevent discrimination that Batson does not reach, some courts have relied upon the Sixth Amendment right to a fair and impartial jury composed of a representative cross-section of the community rather than upon the equal protection clause, which Batson utilized. [FN82] A Batson- type standard has been used but, unlike Batson, has been restricted neither to venirepersons of the same race as the defendant [FN83] nor to race as the only factor triggering inquiry. [FN84]

For example, in Booker v. Jabe, [FN85] the Sixth Circuit used the Sixth Amendment as the basis for prohibiting a prosecutor's discriminatory use of peremptory challenges, but did not go so far as to prescribe a result. Instead, under Booker, a prima facie showing is made if "(1) the group ***201** alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion were made on

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the basis of the individual venirepersons' group affiliation ...." [FN86] Since discrimination under such a standard will be as difficult to detect as in Batson and will require the same type of inquiry into prosecutorial motives, an adversary hearing procedure allowing for defense presence and rebuttal should also apply to jurisdictions using a Sixth Amendment standard, such as the one in Booker. [FN87]

B. Standard of Appellate Review

In Batson the Court noted that a trial court's ruling on a claim of a Batson violation will largely be an "evaluation of credibility." [FN88] Because of this, "a reviewing court ordinarily should give those findings great deference." [FN89] This past Term in Tompkins v. Texas, [FN90] an equally divided Supreme Court upheld without opinion an extremely deferential standard of appellate review of a trial court decision on a Batson claim. The lower court in Tompkins found that "the prosecuting attorney's reasons ... constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility." [FN91] The lower court also stated that whether it "would have made the same judgment as the trial judge did is unimportant, because her conclusion, given a subjective belief in the truth of the prosecuting attorneys' explanations, which is supported by sufficient evidence, comports with that of a rational trier of fact." [FN92]

The issue of the defense's role during the prosecution's response to its prima facie case is intertwined with the standard of appellate review. If the Court is to continue its standard of "great deference," then it is even more vital to require defense participation in order to ensure, first, that the trial judge is forced to confront all the facts; and, second, that an adequate record is developed for genuine appellate review since the absence ***202** of defense participation will leave important facts out of the record and make it virtually impossible to overrule a trial court's decision. [FN93]

C. Administrative Costs

An argument such as the one raised by the government in United States v. Thompson [FN94]-that the administrative costs of an adversary hearing will outweigh the benefits-misses on three counts. First, almost all constitutional guarantees involve administrative costs. Second, since the amount of time for both sides to state their arguments, rebut the other side, and let the judge rule should be very short, and usually less than going into chambers to hear the prosecution's reasons, the administrative burden in terms of time spent is very slight. [FN95] Third, if administrative cost is the primary goal, the best solution would be to abolish the peremptory challenge altogether since that would reduce the burden to its minimum level. [FN96]

The procedure this Note advocates could lengthen voir dire for two reasons: Prosecutors who wish to remove a group from the jury may want to ask more questions in order to have neutral justifications to point to, and defense attorneys in response may want to ask more questions to elicit answers that show the prosecutor's reasons to be pretextual. However, judges retain great discretion over the content of questions that may be asked at voir dire. [FN97] In exercising this power, judges should not allow extensive "fishing expeditions" in voir dire by prosecutors attempting to avoid the Batson restrictions. [FN98] Judges could accomplish this by, for example, setting time limits, reviewing questions the attorneys wish to ask prior to voir dire, or conducting voir dire themselves, as is already done in some jurisdictions. [FN99]

***203** D. Deterrence

Although many authors have advocated the elimination of peremptory challenges because they believe that discrimination cannot otherwise be eliminated from the jury selection process, [FN100] an adversary hearing procedure could deter and thus eliminate most, if not all, of the discrimination in the jury selection process while retaining some form of the peremptory challenge, which has historically been an important part of the protection afforded both defendants and the government at trial. [FN101]

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The difference between the deterrent value of Swain and that of Batson is that Swain was basically a toothless rejoinder to prosecutors that they should not discriminate, while Batson requires prosecutors to articulate reasons for their challenges. An adversarial Batson hearing further requires a prosecutor, knowing that the defense counsel will be poised to attack any hint of racial motivation, to have truly neutral reasons for the peremptory challenges that she exercises. Forcing a prosecutor to state reasons in an adversary hearing-and possibly under cross-examination if the judge so desires-should help to deter many if not all uses of discriminatory peremptory challenges.

E. Exceptions to the Adversary Hearing Requirement

A prosecutor may have a legitimate reason for not wanting the defense to hear her reasons for a peremptory challenge. Nevertheless, courts must limit any exception to the general rule.

Prosecutors have claimed that open disclosure of their reasons for peremptory challenges will reveal case strategy to the defense. [FN102] In United States v. Thompson, [FN103] the Ninth Circuit, although forbidding ex parte, in camera Batson hearings, carved out an exception to its general rule for circumstances where a prosecutor claims that revealing reasons for his peremptory challenges would divulge case strategy. [FN104] Allowing case strategy ***204** as an exception to a general rule of adversary hearings is too open-ended, for just as prosecutors have become expert in articulating "neutral" reasons for their challenges in the aftermath of Batson, [FN105] so too they could relate their peremptory challenges to case strategy in an attempt to obtain an ex parte, in camera hearing. This exception to a general policy of adversary hearings thus serves to undermine the values that the policy was intended to preserve. As the court in Tucker correctly stated, "the Thompson exception swallows the Thompson rule." [FN106]

The case strategy exception rests on the assumption that a prosecutor's sole duty is to win a case [FN107] and that disclosing case strategy to the defense would create an unfair playing field. Much of the debate over peremptory challenges prior to Batson similarly concerned the idea that the trial is a game in which each side should be allowed to carry its fight to the fullest. [FN108] However, the Supreme Court has recognized the folly of seeing trials as mere sporting events. In upholding a Florida notice-of-alibi rule, which required that a defendant give notice in advance of trial if he intended to claim an alibi, the Court stated: " t he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." [FN109]

An exception to the general policy of adversarial Batson hearings should be allowed only for a "compelling reason." A "compelling reason" occurs only when harm to persons unconnected with that criminal proceeding may result from disclosure, such as when a prosecutor strikes a ***205** venireperson because that venireperson is the subject of another criminal investigation. [FN110]

If a "compelling reason" is present and the judge grants the prosecutor's request to give her reasons in camera, the judge should ensure that a court reporter is present to record the hearing. Then the defense should be presented with a transcript of the hearing with such redactions as the judge deems necessary to preserve the rights of persons not connected to the criminal proceeding. This procedure is the best way to balance the competing concerns of the defendant and of ongoing criminal investigations or persons not involved in the defendant's trial.

V. FULL EVIDENTIARY HEARINGS

The previous Sections have argued that courts must allow the defense to be present and to rebut the prosecution during Batson hearings. [FN111] This Section considers whether courts should require prosecutors, after the defense has made out a prima facie case, to testify under oath to the reasons for their peremptories, to answer the defense counsel's questions on cross- examination, and to respond to questions that the trial judge may have.

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Because of the administrative burden that would result, appellate courts should not require this procedure, except in hearings on remand, but they should permit them. Therefore, the decision should be entirely within the discretion of the trial judge. [FN112]

***206** A. Balancing the Benefits and Burdens in the Typical Batson Hearing

Appellate courts that have reviewed trial court denial of a defendant's motion to subject the prosecutor to cross-examination have not required such a procedure. [FN113] They wish to avoid the administrative burden of a "trial within a trial." [FN114] This burden is not outweighed by the benefits of the full evidentiary hearing since the additional benefits are usually slight. An adversary hearing in which the parties argue their cases and the defense rebuts will usually be sufficient for the judge to make an informed decision, [FN115] thus making a full evidentiary hearing unnecessary in the majority of cases.

Although no court has yet required a full-scale evidentiary hearing, trial courts should be allowed to conduct such a hearing when, in their discretion, it would be warranted. Therefore, appellate courts should leave this decision entirely within the discretion of the trial judge and neither forbid nor require such a hearing.

B. Balancing in the Batson Hearing on Remand

When an appellate court finds a potential Batson violation and remands the case to the trial level, the appellate court should require that the trial court conduct a full evidentiary hearing. When a court remands a case, it has found some problem that needs to be addressed by the trial court. In such a case, forcing a prosecutor to state reasons under oath, and subject to cross- examination, ensures that the remand is properly handled. Since the amount of time between the original jury selection process and the hearing on remand is likely to be great, testimony under oath and cross-examination will serve as a useful aid in the attempt to reconstruct the earlier event.

In terms of burden,the major difference between the typical Batson hearing and the hearing on remand is the number of times that each occurs. Since Batson hearings on remand should be rare, requiring a fuller hearing would not overly burden the courts in the way that holding such a procedure at every Batson hearing would. [FN116]

***207** VI. CONCLUSION

Allowing the defense to be present to hear the prosecution's reasons and to rebut them whenever a prima facie case of discrimination is made eliminates the truly "peremptory" nature of the peremptory challenge. The Supreme Court, however, recognized this consequence in Batson and subordinated it to a goal of removing racial discrimination. Swain represented an attempt to preserve the "peremptory" nature of the challenge, but the dreadful accounts of the use of peremptory challenges in the years between Swain and Batson convinced the Supreme Court that it could no longer allow these practices.

Courts must not allow the spirit of Batson to be diminished by misguided allegiance to the peremptory challenge. Batson is an attempt to remove discrimination from the jury selection process without eliminating the peremptory challenge. The balance is delicate, but Batson's movement is towards the eradication of discrimination and away from a truly "peremptory" challenge. The post-Batson peremptory is forever changed; allowing ex parte, in camera hearings serves to limit that change and the rights it was intended to protect.

Courts should not read Batson as mandating a procedure, since it did not, but should go beyond Batson and require both the presence and participation of the defendant at the Batson determination unless there is a compelling reason for an in camera hearing. This procedure helps to secure the rights of defendants, the excluded

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jurors, [FN117] and the community [FN118] and provides both fairness and the appearance of fairness, fundamental values in the American criminal justice system.

[FN1]. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[FN2]. 476 U.S. 79 (1986).

[FN3]. After the group of prospective jurors has been assembled, each side is allowed an unlimited number of "challenges for cause," which are made on a "narrowly specified, provable, and legally cognizable basis of partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965). In addition, each side is allowed a specified number of peremptory challenges. These are made "without a reason stated, without inquiry and without being subject to the court's control." Id.; see J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-75 (1977). Peremptory challenges are not a constitutional right. Batson, 476 U.S. at 91; Swain, 380 U.S. at 219.

[FN4]. The Court based its decision in Batson on the equal protection clause of the Fourteenth Amendment rather than on the Sixth Amendment right to trial by an impartial jury. Prior to Batson, two federal circuits had utilized the Sixth Amendment as the basis for prohibiting a prosecutor's discriminatory use of peremptory challenges to sidestep the almost impossible burden that Swain v. Alabama imposed on a defendant. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001, aff'd on reconsideration, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated, 478 U.S. 1001 (1986). Prior to Batson, five state courts used state constitutional equivalents to the Sixth Amendment to reach the same result. People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Riley v. State, 496 A.2d 997 (Del. 1985); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980). The Supreme Court has granted certiorari in a case raising the question whether the fair cross-section requirement of the Sixth Amendment prohibits the prosecution's racially discriminatory use of peremptory challenges, specifically in the context of a white defendant objecting to the removal of black jurors. Holland v. Illinois, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), cert. granted, 109 S.Ct. 1309 (1989). The Court in the context of "death qualification" for jurors has stated that "an extension of the fair-cross- section requirement to petit juries would be unworkable and unsound ...." Lockhart v. McCree, 476 U.S. 162, 174 (1986). See infra text accompanying notes 82-87.

[FN5]. 380 U.S. 202 (1965).

[FN6]. Batson, 476 U.S. at 92.

[FN7]. Id. at 92-93.

[FN8]. Relying on this language, the Third Circuit held that Batson also applies to white defendants who claim that the prosecutor is purposefully removing white venirepersons from the jury. Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989).

[FN9]. Batson, 476 U.S. at 96.

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[FN10]. In Gomez v. United States, 109 S. Ct. 2237 (1989), the Supreme Court held that the Federal Magistrates Act, 28 U.S.C. § 636(b)(3) (1982), does not authorize federal magistrates to conduct voir dire.

[FN11]. Batson, 476 U.S. at 96-97.

[FN12]. Id. at 97-98.

[FN13]. Id. at 98.

[FN14]. For an analysis of many of the unanswered Batson issues, see Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153, 163-211 (1989). Alschuler identifies seven questions Batson left in its wake: (1) What constitutes prima facie proof of discriminatory purpose? Compare State v. Vincent, 755 S.W.2d 400, 401-03 (Mo. Ct. App. 1988) (prosecutor's use of all peremptories to strike blacks does not spoil jury that includes substantial number of blacks) with Stanley v. State, 313 Md. 50, 72-75, 542 A.2d 1267, 1278-79 (1988) (prima facie case made when prosecutor used eight of ten challenges against blacks even though three blacks remained on jury). (2) What qualifies as a racially neutral explanation? See Alschuler, supra, at 174 ("Whether the presence of one neutral reason is sufficient, whether the prosecutor must have been wholly uninfluenced by race, or whether the court must probe the prosecutor's psyche deeply enough to determine how he or she would have treated a white juror who exhibited similar characteristics is uncertain."). (3) Should a court remedy improper exclusion by seating the improperly challenged juror or by dismissing the entire panel? (4) Should representation of a targeted group on the jury nullify any attempt to raise a prima facie case of discrimination against that group? This question is related to the first question of what constitutes prima facie proof of discrimination. (5) Is discrimination on nonracial bases allowed? See State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) ("Batson does not extend to gender-based discrimination."); Alschuler, supra, at 183 ("Were Batson limited to cases of racial discrimination, the limitation would be unattractive. Nevertheless, if Batson were extended to discrimination grounded on 'things like race' as well as race itself, there might be little left of the peremptory challenge."). (6) Does a defendant have standing to object to discrimination against prospective jurors of a race other than his own? The Supreme Court will hear arguments this Term on the question whether either the equal protection clause of the Fourteenth Amendment or the Sixth Amendment right to a fair and impartial jury provides a basis for a white defendant to object to the exclusion of a black juror. Holland v. Illinois, 121 Ill. 2d 126, 520 N.E.2d 270 (1987), cert. granted, 109 S. Ct. 1309 (1989). (7) Is racial discrimination in the use of peremptory challenges permissible for defense attorneys? See Goldwasser, Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 HARV. L. REV. 808, 809 (1989) (Batson restrictions on prosecutorial peremptory challenges should not be extended to defendants' use of peremptory challenges). But see Note, Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky, 88 COLUM. L. REV. 355, 365-68 (1988) (discriminatory peremptory challenges by either side should be disallowed).
The number of issues generated by Batson led one commentator to remark: "If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than Batson." Pizzi, Batson v. Kentucky, Curing the Disease but Killing the Patient, 1987 SUP. CT. REV. 97, 155 (1987).

[FN15]. This Note uses the term "defense" to refer to both the defendant and the defense counsel, except where otherwise noted. Section III will discuss the defendant and defense counsel separately. See infra text accompanying notes 45-65.

[FN16]. Gerstein hearings are an example of this procedure: Judges, in the presence of the defendant, conduct a

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non-adversarial hearing to determine probable cause in "information" states that do not provide preliminary hearings. Gerstein v. Pugh, 420 U.S. 103 (1975).
This second option is unlikely to be adopted as a rule for all Batson hearings. Nevertheless, some courts have allowed such a Batson procedure to occur.

[FN17]. Compare United States v. Tucker, 836 F.2d 334, 338-40 (7th Cir. 1988), cert. denied, 109 S. Ct. 3154 (1989) and United States v. Davis, 809 F.2d 1194, 1200-02 (6th Cir.), cert. denied, 483 U.S. 1007-08 (1987) with United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir.), cert. denied, 109 S. Ct. 1764 (1989) and United States v. Garrison, 849 F.2d 103, 106-07 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988) and United States v. Thompson, 827 F.2d 1254, 1257-61 (9th Cir. 1987).

[FN18]. But see Powell v. State, 187 Ga. App. 878, 882, 372 S.E.2d 234, 238 (Ct. App. 1988) (Pope, J., concurring specially) (defense should be allowed to cross-examine prosecutor at Batson hearing).

[FN19]. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

[FN20]. Id. at 99-100 n.24.

[FN21]. Id. at 99 n.24.

[FN22]. "The prosecutor ... must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." Id. at 98 (footnotes omitted).

[FN23]. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the most important Title VII case cited, the Court adopted a three- step procedure that would apply in the following way to Batson hearings. First, the defendant has to prove by a preponderance of the evidence a prima facie case of discrimination; second, the prosecutor has to articulate a legitimate, nondiscriminatory reason for his challenges; finally, the defendant must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the prosecutor were not true.

[FN24]. Batson, 476 U.S. at 94 n.18 (citations omitted).

[FN25]. See Stanley v. State, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988); State v. Antwine, 743 S.W.2d 51, 63 (Mo. 1987) (en banc).

[FN26]. See United States v. Davis, 809 F.2d 1194, 1201 (6th Cir.) (Batson "has [not] fashioned any procedural guidelines outside those articulating burdens of proof and persuasion ...."), cert. denied, 483 U.S. 1007-08 (1987).

[FN27]. 809 F.2d 1194 (6th Cir.), cert. denied, 483 U.S. 1007-08 (1987).

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[FN28]. "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a).

[FN29]. Davis, 809 F.2d at 1200.

[FN30]. 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001, aff'd on reconsideration, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987). Booker was one of the two federal cases prior to Batson that held that the Sixth Amendment applied to a prosecutor's exercise of peremptory challenges. See supra note 4.

[FN31]. 291 U.S. 97 (1934).

[FN32]. This approach ignores the additional information defense rebuttal could bring to a Batson hearing after the prosecutor has given his reasons, such as showing the prosecutor's reasons to be pretextual by, for example, pointing out non-black venirepersons who possess characteristics similar to those of the black venirepersons who were challenged. The court's broad language underscored its view on the trial court's discretion: After the defense has established a prima facie case of racial motivation, defense "participation was no longer necessary for the district court to make its determination. At that point, the district court was entitled to hear from the Government under whatever circumstances the district court felt appropriate." Davis, 809 F.2d at 1202 (emphasis added).

[FN33]. 836 F.2d 334 (7th Cir. 1988), cert. denied, 109 S. Ct. 3154 (1989).

[FN34]. Despite its conclusion, the court stated that it believed adversarial hearings to be the "appropriate method for handling most Batson- type disputes." Id. at 340. It did not, however, require them.

[FN35]. Id.

[FN36]. 827 F.2d 1254 (9th Cir. 1987).

[FN37]. The prosecutor's statements included: "She looked really sullen, and she just, I mean it was like a glare. I felt very uncomfortable with her, and I wouldn't put her on"; "I thought he lived in the neighborhood-he's black, too, and he was dressed casually, and I thought he might identify with him too much so I excused him." Id. at 1256 n.1.

[FN38]. Id. at 1256.

[FN39]. Id. at 1259-60. In addition, the court considered the argument that an adversary hearing is inappropriate because the government lawyer may be required to reveal confidential matters of tactics and strategy, potentially impairing his ability to prosecute the case. Although the court found this reason not to be a sufficient justification in that particular case, it did adopt an exception to its general requirement of open, adversarial proceedings. The court held that a judge can examine the prosecutor's reasons ex parte and in camera if the prosecutor claims that the reasons relate to case strategy and the judge agrees after a separate in camera hearing. The Ninth Circuit affirmed

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this exception to the adversarial requirement in United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1987).

[FN40]. 849 F.2d 103 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988).

[FN41]. Id. at 106.

[FN42]. 867 F.2d 436, 441 (8th Cir.), cert. denied, 109 S. Ct. 1764 (1989).

[FN43]. See Stanley v. State, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988) ("We read Batson as allowing rebuttal as per the Title VII cases."); State v. Antwine, 743 S.W.2d 51, 63 (Mo. 1987) (en banc) ("Batson intimates that it should be read side-by-side with the Supreme Court's Title VII cases.").

[FN44]. See Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987) (defense can offer evidence that reasons are sham or pretext); Gray v. State, 317 Md. 250, 258, 562 A.2d 1278, 1282 (1989) (trial judge should offer defense opportunity to rebut prosecutor's explanations); Williams v. State, 507 So. 2d 50, 53 (Miss. 1987) (defense afforded opportunity to challenge and rebut explanations); State v. Jackson, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988) (defense allowed to offer evidence to strengthen case after prosecution made showing).

[FN45]. "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[FN46]. Illinois v. Allen, 397 U.S. 337, 338 (1970); see also Diaz v. United States, 223 U.S. 442, 453-55 (1912) (defendant in felony case has right to attend all stages of trial from impaneling of jury to delivery of verdict).

[FN47]. Pointer v. Texas, 380 U.S. 400, 403-06 (1965).

[FN48]. In a Batson hearing the only "witness" against the defendant is the prosecuting attorney, and the "evidence" is not of the type that will be used against the defendant at trial.

[FN49]. United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam). The due process clause of the Fifth Amendment states, "No person shall ... be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The equivalent clause of the Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The Court has also held that the defendant's right to be present at all critical stages of the trial is a "fundamental right." Rushen v. Spain, 464 U.S. 114, 117 (1983).

[FN50]. "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a). When Rule 43 was enacted, it was intended to be a statement of the law existing at the time. Fed. R. Crim. P. 43 advisory committee's notes, ¶ 1. The Supreme Court has not subsequently defined the contours of Rule 43 relative to the Constitution. Some courts have stated that Rule 43 extends beyond the Constitution, including the protections afforded by the common law right of

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presence, as well as the Sixth Amendment confrontation clause and the due process guarantee of the Fifth and Fourteenth Amendments. United States v. Gordon, 829 F.2d 119, 123 (D.C. Cir. 1987); United States v. Alessandrello, 637 F.2d 131, 138 (3d Cir. 1980); cert. denied, 451 U.S. 949 (1981); United States v. Brown, 571 F.2d 980, 986 & n.5 (6th Cir. 1978). Contra United States v. Tortora, 464 F.2d 1202, 1210 n.6 (2d Cir. 1972) (rule no more than restatement of defendant's constitutional rights). The minimum guarantee of Rule 43 extends at least as far as the Constitution in requiring the defendant's presence at a Batson hearing. Therefore, an appellate court's inquiry into the defendant's right to be present at a Batson hearing should not end with the Constitution, especially because the language of the Rule explicitly states that the defendant should be present at the "impaneling of the jury." But see United States v. Davis, 809 F.2d 1194, 1202 (6th Cir.) ("unpersuaded" that Rule 43 requires defendant's presence at Batson hearing), cert. denied, 483 U.S. 1007-08 (1987).

[FN51]. Lewis v. United States, 146 U.S. 370, 372 (1892). The trial starts "at least from the time when the work of empanelling the jury begins." Hopt v. Utah, 110 U.S. 574, 578 (1884).

[FN52]. 470 U.S. 522 (1985) (per curiam). In Gagnon a juror expressed concern after noticing that defendant Gagnon was drawing sketches of the jurors. The judge, juror, and Gagnon's counsel conferred in camera to determine the juror's impartiality. The Supreme Court ruled that Gagnon's absence was not a due process violation, stating that the defendant could neither have contributed to nor gained from being present at the conference. In fact, the Court said, the defendant's presence could have been counterproductive in trying to determine whether the juror's concerns had affected impartiality. The Court concluded that the defendant's presence was not required to ensure either fundamental fairness or a reasonable opportunity to construct a defense. Id. at 527. The Court also held that the defendant waived any rights he may have had by failing to object at the time of the conference. Id. at 529.

[FN53]. Id. at 526.

[FN54]. 482 U.S. 730 (1987).

[FN55]. Id. at 745. Like Gagnon and Stincer, the typical presence case arises on appeal when a defendant raises a claim that he was not present a proceeding at which the defendant's attorney was present. Courts analyze such a claim by looking at the stage of the criminal process, by asking whether the defendant was represented by counsel at the proceeding, and, finally, by inquiring whether the defendant's interests were adequately protected by the defense counsel. For example, in United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987), the D.C. Circuit held that the defendant had a statutory right under Rule 43(a) of the Federal Rules of Criminal Procedure and a constitutional right to be present at voir dire despite the defense counsel's presence. Other cases have held that the defendant's interests were protected by the presence of defense counsel. For example, in United States v. Boone, 759 F.2d 345 (4th Cir.), cert. denied, 474 U.S. 861 (1985), the Fourth Circuit held that the absence of the defendant from an in camera conference concerning the dismissal of a juror was not a constitutional violation so long as counsel for the defendant was present. Courts do this under the rubric of a harmless error analysis: If the defense counsel's representation is adequate and thus the defendant's absence does not affect the outcome, the absence of the defendant is treated as irrelevant. Rule 52(a) of the Federal Rules of Criminal Procedure states: "Harmless Error: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a). In Chapman v. California, 386 U.S. 18 (1967), the Court stated that the purpose of the harmless error rule was to avoid "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Id. at 22.
When a court uses harmless error analysis and asks whether the defendant's interests were adequately represented by defense counsel, the court implies that the stage of the trial is one in which the defendant has a right to be present. If the stage of the trial were not one in which the defendant has the right to be present, then the court

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would simply dispose of the case. Therefore, Gagnon and Stincer, and other cases that address a defendant's right to be present by looking at whether the defendant's interests were adequately represented by defense counsel, suggest that trial courts should allow defendants to be present at those stages. On appeal they may be analyzed under a harmless error standard if the defendant was not present, but the existence of this safety net on appeal does not mean that trial judges should not allow defense presence at the stage in question.

[FN56]. United States v. Bascaro, 742 F.2d 1335, 1349 (11th Cir. 1984), cert. denied sub nom. Hobson v. United States, 472 U.S. 1017 (1985); United States v. Chrisco, 493 F.2d 232, 237 (8th Cir. 1974). For an example of the Supreme Court's acceptance of the jury selection process as a critical stage of the criminal proceeding, see Gomez v. United States, 109 S. Ct. 2237 (1989) (Federal Magistrates Act does not authorize magistrates to conduct voir dire). The Court in Gomez cited Lewis v. United States, 146 U.S. 370, 374 (1892), in "affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present." Gomez, 109 S. Ct. at 2246.

[FN57]. Gagnon, 470 U.S. at 520.

[FN58]. See, e.g., United States v. Tucker, 836 F.2d 334, 337 (7th Cir. 1988) ("All the defendants objected to an ex parte procedure."), cert. denied, 109 S. Ct. 3154 (1989).

[FN59]. Strauder v. West Virginia, 100 U.S. 303 (1880); see also Batson v. Kentucky, 476 U.S. 79, 84 n.3 (1986).

[FN60]. An eleven-county study in New York, a jurisdiction that retains attorney-conducted voir dire, discovered that voir dire took longer than the trial itself in 20% of 462 cases studied by the New York Governor's Commission on Administation of Justice. The average voir dire took 12.7 hours, which was 40f the time of the entire case. Chambers, Who Should Pick Jurors, Attorneys or the Judge, N.Y. Times, June 13, 1983, at B4, col. 3.

[FN61]. 349 U.S. 133 (1955).

[FN62]. Id. at 166.

[FN63]. Peters v. Kiff, 407 U.S. 493, 502 (1972) (opinion of Marshall, J.).

[FN64]. See United States v. Bailleaux, 685 F.2d 1105, 1114-15 (9th Cir. 1982) (court should examine in camera whether evidence is relevant for discovery).

[FN65]. See United States v. Sharp, 778 F.2d 1182, 1187 (6th Cir. 1985) (court must conduct in camera interview of informant before disclosing identity), cert. denied, 475 U.S. 1030 (1986).

[FN66]. See State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987):
The trial judge's task is extremely difficult. One doubts that a prosecutor will admit that his decision to challenge a particular member of the venire was based upon race. ... Batson thus requires the trial judge to embrace a participatory role in voir dire, noting the subtle nuance of both verbal and nonverbal communication

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from each member of the venire and from the prosecutor himself.

[FN67]. The Supreme Court adopted the discriminatory purpose standard for equal protection claims in Washington v. Davis, 426 U.S. 229 (1976). Batson may represent a step away from Washington v. Davis, because it can shift the burden of proof to the prosecutor by allowing evidence of result-a "pattern of strikes" during voir dire-to show purpose. Batson v. Kentucky, 476 U.S. 79, 96-97 (1986).

[FN68]. This method seems to be the best way to show discrimination after the prosecutor has proffered her reasons, since reasons given to challenge black venirepersons may also apply to white venirepersons who were not challenged. See, e.g., Floyd v. State, 511 So. 2d 762, 765 (Fla. Dist. Ct. App. 1987) (disparate treatment of black and white venirepersons "strong evidence [of] subterfuge to avoid admitting discriminatory use of the peremptory challenge"); Gamble v. State, 257 Ga. 325, 330, 357 S.E.2d 792, 796 (1987) (trial court's finding clearly erroneous because, among other reasons, "similarly situated white jurors were not challenged").

[FN69]. Batson, 476 U.S. at 106 (Marshall, J., concurring).

[FN70]. Id.

[FN71]. Id.

[FN72]. Id. at 107.

[FN73]. Batson, 476 U.S. at 99 n.22.

[FN74]. Id.

[FN75]. Swain v. Alabama, 380 U.S. 202, 224 (1965).

[FN76]. See Batson, 476 U.S. at 101 (White, J., concurring); Batson, 476 U.S. at 103 (Marshall, J., concurring).

[FN77]. Professor Lawrence has recently indicated how racial discrimination or stereotyping can occur even among white persons apparently strongly opposed to racial discrimination. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Lawrence used examples from modern life to illustrate his point that stereotypes may be present in persons not thought to be racists. Howard Cosell, a consistent champion of the rights of black athletes, referred to a professional football receiver as a "little monkey" on national television. Id. at 339-40. Nancy Reagan spoke to a group of supporters and remarked that she wished her husband could have been present to see all the "beautiful white people." Id. at 340. Lawrence concluded that "[r]acism continues to be aided and abetted by self-conscious bigots and well-meaning liberals alike." Id. at 387.

[FN78]. See id. at 322 ("We do not recognize the ways in which our cultural experience has influenced our beliefs

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about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").

[FN79]. This of course raises the question of what constitutes a prima facie case. Some courts have used a statistical basis for their decision, stating that a prima facie case is not raised when the jury includes a substantial number of blacks, while others have probed more deeply into the prosecution's actions. Compare United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) (no remand since jury accepted by prosecution included two of four blacks in original venire) with Stanley v. State, 313 Md. 50, 72-75, 542 A.2d 1267, 1278-79 (1988) (prima facie case made even though three blacks remained on jury). See generally Alschuler, supra note 14, at 170-73.

[FN80]. Batson, 476 U.S. at 96-97.

[FN81]. The American criminal justice system is based upon adversarial argument. Arguing the inferences to be drawn from all the testimony and pointing out the weaknesses in the other side's position helps to sharpen and clarify the issues for the factfinder. Herring v. New York, 422 U.S. 853, 862 (1975).
Typically, the judge renders decision after hearing the arguments of both sides. Placing the judge in an adversarial position, as a closed Batson hearing necessarily does, forces him away from the normal judicial role of objective arbiter. Therefore, to avoid compromising the judicial function and the judge's role as detached decisionmaker, Batson hearings should involve the full arguments of the attorneys and thus include opportunity for defense rebuttal.

[FN82]. Some courts relying on the Sixth Amendment or a state equivalent of the Sixth Amendment did so prior to Batson to overcome the formidable burden of proof under Swain. See, e.g., People v. Wheeler, 22 Cal. 3d 358, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Others have used the Sixth Amendement since Batson to cover a white defendant-black juror situation, since Batson applies only to jurors of the same race as the defendant. See, e.g., Gardner v. State, 157 Ariz. 541, 544-46, 760 P.2d 541, 544-46 (1988); Seubert v. State, 749 S.W.2d 585, 588 (Tex. Ct. App. 1988). For cases holding that Batson does not apply to the white defendant-black juror situation, see United States v. Townsley, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (Batson does not apply to white defendant tried with black defendants); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987) (Batson mandates defendant be of same race as excluded juror). The Court will hear arguments this term in Holland v. Illinois, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), cert. granted, 109 S. Ct. 1309 (1989), to determine if either the equal protection clause of the Fourteenth Amendment or the Sixth Amendment right to trial by an impartial jury covers the white defendant-black juror situation.
Extending the right to a non-discriminatory jury selection process to defendants not of the same race as the juror is a logical extension of Batson. Batson spoke of harm to the excluded juror and the community, as well as to the defendant, when venirepersons are excluded because of race. Batson, 476 U.S. at 87. Therefore, the race of the defendant should not be the only relevant factor. A good example of discrimination against jurors regardless of the defendant's race is contained in a Dallas County District Attorney's Office manual, which stated that prosecutors should not look for "any member of a minority group" when picking jurors. J. VAN DYKE, supra note 3, at 152-53.

[FN83]. See, e.g., Gardner, 157 Ariz. at 546, 760 P.2d at 546; Seubert, 749 S.W.2d at 588.

[FN84]. See, e.g., Commonwealth v. Soares, 377 Mass. 461, 488-89, 387 N.E.2d 499, 516 (using state constitution to prohibit discrimination based on race, sex, color, creed or national origin), cert. denied, 444 U.S. 881 (1979).

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[FN85]. 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001, aff'd on reconsideration, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987).

[FN86]. Id. at 773; see also State v. Gilmore, 103 N.J. 508, 535-36, 511 A.2d 1150, 1164 (1986) (adopting standard similar to Booker in a post- Batson case).

[FN87]. If the Court holds in Holland v. Illinois, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), cert. granted, 109 S. Ct. 1309 (1989), that the Sixth Amendment applies to the petit jury and requires neither that race be the only prohibited basis of discrimination nor that the venireperson in question be of the same cognizable group as the defendant, the Court should dictate a procedure in which the defense is presented an opportunity to rebut the prosecution after the prosecution has presented reasons for its peremptory challenges.

[FN88]. Batson, 476 U.S. at 98 n.21.

[FN89]. Id.

[FN90]. 109 S. Ct. 2180 (1989), aff'g by an equally divided Court No. 68,870 (Texas Crim. App. Oct. 7, 1987) (WESTLAW, State directory, TX-CS database), 1987 WL 906.

[FN91]. Tompkins v. State, No. 68,870 (Tex. Crim. App. Oct. 7, 1987) (WESTLAW, State directory, TX-CS database), 1987 WL 906, at 51. One of the prosecutor's reasons for striking a black postal worker was that the prosecutor did not have "very good luck with postal employees." Id. at 50.

[FN92]. Id. at52.

[FN93]. See Note, Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection, 74 Va. L. Rev. 811, 835- 36 (1988) (use of ex parte, in camera proceedings freezes analysis of Batson claims in their infancy).

[FN94]. 827 F.2d 1254 (9th Cir. 1987).

[FN95]. For a similar argument, see id. at 1259-60; Gray v. State, 317 Md. 250, 258-60, 562 A.2d 1278, 1282-83 (1989).

[FN96]. In his concurrence in Batson, Justice Marshall advocated complete elimination of peremptory challenges because he believed it to be the only way to eliminate discrimination from the jury selection process. Batson, 476 U.S. at 102-08 (Marshall, J., concurring). Elimination of peremptory challenges could occur if those concerned most with removing discrimination and those concerned most with trial speed unite as critics of the continued use of peremptory challenges.

[FN97]. See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.3 (1984 & Supp. 1989).

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[FN98]. It is also possible that defense counsel may use a Batson challenge as a tool of harassment. One commentator almost invites such abuse by suggesting that "[p]roperly used, [Batson] can become an important weapon in the defense arsenal." JURYWORK § 4.07[3] (E. Krauss & B. Bonora eds. 1989). However, since even one challenge against a same-race juror may raise a prima facie case of purposeful discrimination, harassment, in effect, could never be proved. Defense counsel's subjective purpose may be to harass the prosecution as well as to prevent blacks from being excluded from the jury, but the result remains the same: Most same-race peremptory challenges will have to be explained by the prosecutor if the defense objects.

[FN99]. See V. STARR & M. MCCORMICK, JURY SELECTION, AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 39-40 (1985) (judges conduct voir dire alone in 13 states, attorneys are primarily responsible in 18 states, judges and attorneys share in 19 states, 75% of federal judges allow no oral attorney participation).

[FN100]. Batson, 476 U.S. at 102-08 (Marshall, J., concurring); J. VAN DYKE, supra note 3, at 167-69; Note, Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection), 72 CORNELL L. REV. 1026 (1987); Note, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 HARV. C.R.C.L. L. REV. 227 (1986); Note, Due Process Limits on Prosecutorial Peremptory Challenges, 102 HARV. L. REV. 1013 (1989). But see Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 STAN. L. REV. 545, 552 (1975) (approving peremptory challenge because it "avoids trafficking in the core of truth in most common stereotypes").

[FN101]. One commentator has suggested that "[a]rguably Batson's force, if any, will lie in the deterrent effect it will have upon prosecutors." Wilson, Batson v. Kentucky: Can the "New" Peremptory Challenge Survive the Resurrection of Strauder v. West Virginia?, 20 AKRON L. REV. 355, 364 (1986).

[FN102]. The Ninth Circuit addressed such a claim in United States v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987).

[FN103]. Id.

[FN104]. In that situation the trial judge is to conduct an initial ex parte, in camera hearing to hear the relationship to case strategy; if the judge concludes that revealing the prosecutor's motives to the defense may be prejudicial to the prosecution's case, then the trial court judge has the discretion to hear the reasons for the peremptory challenges in an ex parte, in camera hearing.

[FN105]. Some reasons that courts have allowed prosecutors to use are of questionable racial neutrality. See, e.g., United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987) (one venireperson was young, single, and unemployed while defendant was young, separated and experiencing financial hardship, another venireperson avoided eye contact, and third venireperson was divorced and had low income); United States v. Mathews, 803 F.2d 325, 331 (7th Cir. 1986) (one venireperson appeared hostile to prosecutor). While these reasons may seem acceptable, allowing such reasons leaves an easy out for prosecutors determined to obtain the most favorable jury possible: merely "uncovering" similar reasons to use in future trials. Since the substantive protection of Batson can be evaded, a strong procedural framework such as the one advocated in this Note is necessary if discrimination is to be eliminated, or at least reduced.

[FN106]. United States v. Tucker, 836 F.2d 334, 340 (7th Cir), cert. denied, 109 S. Ct. 3154 (1989).

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[FN107]. On the contrary, a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

[FN108]. The debate over criminal discovery illustrates the demise, over time, of that view of the criminal process. See LAFAVE & ISRAEL, supra note 97, § 19.3, at 474-82. In other contexts, the prosecution has been required to disclose evidence to the defense. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963) (prosecution must disclose material evidence that is favorable to defense); Roviaro v. United States, 353 U.S. 53 (1957) (informer's privilege must give way where disclosure of identity, or of contents of communication, is relevant and helpful to defense of accused, or is essential to fair determination of cause).

[FN109]. Williams v. Florida, 399 U.S. 78, 82 (1970); see also Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 WASH. U.L.Q. 279 (1963) (arguing for discovery in criminal cases).

[FN110]. See United States v. Garrison, 849 F.2d 103, 106 (4th Cir.) (example of compelling exception is government investigation of potential juror's involvement in other crimes), cert. denied, 109 S. Ct. 566 (1988); Gray v. State, 317 Md. 250, 257-58, 562 A.2d 1278, 1282 (1989).

[FN111]. A variation on the question of what procedure to use for hearing a prosecutor's reasons is whether a prosecutor's written submissions that are in addition to or in lieu of her arguments in open court should be subject to the defendant's examination. Two panels of the Fourth Circuit have recently addressed this issue and upheld ex parte, in camera examinations of the prosecutorial papers. United States v. Tindle, 860 F.2d 125 (4th Cir. 1988), cert. denied, 109 S. Ct. 3176 (1989); United States v. Garrison, 849 F.2d 103 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988).
These decisions are incorrect. Although courts may ask for written arguments, they should not compel submission of the prosecutor's notes. When the prosecutor's notes are voluntarily submitted or when written arguments are made to the court, the judge should treat the prosecutor's writing in the same way they handle a prosecutor's request for an ex parte, in camera oral hearing: The written submission, whether it is notes from the jury selection process or a written argument, should be disclosed to the defense except for a "compelling reason." To prevent surprise and to balance the scales, trial courts should inform prosecutors of this rule before any writings are submitted.

[FN112]. One problem with requiring or even conducting a full evidentiary hearing is that in such a hearing the prosecutor must act as both an advocate and a witness. This dual role may appear to conflict with Rule 3.7 of the Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983) states:
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.
This concern is misguided in the context of a Batson hearing because Rule 3.7 is directed towards protecting the rights of the opposing party. The comment to the Rule states: "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment (1983). In a Batson hearing the defendant is the party making the request for a full-scale hearing. Therefore, a court should not deny a defendant's motion to put the prosecutor on the stand solely because of a potential violation of Rule 3.7. Additionally, courts should not be constrained from using this procedure sua sponte, unless the defendant objects.

[FN113]. United States v. Garrison, 849 F.2d 103 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988); Powell v. State,

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187 Ga. App. 878, 372 S.E.2d 238 (Ct. App. 1988); Gray v. State, 317 Md. 250, 562 A.2d 1278 (1989); State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988).

[FN114]. Jackson, 322 N.C. at 258, 368 S.E.2d at 842; see also Garrison, 849 F.2d at 106 ("Although a district court could conduct such a hearingif it believed circumstance warranted it, Batson does not require this intrusion on the trial proceedings."), cert. denied, 109 S. Ct. 566 (1988).

[FN115]. See Jackson, 322 N.C. at 258, 368 S.E.2d at 842 ("presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination").

[FN116]. In several cases involving Batson hearings on remand, the trial court has conducted a full evidentiary hearing with sworn testimony by the prosecutor and cross-examination by the defense. See Shelton v. State, 521 So. 2d 1035 (Ala. Crim. App. 1987); Chew v. State, 317 Md. 233, 562 A.2d 1270 (1989); see also Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987) (prosecutor testified at hearing).
In Gray v. State, 317 Md. 250, 562 A.2d 1278 (1989), the court held that a trial judge's refusal in a Batson remand hearing to require the prosecutor to testify under oath or to permit cross-examination was not an abuse of discretion. When an appellate court is confronted with an appeal after a remand hearing, the decision in Gray is appropriate, so long as the court is satisfied with the procedure utilized by the trial court. However, when an appellate court initially remands a case to the trial court, it should explicitly require a full evidentiary hearing.

[FN117]. "[T]he Court [has] recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate [s] against the excluded juror." Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[FN118]. Id. (discriminatory jury selection "undermine[s] public confidence in the fairness of our system of justice" and harms entire community).

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86 GEOLJ 2133
(Cite as: 86 Geo. L.J. 2133)

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Georgetown Law Journal
July, 1998

Symposium: The Independent Counsel Act: From Watergate to Whitewater and Beyond Contribution

*2133 THE PRESIDENT AND THE INDEPENDENT COUNSEL

Brett M. Kavanaugh [FNa1]

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TABLE OF CONTENTS

INTRODUCTION 2134

I. BACKGROUND 2138

A. THE CURRENT LEGAL SCHEME 2138

1. The Policy Justification for a Special Counsel 2138

2. Two Statutory Mechanisms for Appointment of Special Counsels 2139

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY? 2140

1. An Illusory Debate 2140

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors 2142

3. Outside Federal Prosecutors are Necessary in Some Cases 2145

II. IMPROVING THE SYSTEM 2145

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A. APPOINTMENT AND REMOVAL OF THE SPECIAL COUNSEL 2146

1. Appointment of the Special Counsel 2146

2. Removal of the Special Counsel 2151

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED 2152

C. JURISDICTION 2153

D. REPORTS 2155

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT 2157

F. THE PRESIDENT'S PRIVILEGES 2161

1. Non-Constitutional Executive Privileges 2163

2. Constitutionally Based Executive Privileges 2166

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege 2172

4. The Policy of Executive Privileges 2173

CONCLUSION 2177

*2134 INTRODUCTION

Officials in the executive branch, including the President and the Attorney General, have an incentive not to find criminal wrongdoing on the part of high-level executive branch officials. A finding that such officials committed criminal wrongdoing has a negative, sometimes debilitating, impact on the President's public approval and his credibility with Congress--and thus ultimately redounds to the detriment of his political party and the social, economic, military, and diplomatic policies that the President, the Attorney General, and other high-ranking members of the Justice Department champion. [FN1] For those reasons, the criminal investigation and prosecution of executive branch officials by the Justice Department poses an actual conflict of interest, as well as the appearance thereof.

In addition, when the law of executive privilege is unclear or involves the application of a balancing test, the Attorney General labors under a further conflict of interest. When the Justice Department seeks access to internal executive branch communications, the Attorney General simultaneously must perform two potentially contradictory functions. First, she must act as the chief legal advisor to the executive branch (a role in which she generally would seek to protect the confidentiality of executive branch communications). Second, she must serve as a prosecutor (a role in which she generally would seek to cabin privileges so as to secure relevant evidence). As former Watergate prosecutor Archibald Cox recognized and as Attorney General Reno's role in the privilege disputes between the President and the Whitewater Independent Counsel has revealed, those dual roles place the Attorney General in a difficult, if not impossible, position in determining when the President's assertion of privileges should be challenged. [FN2] This conflict alone necessitates an outside prosecutor *2135 (unless the Attorney General

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announces at the outset of the investigation that she will not accede to any executive privilege claim other than national security). Otherwise, the public cannot be sure that the Attorney General has not improperly sacrificed law enforcement to the President's assertion of executive privilege.

The conflicts of interest under which the Attorney General labors in the investigation and prosecution of executive branch officials, particularly high- level executive branch officials, historically have necessitated a statutory mechanism for the appointment of some kind of outside prosecutor for certain sensitive investigations and cases. As the Watergate Special Prosecution Task Force stated in its report, "the Justice Department has difficulty investigating and prosecuting high officials," and "an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." [FN3] This article agrees that some mechanism for the appointment of an outside prosecutor is necessary in some cases.

Nonetheless, Congress can improve the current "independent counsel" system, which was established by the Ethics in Government Act of 1978. [FN4] Several problems have been identified with the current system, including the following: (1) the appointment mechanism, by attempting to specify situations where an independent counsel is necessary, requires the President and Attorney General to seek appointment of an independent counsel in cases where it is not warranted and permits the President and Attorney General to avoid appointment of an independent counsel in cases where it is warranted; (2) the appointment and removal provisions (which do not involve the President) are contrary to our constitutional system of separation of powers and, both in theory and perception, lead to unaccountable independent counsels; (3) the investigations last too long; (4) an independent counsel can investigate matters beyond the initial grant of jurisdiction; and (5) independent counsel investigations have become "politicized" (a commonly used but rarely defined term).

This article suggests that those problems--to the extent they are unique to an independent counsel and do not apply to federal white-collar investigations more generally--result primarily from the uneasy relationship between the President and the independent counsel that the independent counsel statute creates. This article advances several proposals that would clarify the President's role in independent counsel investigations, thereby reducing the number of investigations and expediting those that are necessary. Each of these proposals stands on its own; the adoption of any one proposal does not necessitate or depend upon the adoption of any other.

First, Congress should change the provision for appointing an independent ***2136** counsel. A "special counsel" [FN5] should be appointed in the manner constitutionally mandated for the appointment of other high-level executive branch officials: nomination by the President and confirmation by the Senate. Currently, an independent counsel is appointed by a three-judge panel selected by the Chief Justice of the United States. Although this unusual procedure survived constitutional scrutiny in Morrison v. Olson, [FN6] it is unwise to assign a small panel of federal judges to select the special counsel because the prosecutor, no matter how qualified, will lack the accountability and the instant credibility that comes from presidential appointment and Senate confirmation. Appointment by the President, together with confirmation by the Senate, would provide greater public credibility and moral authority to the independent counsel and would dramatically diminish the ability of a President and his surrogates, both in Congress and elsewhere, to attack the independent counsel as "politically motivated." In addition, any supposed concerns about "accountability" would be alleviated if the independent counsel were appointed (and removable) in the same manner as other high-level executive branch officials.

Second, the President should have absolute discretion (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel. The current statute, by attempting to specify in minute detail the precise situations requiring an independent counsel, is largely overinclusive, thus producing too many investigations. At the same time, the statute is underinclusive because it allows an Attorney General to use the law as a shield in situations that by any ordinary measure would warrant the appointment of a special counsel.

For example, Attorney General Janet Reno appointed an independent counsel to investigate whether Secretary of Agriculture Michael Espy accepted illegal gratuities--a very important investigation, but one that Congress and the people might have entrusted to the Justice Department. [FN7] On the other hand, the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the

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independent counsel statute's triggering mechanism. That approach ignores the broader question that should be the issue (and historically has been the issue): At the end of the day, will the American people and the Congress have confidence in the credibility of the Justice Department investigation if it culminates in a no-prosecution decision against those high-level executive branch officials under investigation?

Third, with respect to an independent counsel's jurisdiction, Congress should ***2137** codify and expand upon the Eighth Circuit's 1996 decision in United States v. Tucker [FN8] to ensure that the President and the Attorney General, rather than any court, define and monitor the independent counsel's jurisdiction. Such a clarification would place sole responsibility for the independent counsel's jurisdiction on these publicly accountable officials. Congress will exercise sufficient oversight to deter the President and Attorney General from illegitimately restricting the independent counsel's jurisdiction. This change would greatly expedite special counsel investigations. Jurisdictional challenges have caused severe delays. For example, a specious challenge to the Whitewater Independent Counsel's jurisdiction delayed a trial of Arkansas Governor Jim Guy Tucker for over two and one-half years before he and his codefendants finally pled guilty.

Fourth, Congress should eliminate the statutory reporting requirement. The reporting requirement adds great time and expense to independent counsel investigations, and the reports are inevitably viewed as political documents. The ordinary rules of prosecutorial secrecy should apply to evidence gathered during an independent counsel investigation, except that the special counsel should be authorized to provide the President and the House Judiciary Committee with a classified report of any evidence regarding possible misconduct by current officers of the executive branch (including the President) that might dictate removal by the President or impeachment by the Congress.

Fifth, Congress can answer a question that the Constitution does not explicitly address, but that can greatly influence independent counsel investigations: Is the President of the United States subject to criminal indictment while he serves in office? Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate. Removal of the President is a process inextricably intertwined with its seismic political effects. Any investigation that might conceivably result in the removal of the President cannot be separated from the dramatic and drastic consequences that would ensue. This threat inevitably causes the President to treat the special counsel as a dangerous adversary instead of as a federal prosecutor seeking to root out criminality.

Whether the Constitution allows indictment of a sitting President is debatable (thus, Congress would not have the authority to establish definitively that a sitting President is subject to indictment). Removing that uncertainty by providing that the President is not subject to indictment would expedite investigations in which the President is involved (Watergate, Iran- Contra, and Whitewater) and would ensure that the ultimate judgment on the President's conduct (inevitably wrapped up in its political effects) is made where all great national political judgments ultimately must be made--in the Congress of the United States.

Sixth, Congress should codify the current law of executive privilege available in criminal litigation to the effect that the President may not maintain any executive privilege, other than a national security privilege, in response to a ***2138** grand jury or criminal trial subpoena sought by the United States. That rule strikes the appropriate balance between the need of federal law enforcement to conduct a thorough investigation and the need of the President for confidential discussions and advice. Codifying the law of executive privilege in this manner would expedite investigations of executive branch officials and ensure that such investigations are thorough and effective (at least, unless the courts were to reverse course and fashion a broader privilege as a matter of constitutional law).

These six proposals together would reduce the number of special counsel investigations and expedite those investigations that do occur. The proposals would enhance the public credibility of special counsel investigations, reduce the inherent tension between the President and the special counsel, and better enable a special counsel to conduct a thorough and effective law enforcement investigation of executive branch wrongdoing. Finally, the changes would ensure that a specific entity (Congress) is directly and solely responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether that conduct warrants a public

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sanction.

I. BACKGROUND

A. THE CURRENT LEGAL SCHEME

1. The Policy Justification for a Special Counsel

The theory behind the appointment of an outside federal prosecutor is that the Justice Department cannot be trusted to investigate an executive branch official as thoroughly as the Justice Department would investigate some other similarly situated person. [FN9] Regardless whether the Justice Department is actually capable of putting political self-interest aside and conducting a thorough investigation, the problem remains. In cases in which charges are not brought, Congress and the public will question whether the investigation has been as thorough and aggressive as it would have been absent the political incentive not to indict. There is no real or meaningful check to deter an under-aggressive or white-washed Justice Department investigation of executive branch officials or their associates.

On the flip side, however, contrary to the claims of some critics, there is a real check against an over-aggressive special prosecutor--the same check that deters an over-aggressive Justice Department prosecutor. It is the jury. As Professor Katy Harriger correctly noted:
Prosecutors, both independent and regular, must have sufficient evidence to ***2139** convince a jury that a crime has been committed. One clear constraint on independent counsel ... is one that is on all prosecutors. They must ask themselves whether their case will pass the "smell test" in front of a jury. Will they find criminal action beyond a reasonable doubt? There is virtually no incentive for any prosecutor, independent or otherwise, to pursue a criminal case that fails that test. To argue then that there are no checks on the independent counsel is, to say the least, disingenuous for it ignores the fact that independent counsel do not operate outside the established legal system in their pursuit of criminal cases. They cannot escape the requirement that their case against an individual be reviewed by an impartial judge and a jury of his peers. [FN10]

Indeed, an acquittal is far more damaging for an independent counsel (whose record will be judged on, at most, a handful of prosecuted cases) than for the Justice Department prosecutor who will handle dozens if not hundreds of cases in his career and for whom one acquittal is ordinarily not a significant blemish.

2. Two Statutory Mechanisms for Appointment of Special Counsels

Commentators do not always appreciate that current federal law provides two different mechanisms for appointment of special counsel to investigate and prosecute a particular matter. First, under the discretionary "special attorney" provisions, the Attorney General may directly select a special attorney to conduct a particular investigation where she deems it appropriate. [FN11] Consistent with this authority, Attorneys General throughout our history have looked outside the Justice Department to appoint special attorneys to handle particular high-profile or politically charged cases. [FN12] For example, the Watergate special prosecutors and the first Whitewater outside counsel were appointed directly by the Attorney General under this authority.

Second, under §§ 591-599 of Title 28, the mandatory "independent counsel" statute, Congress has specified a number of covered persons as to whom the Attorney General must seek the appointment of an independent counsel if, after a preliminary investigation, she finds "reasonable grounds to believe that further investigation is warranted." [FN13] The Attorney General does not select an independent counsel herself, but instead applies to a panel of three judges (the "Special Division") preselected by the Chief Justice of the United States. [FN14] The panel of judges then selects an independent counsel. [FN15] The independent counsel's ***2140** jurisdiction is technically defined by the Special Division, [FN16] although the Special Division defines it in the manner requested by the Attorney General. [FN17] The independent counsel is to conduct all investigations and

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prosecutions "in the name of the United States," [FN18] and is to conclude his investigation by notifying the Special Division and filing a report on "the work of the independent counsel." [FN19] The independent counsel may not expand his jurisdiction to cover unrelated matters except upon application to the Attorney General and approval by the Special Division. [FN20] Pursuant to this statute, nearly twenty independent counsel have served since 1978, most notably in the Iran-Contra and Whitewater matters.

There are two important differences between the discretionary "special attorney" statute and the mandatory "independent counsel" statute. First, the special attorney is appointed by the Attorney General, not by a panel of judges. (Neither system involves the Senate.) Second, the Attorney General possesses unfettered discretion whether to seek a special attorney for a particular case, whereas the independent counsel statute requires that the Attorney General seek an independent counsel in certain cases.

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY?

1. An Illusory Debate

Let's briefly put aside the questions of who should appoint the outside federal prosecutor as well as the question of under what circumstances the outside prosecutor should be appointed. The initial, fundamental issue is whether Congress should provide any statutory mechanism for authorizing the selection of persons outside the Justice Department to lead particular federal criminal investigations and prosecutions. Indeed, the rhetoric spewed and the ink spilled over the independent counsel law often frame the question in these terms--namely, whether an outside prosecutor is ever necessary for the investigation of executive branch officials.

This supposed debate is, however, entirely illusory. Even the most severe ***2141** critics of the current independent counsel statute concede that a prosecutor appointed from outside the Justice Department is necessary in some cases.

For example, Professor Julie O'Sullivan has criticized many aspects of the mandatory independent counsel regime. She nonetheless concedes that "[a]s in the past, in extraordinary cases where the appearance or reality of a genuine conflict of interest requires that a matter be referred to someone outside the DOJ, that referral should be made to a regulatory IC" appointed from outside the Justice Department by the Attorney General. [FN21] In other words, Professor O'Sullivan agrees that there must be some legal mechanism for appointing an outside special counsel to handle high-profile investigations of executive branch officials.

Similarly, former Justice Department official Terry Eastland has criticized the independent counsel statute in a lengthy analysis of the history and policy of special prosecutors. But Mr. Eastland, too, believes that "[i]nsofar as criminal investigation and prosecution goes, Presidents or their Attorneys General could exercise their discretionary authority in cases of conflict of interest and name Watergate-type prosecutors." [FN22]

Theodore Olson, head of the Office of Legal Counsel under President Reagan, has criticized the statute but also has stated that "there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation because public integrity requires that." [FN23] Mr. Olson noted that Attorney General William Barr, for example, had selected special prosecutors from outside the Justice Department to ensure that the lead prosecutor was not a "permanent direct subordinate of the Attorney General or the President." [FN24]

The Bush Administration lobbied against the independent counsel statute in 1992. However, the Deputy Attorney General conceded that "we all recognize that there is a need" for the Attorney General to appoint an outside counsel on occasion, and explained that Attorney General Barr "has on two occasions availed himself of the statute [28 U.S.C. § 515] that allows him to appoint an outside authority as a special counsel." [FN25]

Finally, the most famous critic of the independent counsel statute is Justice Antonin Scalia. His dissent in Morrison v. Olson, [FN26] the decision upholding the constitutionality of the independent counsel statute, is largely an analysis of the Constitution's separation of powers, including the requirements of the Appointments

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Clause and the Court's jurisprudence regarding the removal power of the ***2142** President. Notwithstanding the length and force of his dissent, Justice Scalia's objection to the independent counsel statute was really quite simple: The President must be able to appoint and remove at will the independent counsel. If the President can select the independent counsel, and the President can remove the independent counsel at will, then Justice Scalia would have no objection. [FN27]

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors

It is not surprising that most critics of the current mandatory independent counsel statute accept the appointment of prosecutors from outside the Department of Justice in certain cases. This Nation possesses a deeply rooted tradition of appointing an outside prosecutor to run particular federal investigations of ***2143** executive branch officials. Outside counsels are not a modern phenomenon. Between 1870 (the birth of the Justice Department) and 1973, presidential administrations appointed outside prosecutors on multiple occasions. [FN28]

In 1875, for example, President Ulysses S. Grant named a special counsel to prosecute the St. Louis Whiskey Ring--a scandal involving a close friend of President Grant. President Grant later ordered the firing of the special prosecutor because the prosecutor was allegedly too aggressive. [FN29]

During President Theodore Roosevelt's Administration, two outside counsels were appointed. In 1902, the Attorney General appointed a Democrat as special counsel to prosecute a land fraud implicating a high-level executive branch officer. The following year, President Roosevelt appointed a special counsel to investigate charges of corruption in the Post Office. [FN31] In so doing, President Roosevelt stated that "I should like to prevent any man getting the idea that I am shielding anyone." [FN30]

In 1924, following a Senate resolution calling for appointment of a special prosecutor, [FN32] President Calvin Coolidge appointed two special prosecutors, one Republican and one Democrat, to jointly conduct the criminal investigation of the Teapot Dome scandal. [FN33] The special prosecutors subsequently obtained the conviction of the former Secretary of Interior for taking a bribe. [FN34]

In 1952, President Harry Truman's Attorney General appointed a Republican as special counsel to investigate allegations of criminal wrongdoing within the administration, including within the Justice Department. [FN35] Like President Grant over seventy years earlier, President Truman's Attorney General eventually fired the special prosecutor.

In 1973, President Nixon's Attorney General named a Democrat, Archibald Cox, as special prosecutor to investigate and prosecute the Watergate cases. President Nixon fired Mr. Cox, but subsequently appointed another Democrat, Leon Jaworski. The prosecutor eventually obtained the convictions of numerous members of the Nixon Administration.

In the wake of Watergate, Congress enacted the Ethics in Government Act of 1978, [FN36] which required the appointment of an independent counsel in certain cases. Since then, Presidents and Attorneys General have sought the appointment ***2144** of nearly twenty independent counsels under the statute but also continued to appoint special prosecutors outside the mandatory independent counsel mechanism in cases where that statute did not apply or had lapsed.

During President Bush's Administration, for example, Attorney General William Barr appointed retired Judge Frederick Lacey as special counsel to investigate allegations related to Iraqi involvement in an American bank, the so-called BNL investigation. He also appointed Judge Nicholas Bua to investigate the Inslaw case, which involved allegations directed at the Justice Department. [FN37]

In 1994, during a brief period when the independent counsel statute had lapsed, President Clinton asked the Attorney General to appoint a special counsel to investigate the Whitewater matter, which involved criminal

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referrals and allegations against former business partners of the President (James B. McDougal and Susan H. McDougal) and a separate, specific allegation of wrongdoing against the President by former Arkansas businessman and Judge David L. Hale. The Attorney General selected Robert B. Fiske, Jr., who served until the independent counsel statute was reauthorized, at which time the panel of judges determined that the statute required appointment of an independent counsel who was not an administration official. [FN38]

This extensive history demonstrates a clear "tradition" of "naming special prosecutors in certain, exceptional circumstances." [FN39] It shows that criminal investigations of executive branch officials or their associates were handled either "through normal channels, within the Justice Department, or outside them through counsels specially appointed by the President or the Attorney General and therefore accountable to the President for their exercise of power." [FN40]

***2145** 3. Outside Federal Prosecutors are Necessary in Some Cases

American legal history has clearly demonstrated the necessity of a mechanism to appoint an outside prosecutor to conduct certain sensitive investigations of executive branch officials. In light of this consistent historical practice, it would take an extraordinarily compelling justification for Congress to turn its back on history and common sense by eliminating all mechanisms for appointing a prosecutor from outside the executive branch.

Such a case has not been made--nor has anyone really attempted to make it. And although there is no scientific answer to the question, it is rather untenable as a matter of common sense to contend that an outside prosecutor is never necessary--that an ordinary Justice Department prosecutor should always preside over a Justice Department investigation. What if the allegation of wrongdoing is directed against the Attorney General herself? What if the allegation of wrongdoing is against the President's spouse or his best friend or the White House Counsel? Would any rational American in such a case believe that the Attorney General and the Justice Department would pursue the matter as vigorously as an outside prosecutor whose personal and professional interests would not be adversely affected by a thorough and vigorous investigation? Two centuries of experience inform us that the citizens (as represented by Congress and the media) will not accept such a procedure. Indeed, the fact that there have been so many outside prosecutors appointed throughout our history demonstrates their importance and necessity. And the further fact that even the strongest critics of the mandatory independent counsel statute concede that an outside prosecutor is necessary in some cases is telling evidence that some mechanism for appointment of an outside prosecutor is appropriate.

For these reasons, future debates should not focus on whether a special counsel statute is necessary, but rather on the more pertinent questions of by whom and under what conditions a special counsel should be appointed.

II. IMPROVING THE SYSTEM

This article proposes that Congress enact the following statutory language in lieu of the current independent counsel statute.

Section 1. Appointment and Jurisdiction of a Special Counsel
(a) When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.
(b) The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

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***2146 Section 2. Reports by a Special Counsel.**
The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

This article also proposes that Congress adopt two provisions not inextricably linked to special counsel investigations, but which have a substantial impact on them.

Presidential Immunity.
The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

Presidential Privileges.
In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by a federal statute or rule that refers specifically to the privileges available to government officials or agencies in grand jury or criminal trial proceedings.

A. Appointment and removal of the special counsel

The single most important change this article proposes concerns the appointment and removal of an independent counsel. Congress should eliminate §§ 591-599 of Title 28, and adopt a new statutory provision:
When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

This seemingly simple change in appointment and removal would greatly change the perception of the appointed prosecutor and thus would satisfy many opponents of the current statute.

1. Appointment of the Special Counsel

There are two current statutory alternatives for selecting an independent counsel. Under § 515 and § 543 of Title 28, the Attorney General has the ***2147** discretion to select a special attorney herself (as Robert Fiske was selected). If the mandatory independent counsel statute is triggered, under § 592, the Attorney General applies to the Special Division and the three-judge panel selects an independent counsel (as Kenneth Starr was selected).

Neither alternative suffices in the kind of investigations of executive branch officials and their associates likely to cause the President and Attorney General, in the exercise of discretion, to seek a special counsel. Congress, therefore, should repeal the provision in the independent counsel statute providing for appointment of an independent counsel by the Special Division and should instead provide that a special counsel be appointed in the manner constitutionally mandated for high-level executive branch officials: appointment by the President and confirmation by the Senate. [FN41]

Section 515, by which the Attorney General directly selects a special attorney, is problematic because there is no check to prevent the President or Attorney General from handpicking a "patsy" prosecutor. Section 592, the current independent counsel statute by which the Special Division selects a special counsel, is problematic for different

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reasons.

First, the judges selecting the independent counsel may be perceived as politically motivated partisans because of their previous careers and affiliations. (Sure enough, the current Special Division panel repeatedly has been attacked as excessively partisan.) If the selection process is perceived as political, the credibility of the independent counsel will suffer. [FN42]

Second, because of its isolation and its inability to conduct a searching inquiry of the candidates, the panel may select someone who does not possess the qualifications that a special counsel should possess--simply because the panel of judges is not able to conduct the kind of search and inquiry that would produce the best possible person.

Third, neither § 515 nor § 592 provides the independent counsel with the moral authority and public credibility that will insulate him from the inevitable political attacks. The need for a special counsel to have the greatest possible insulation against erroneous charges of political partisanship has been demonstrated time and again. Whether it is Ron Ziegler complaining that the Watergate ***2148** Special Prosecution Task Force is a hotbed of liberals or President Clinton agreeing that the Whitewater Independent Counsel is out to get him, charges of political partisanship are almost sure to occur during independent counsel investigations.

Such attacks are inevitable because they are built into the system. The very point of an outside federal prosecutor is to counter the assumption that the investigation has been whitewashed because of political kinship (the charge to which the Department of Justice has been subject in the campaign fundraising investigation). [FN43] For that reason, outside special counsels historically have been selected from the party other than that of the President. [FN44] But the appointment of someone from the party opposing the President inevitably sparks doubts whether the outside counsel--theoretically a political "foe" of the President in some sense--possesses too much of a partisan agenda against the President.

Watergate Special Prosecutor Archibald Cox is perhaps the most notorious example. He had worked in the Kennedy Administration and was a very close friend and ally of Senator Edward Kennedy (an opponent of President Nixon). But in virtually all cases, the independent counsel will be quite vulnerable to attacks of political partisanship by the President and his allies simply by virtue of his known political affiliation.

This is not an idle problem. The glib answer that the independent counsel should just "take it" when he is criticized as politically motivated is a nice theory, but it does not work in practice. Although many prosecutors receive complaints that they are politically motivated, those complaints take on a different order of magnitude when they emanate from the Oval Office. [FN45] Sustained presidential (and presidentially directed) criticism of an independent counsel eventually will have an impact on a large percentage of the citizens and on their opinion of the independent counsel. Those citizens include both potential witnesses and potential jurors. The decision by witnesses whether to volunteer the full truth (or not) often may depend on their impressions of the credibility and integrity of the special counsel. As to juries, a truly energetic political campaign to destroy the credibility of an independent counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but ***2149** the most clear-cut cases of guilt. [FN46]

Congress can and should make it harder for future Presidents and presidential allies to attack the credibility of outside federal prosecutors. The best way to ensure as much insulation as possible, consistent with our constitutional structure, is to require presidential appointment and Senate confirmation. This process would serve many purposes.

First, the President could not credibly attack the special counsel whom the President had appointed. Similarly, Senate confirmation would make it difficult for anyone to claim that the special counsel is excessively partisan, for any person likely to put politics above law and evidence would not navigate the confirmation process.

Second, presidential appointment and Senate confirmation would ensure that the credentials of a special counsel are extraordinarily high. And particular issues regarding the nominee's past could be fleshed out and explained

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rather than being dredged up years down the road by the subjects of the investigation.

Third, unlike the special attorney provision of § 515, Senate confirmation would prevent charges that the special counsel is too sympathetic to the incumbent administration. Before the independent counsel statute was reauthorized in 1994, Robert Fiske was selected by the Attorney General as a special attorney for Whitewater. Like Kenneth Starr after him, Mr. Fiske possessed precisely the kind of superb credentials one would hope for in a special counsel. Yet Mr. Fiske was not subject to Senate confirmation, and Republicans such as Senator Lauch Faircloth were subsequently able to attack Fiske as soft on the administration. [FN47] These attacks on Fiske's supposed partisanship would have seemed ludicrous had those same Senators been forced to vote for him during the confirmation process.

Senate confirmation "serves both to curb executive abuses of the appointment power ... and to promote a judicious choice of persons for filling the offices of the union." [FN48] As Alexander Hamilton noted, "the necessity of their concurrence would have a powerful ... operation. It would be an excellent check upon a spirit of favoritism in the President. ... The possibility of rejection would be a strong motive to care in proposing." [FN49] The Supreme Court similarly noted that " b y requiring the joint participation of the President and ***2150** the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." [FN50]

To be sure, presidential appointment and Senate confirmation is not a fool- proof method of insulating a special counsel from unfair political attacks. But it would render the special counsel "accountable," in theory and appearance, and would give the special counsel greater ability to pursue his tasks without being subject to unfair and unrelenting political attack. In short, it would provide the aura of moral and political authority that the special counsel needs if he is to do his job as aggressively as we would hope.

There no doubt will be some objections to this proposal. Some might argue that the President would not be inclined to appoint a truly independent and aggressive prosecutor because the allegations almost by definition would involve the activities of his close associates. But that is the wisdom of Senate confirmation. Indeed, the President would be wise to and likely would consult closely not only with his Attorney General and perhaps his White House Counsel, but also with Senate leaders, before even nominating a special counsel. Moreover, the media no doubt would aggressively probe the background and credentials of the individual selected by the President. The danger of the President appointing, and the Senate confirming, a crony or patsy as special counsel seems almost nonexistent.

As noted above, some might oppose this proposal by arguing that a prosecutor should not worry about attacks on his reputation. That, too, is a naive view. Attacks on the prosecutor's reputation ultimately are designed to scare potential witnesses and to infect the jury pool with negative feelings towards the prosecution. It is no secret that many defense attorneys engage in these smear tactics. The prosecutor, as a representative of the people of the United States, must take appropriate steps to counter such attacks lest they allow an injustice to occur--namely, a guilty person being erroneously acquitted because of the jury's negative view of the prosecutor. By means of this proposal, Congress can help to prevent such dangerous reputational attacks on a special counsel.

Others might oppose this proposal on the ground that Senate confirmation is a slow and unwieldy process or that it could turn into a political circus. Neither argument is ultimately persuasive. When the Senate considers nominees for important positions as to which there are severe time constraints, the Senate can and does act very quickly. For example, the Senate proceeds with extraordinary expedition to confirm the Cabinet of a newly elected President so that the Cabinet is in place when the President takes office. A respected individual selected as special counsel would be promptly considered and confirmed.

To be sure, certain Senators might use the opportunity to attack the subject of the investigation, or alternatively to attack the nominee. The first scenario seems unavoidable, but not particularly costly. As to the second, that is the point of the process. Any special counsel who would engender significant opposition should ***2151** not be nominated in the first place--or should be withdrawn if serious opposition develops.

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2. Removal of the Special Counsel

Currently, an independent counsel can be removed for "good cause," [FN51] a term undefined as a matter of law or practice. A special attorney appointed directly by the Attorney General can be removed at will. [FN52]

The "good cause" provision strikes many commentators as unconstitutional or, at least, unwise. As Justice Scalia intimated in Morrison, at first blush it is somewhat difficult to understand why the President does not have the authority to dismiss any executive branch official at will. [FN53] In any event, Justice Scalia also argued that a federal prosecutor should be removable at will for more practical reasons--that "the primary check against prosecutorial abuse is a political one" and that the independent counsel system thwarts this traditional check on a prosecutor's actions. [FN54] If there is an out-of-control prosecutor, Justice Scalia reasons that the President should possess the authority and the responsibility to remedy the situation.

The notion that the independent counsel is "unaccountable" has become the mantra of subjects of the investigation who inevitably attempt to denigrate the investigation as partisan and out of control. Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him. Congress should give back to the President the full power to act when he believes that a particular independent counsel is "out to get him." Such a step not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up.

The objection to "removal at will" is that the independent counsel might be too timid because of fear that he could be fired. That objection overstates the danger. After all, a number of special prosecutors have been appointed throughout our history, and there is simply no persuasive evidence that the threat of removal adversely affected their investigations. Indeed, in a perverse way, removal is a sure way to immortality, as Archibald Cox learned. Moreover, ***2152** President Nixon's firing of Cox--the last occasion when a President removed a special counsel--created an enormous controversy and triggered impeachment proceedings. [FN55] History clearly demonstrates that the President will pay an enormous political price if he does not have a persuasive justification for dismissing a special counsel. The deterrent to a President dismissing a special counsel thus would be the same as the deterrent to his firing the Attorney General--a practical and political (as opposed to legal) deterrent requiring the President to be able to explain his decision to Congress and the public.

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED

As noted above, this article proposes the following statutory language.
When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

Congress should no longer try to specify in advance the circumstances requiring a special counsel. The triggering mechanism of the current mandatory independent counsel statute can be grossly over-or under-inclusive depending on the circumstances. In some cases, the Attorney General is required to request an independent counsel even when it seems evident that Congress and the public would accept the credibility of a Justice Department investigation (for example, the investigation of Secretary of Labor Alexis Herman). In other cases, such as the Democratic campaign fundraising matter, the mandatory appointment provision of the statute is not triggered, even though there seems an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation.

Indeed, the campaign fundraising matter has revealed a series of heretofore unforeseen flaws in the triggering mechanism of the statute. First, the decision whether to appoint an independent counsel has degenerated into a debate between the Attorney General and her critics over the precise features of the triggering mechanism--for example, whether a sufficiently specific and credible allegation has been made against a "covered person." This

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dispute has focused on the question of which telephones were used to make certain fundraising calls. The debate over such technicalities has obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries. [FN56]

***2153** Second, at least at the outset of the investigation, Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive. Over the reported objection of FBI investigators, Justice Department officials prohibited certain investigative techniques because the threshold for triggering the independent counsel statute was not met. [FN57] Thus, the Attorney General (or, at least, her delegates) has used the statute not as a sword against executive branch officials, but as a shield to protect them.

Of course, the precise specificity and credibility of allegations against covered persons should be irrelevant. For purposes of the independent counsel statute, the important question should not be whether certain technical requirements have or have not been met. Instead, it should be the following: Will the Congress and the public have confidence in the credibility and thoroughness of the investigation if the investigation results in a determination that such officials did not violate the criminal law?

There can be no definitive answer to this question, but that is the point. Depending on the circumstances--who committed the alleged offense, the nature of the offense, the credibility of the Attorney General, the confidence of the Congress in the Justice Department--there may be more or less of a perceived need for a special counsel to take over. It has proved wildly unwise for Congress to try to anticipate those situations; the debate over whether an independent counsel should be appointed for the campaign fundraising issues has only highlighted the flaws in the current triggering mechanism.

Some might contend that the statute should still be mandatory against certain officials such as the President and Attorney General. As will be discussed further below, an independent counsel should never be appointed to prosecute the President (because a sitting President should not be subject to criminal indictment until he leaves office or is removed by impeachment proceedings). If the Attorney General is the subject of a truly serious allegation and remains in office, the people can be confident that the President or the Congress will ensure that a special counsel is appointed.

In sum, the decision whether to appoint a special counsel should be at the President's discretion as informed by the Congress and the media. That is as it should be--those audiences are the two primary representatives of the citizens, and the citizens are the persons who ultimately must be persuaded that an investigation resulting in a no-prosecution decision was thorough and credible.

C. JURISDICTION

The following proposed statutory language relates to jurisdiction.
When the public interest requires, the President may appoint, by and with ***2154** the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.
The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

The current mandatory independent counsel statute authorizes the Attorney General to delineate the independent counsel's jurisdiction, to refer related matters to the counsel, and to seek expansion of the counsel's jurisdiction. The statute is silent on the question of whether a criminal defendant or subpoena recipient can challenge the jurisdiction of the prosecutor. In United States v. Tucker, however, the Eighth Circuit ruled that the independent counsel's jurisdiction, as specified by the Attorney General, is not subject to judicial review. [FN58]

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Congress should clarify the jurisdictional provisions in a manner consistent with Tucker, such that only the President and Attorney General, and not the courts, define and monitor the independent counsel's jurisdiction. This clarification would ensure direct oversight over the independent counsel's jurisdiction by the official primarily affected (the Attorney General), but should not unduly hamper the investigation.

As explained by the Eighth Circuit in Tucker, the Attorney General, on behalf of the President, has the competence and authority to monitor an independent counsel's jurisdiction. Ordinarily, she is the "traffic cop" who decides whether a particular investigation should be handled by Main Justice or by a local United States Attorney's Office. She also resolves clashes between different United States Attorneys' offices. So, too, with respect to a special counsel's jurisdiction, the Attorney General should play the role of traffic cop, the role she already performs to some degree. Of course, there is always a danger that the President or Attorney General will attempt to limit an independent counsel's investigation to protect the administration. Regular congressional oversight of the independent counsel's jurisdiction should deter the imposition of such restraints, however.

To be sure, one can expect that there will be some friction at the margins between the special counsel and the Attorney General. [FN59] The Attorney General must take pains not to hamstring the special counsel, not to make his investigation less effective than an ordinary Justice Department investigation. In particular, it is, of course, common and accepted (and even necessary) police and prosecutorial practice to attempt to investigate and prosecute witnesses for other ***2155** crimes, thereby inducing the witness to tell the truth in the primary investigation. As Robert Fiske has correctly noted, it would be unwise in the extreme for the Attorney General to take that authority away from a special counsel: "I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation." [FN60]

Codifying Tucker thus would not only clarify the role of the Attorney General and special counsel, but also would greatly expedite special counsel investigations. Judicial challenges to independent counsel jurisdiction have caused severe delays in the Michael Espy and Whitewater independent counsel investigations. For example, a trial of Arkansas Governor Jim Guy Tucker in the Whitewater investigation was delayed well over two and one-half years because of a challenge to the independent counsel's jurisdiction.

D. REPORTS

Congress should enact the following statutory language regarding the special counsel's duty to provide information regarding the evidence developed during his investigation.
The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

The most illogical part of the current independent counsel statute is its final report requirement. The provision was originally designed to ensure that the special prosecutor did not "whitewash" the investigation. That rationale does not justify a report; the fear of whitewashing is the reason that a special counsel is appointed in the first place. If anything, the supposed justification for the reporting requirement would call for the Justice Department to provide a report in those high-profile investigations where there is a potential for a conflict, but where the Department nonetheless conducts the investigation.

In any event, § 594(h) of the current statute requires that an independent counsel's final report set forth "fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." [FN61] ***2156** Before the 1994 amendment, the statute also required that the final report set forth "the reasons for

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not prosecuting any matter within the prosecutorial jurisdiction" of the independent counsel. [FN62]

Section 595(c) of Title 28 also requires that the independent counsel report to the Congress on any information that "may constitute grounds for an impeachment." [FN63] The latter provision codifies the process by which Leon Jaworski transmitted a report to Congress during the Watergate investigation. As far as is publicly known, however, a report under § 595(c) has never been issued since its enactment in 1978.

As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process. A report discussing facts and evidence would make sense if the prosecutor's goal was to establish publicly by a preponderance of the evidence what happened with respect to a particular event--as often is the case in congressional or inspector general investigations, or in civil litigation. That is not the goal of the independent counsel. Instead, an independent counsel is appointed only to investigate certain suspected violations of federal criminal law in order to determine whether criminal violations occurred, and to prosecute such violations if they did occur. That goal--to determine whether criminal violations occurred--is quite different from the goal of issuing public conclusions regarding a particular event. [FN64]

On the other hand, as is reflected in § 595(c), there is a strong sense that evidence of the conduct of executive branch officers should not be concealed, at least not from Congress, which is constitutionally assigned the duty to determine their fitness for office. Thus, any information gathered with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress (not dissimilar to the manner in which FBI background information is disclosed when a nomination is pending). The statutory language proposed by this article thus attempts to incorporate the best of § 594(h) and § 595(c), to eliminate the worst, and to ensure that, on the one hand, miscreants not serve in the executive branch, and on the ***2157** other, that personal privacy and reputation not be sacrificed unnecessarily and unwisely.

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT

This article proposes the following statutory language to establish that a sitting President cannot be indicted.
The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

The supposed "politicization" of independent counsel investigations occurs primarily in those investigations where the President is a target or a potential defendant; those investigations quickly become politicized because of the threat that the President might be indicted. As will be explained, a serious question exists as to whether the Constitution permits the indictment of a sitting President. Regardless how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation. [FN65]

In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated--whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party--and thus also for the political, economic, social, diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed,

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beg, an all-out attack by the innumerable ***2158** actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr--the four modern special prosecutors to investigate presidents.

The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate--and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office. [FN66]

Watergate Special Prosecutor Jaworski concluded, for example, that "the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused." Accordingly, he thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him:
[Tlhe impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts. [FN67]

President Nixon similarly argued that "[w]hatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them." [FN68] As Solicitor General, Robert Bork reached the same conclusion, arguing that a Vice President could be criminally prosecuted, but that the President could not. [FN69] Judge George MacKinnon, too, argued that "a President is subject to the criminal ***2159** laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office." [FN70] To indict and prosecute a President or to arrest him before trial "would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties." [FN71] Therefore, he concluded, " t he real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties." [FN72]

The Supreme Court's decision in Clinton v. Jones [FN73] indicated that the President is subject to private lawsuits to remedy individuals harmed. But the Court's decision does not apply to criminal proceedings against the President, which seek to enforce public, not private, rights. The Court thus repeatedly referred in its opinion to "private" actions against the President. [FN74]

The constitutional mechanism of impeachment recognizes, at least implicitly, that criminal prosecution of a sitting President is fraught with peril-- virtually untenable as a matter of practice and unwise as a matter of policy. The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President's political party (and the causes he champions) would almost certainly be devastated. Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor--whether it be the Attorney General or special counsel--and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. [FN75] Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made--in the Congress of the United States.

***2160** The words of Alexander Hamilton ring as true today as they did two centuries ago:

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[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust ... are of a nature which may with peculiar propriety be denominated POLITICAL .... The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other.... [FN76]

Investigation of the President, Hamilton stated, is a kind of "NATIONAL INQUEST" and "[i]f this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves." [FN77]

The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion "to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." [FN78] In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards. [FN79] The Federalist Papers similarly point out that:
the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. [FN80]

Hamilton further noted that the checks on a President include that he shall be "liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." [FN81]

Thus, the Framers explained the wisdom, and perhaps also the constitutional necessity, of the idea that public judgment with respect to the President be ***2161** rendered not by a prosecutor or jury, but by the Congress. A prosecutor acts to vindicate harm to the public, not to any private individual (unlike in a civil case such as Clinton v. Jones). The decision to vindicate harm to the public caused by the President, no matter how he caused it, should belong to the Congress in the first instance.

Why is the President different from Members of Congress or Supreme Court Justices or Cabinet officials? The Constitution vests the entire executive power in a single President: the powers of the Commander in Chief of the Army and the Navy, the power to command the Executive Departments, the power shared with the Senate to make treaties and to appoint Ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant reprieves and pardons. [FN82]

While federal prosecutors have credibly prosecuted Cabinet officers, White House officials, and other friends and associates of the President, a credible determination by a federal prosecutor to indict (or not indict) the President himself would be nigh impossible. The experience of recent years has only reinforced the wisdom of the Framers.

What, then, should happen? When nonfrivolous allegations or evidence of wrongdoing by the President is received by a prosecutor, that evidence should be forwarded to the House of Representatives. If Congress declines to investigate, or to impeach and remove the President, there can be no criminal prosecution of the President at least until his term in office expires. [FN83] (Most criminal investigations include multiple potential defendants, so the criminal investigation as a whole generally might proceed, depending on the circumstances.) As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President. There is simply no danger that such crimes would go criminally unpunished; the only question is when they can be punished.

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F. THE PRESIDENT'S PRIVILEGES

The following statutory language is proposed:
In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by federal statute or rule that refers specifically to the privileges ***2162** available to government officials or agencies in grand jury or criminal trial proceedings.

One major cause of delay in independent counsel investigations has been the repeated assertion of various executive privileges. The privilege assertions not only force the President and various independent counsels into adversary postures, but they also have undermined the independent counsel's ability to conduct an expeditious and thorough investigation. During the last quarter- century, the federal courts have resolved many of the executive privilege issues that have arisen during criminal investigations. [FN84] In particular, the Supreme Court's 1974 decision in United States v. Nixon, [FN85] the Eighth Circuit's 1997 decision in In re Grand Jury Subpoena Duces Tecum, [FN86] and Judge Silberman's 1990 concurrence in United States v. North [FN87] (as well as a subsequent 1997 D.C. Circuit decision in In re Sealed Case [FN88]) have essentially defined the boundaries of the executive privileges that the President may assert in federal grand jury or criminal proceedings. The result of those cases is clear: the courts may not enforce a President's privilege claim (other than one based on national security) in response to a grand jury subpoena or a criminal trial subpoena sought by the United States.

Any dire claims that this rule disables the Presidency are overstated, moreover, because the President is always free to withhold other sensitive or critical information if he finds it necessary. [FN89] To do so, a President must order the federal prosecutor not to seek the information and must fire the prosecutor if he refuses (as President Nixon fired Archibald Cox). [FN90] Such action would surely focus substantial public attention on the President's privilege claims, but if the President's argument is as strong as he purportedly believes, he should (and must) be able to explain it to the Congress and the public. But Nixon, and the cases since Nixon, establish that the President cannot rely on the courts to protect him except with respect to national security information. [FN91]

***2163** The current law of governmental privileges available in criminal proceedings derives from two sources: (1) Section 535 of Title 28, which requires all executive branch officials to disclose any information to law enforcement regarding possible criminal activity by a member of the executive branch, thus overriding any purported common-law privileges available to the President; and (2) the Supreme Court's decision in Nixon regarding the scope of the constitutional executive privilege for presidential communications available to the President under article II of the Constitution.

1. Non-Constitutional Executive Privileges

Federal Rule of Evidence 501 provides that privileges in federal criminal trials and grand jury proceedings are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except as "provided by Act of Congress" or the Constitution. Section 535(b) of Title 28 makes clear for purposes of federal criminal proceedings that the President may not maintain any common-law privilege claim such as the governmental attorney-client and work product privileges that President Clinton asserted in the Whitewater investigation. The statute provides:
Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reportedly to the Attorney General by the head of the department or agency.... [FN92]

In its decision in In re Grand Jury Subpoena, the Eighth Circuit labeled the statute "significant," and stated that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. [FN93]

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Some have attempted to dismiss this statute, arguing that it contains an implicit exception for information received by government attorneys. [FN94] That ***2164** argument contravenes the clear and all-encompassing language of the statute. The statute contains no distinction between information obtained by government attorneys and that obtained by other government employees. In addition, Congress included a specific exception to this disclosure obligation for "class es of information" as to which the Attorney General "directs otherwise," [FN95] and the Attorney General has not exempted information obtained by government attorneys representing the government. As a matter of elementary statutory construction, that explicit exception confirms the statute's plain meaning--and no further exceptions can be judicially inferred or created. [FN96]

The legislative history supports that conclusion as well. The House Committee Report accompanying § 535 stated that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." [FN97] The report emphasizes that " i f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have complete cooperation from the department or agency concerned." [FN98] The Justice Department supported the legislation:
The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law- enforcement officer of the Government is to have free access to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office. [FN99]

In addition, the President's official counsels have traditionally recognized this obligation. For example, Lloyd Cutler, who served as White House Counsel in two Administrations, has stated that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." [FN100] Mr. Cutler noted that there is a "Government rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible ***2165** violation of a criminal statute." [FN101] Mr. Cutler further remarked that " w hen you hear of a charge and you talk to someone in the White House ... about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" [FN102]

Similarly, twenty-five years ago, after White House Counsel John Dean had resigned, Robert Bork was asked whether he would consider becoming President Nixon's official White House Counsel. Bork asked Chief of Staff Alexander Haig whether he would be on the government payroll and was told that he would be. He then explained to Haig that "[a] government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the president, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." [FN103] (Bork ultimately did not receive the job).

In the same vein, the 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a possible violation of law. If there is a reasonable suspicion of a crime ... about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." [FN104]

Some have argued against this commonsense conclusion, pointing for apparent support to several unpublished Office of Legal Counsel (OLC) memoranda--but the Eighth Circuit quickly and correctly concluded they were totally inapposite. [FN105] The OLC memoranda do not apply to situations where a government attorney represents a government agency and learns information during ***2166** the course of her official representation of that agency. [FN106]

In short, § 535 refutes any claim of an executive common-law privilege (including a governmental attorney-client or work product privilege) in federal criminal proceedings in response to a grand jury or trial subpoena sought by the United States.

2. Constitutionally Based Executive Privileges

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Section 535, of course, does not prevent the President from asserting constitutionally based privileges. In United States v. Nixon, [FN107] the Supreme Court applied the executive privilege for presidential communications, which the President had asserted in response to a criminal trial subpoena sought by the United States. For purposes of criminal cases where the United States has sought a subpoena, the Court concluded that executive privilege protects only national security and foreign affairs information. [FN108]

The dispute in Nixon arose in connection with a criminal trial of seven individuals, including former White House officials. The District Court issued a trial subpoena sought by the United States (represented by the special prosecutor) to obtain tape recordings of conversations among President Nixon and various high-level White House officials, including White House Counsel John Dean. [FN109] President Nixon resisted production of the tapes, citing the executive privilege for presidential communications.

In the Supreme Court, President Nixon argued that the subpoena did not meet the threshold requirements under Federal Rule of Criminal Procedure 17 of relevance and admissibility. [FN110] He also asserted executive privilege, citing article II of the Constitution. [FN111] President Nixon contended that the executive privilege for presidential communications was absolute and that the courts could not compel production of the tapes. Even if the privilege were not absolute and "even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items," President Nixon argued that "the Special Prosecutor must demonstrate a unique and compelling need to overcome ***2167** the privileged nature of the materials." [FN112] President Nixon thus argued in the alternative for some heightened showing, not dissimilar to the standard applied by the D.C. Circuit in Nixon v. Sirica, where the Court of Appeals held that the privilege claim of President Nixon was overcome by the "uniquely powerful" showing made by the special prosecutor. [FN113]

The Supreme Court found that the special prosecutor had met the relevance and admissibility requirements of Federal Rule of Criminal Procedure 17 for trial subpoenas: "there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment" and there was "a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment." [FN114]

The Court recognized, based on Article II, a "presumptive privilege for Presidential communications." [FN115] The privilege derived, the Court said, from the Constitution and from the "valid need for protection of communications between high Government officials and those who advise and assist them"--the "importance" of which "is too plain to require further discussion." [FN116] The Court stated that " t he expectation of a President to the confidentiality of his conversations and correspondence ... has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." [FN117] The privilege, the Court said, was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." [FN118]

However, the Court stated that the tapes, by President Nixon's concession, did not reveal military or diplomatic secrets and thus did not implicate the President's authority "as Commander-in-Chief and as the Nation's organ for foreign affairs." [FN119] The Court therefore found that the President possessed only a "generalized interest in confidentiality." [FN120]

The Court then struck the balance between the President's generalized interest in confidentiality and the "need for relevant evidence in criminal trials." [FN121] In this regard, the Court said it was important to distinguish the need for evidence in criminal proceedings from the need for evidence in congressional proceedings, civil cases, or Freedom of Information Act (FOIA) actions. In the latter situations, it may well be that the executive privilege for presidential ***2168** communications is absolute (or in the case of congressional subpoenas, a nonjusticiable question). However, the criminal context is different. As the Court emphasized, the traditional commitment to the rule of law is "nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." [FN122] The Court further noted that " t he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. ... To ensure that justice is done, it is

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imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." [FN123]

The Court then held that the need for relevant evidence in criminal proceedings outweighed the President's "generalized interest in confidentiality" unless the executive privilege claim was founded on a claim of state secrets:

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. [FN124]

The Court thus accepted neither President Nixon's primary argument that the privilege was absolute, nor his secondary argument that the Special Prosecutor must show a "unique and compelling need" to obtain the tapes. The Court found that the showing under Rule 17 itself demonstrated a need sufficient to obtain non-state secret presidential communications in criminal proceedings. The Court thus ordered that, upon remand, "[s]tatements that meet the test of admissibility and relevance" must be produced to the special prosecutor. [FN125] Nixon, in short, held that the showing required under Rule 17 (relevance and admissibility for a trial subpoena; relevance for a grand jury subpoena) itself demonstrates the specific need for evidence that overrides the President's ***2169** general need for confidentiality. [FN126]

Lest there be any doubt about the meaning of Nixon, a foray into internal memoranda available from the Library of Congress provides historical confirmation. The Court specifically and consciously rejected the suggestion of President Nixon and the D.C. Circuit in Nixon v. Sirica that there be a case-by-case balancing test in which the prosecutor or grand jury must make some particularized, compelling showing in addition to the showing required by Rule 17. The memoranda among the Justices reveal some initial disagreement regarding this precise question, with Justice Byron White being in favor of the position ultimately adopted and Justice Lewis Powell favoring some undefined higher showing of need. The case was argued on July 8, 1974. On July 12, Justice Powell wrote to the Justices that "[w]e were not entirely in agreement as to the standard to be met in overcoming the privilege." [FN127] Justice White wrote on July 15, 1974:

[T]he privilege does not extend to evidence that is relevant and admissible in a criminal prosecution. The public interest in enforcing its laws and the rights of defendants to make their defense supply whatever necessity or compelling need that may be required to reject a claim of privilege when there has been a sufficient showing that the President is in possession of relevant and admissible evidence. ... I, therefore, differ with Nixon v. Sirica insofar as it held that the Special Prosecutor must make some special showing beyond relevance and admissibility. Necessarily, then, the trial judge, who followed Nixon v. Sirica, did not apply the correct standard in this case. [FN128]

After the Chief Justice circulated a new draft that still did not fully accord with Justice White's views, Justice White wrote the Conference on July 18, 1974:

[The current draft] impl[ies] that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, my view is that relevance and admissibility themselves provide whatever compelling need must be shown. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and

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admissibility. [FN129]

***2170** Justice White felt sufficiently strong about this issue to add that "it is likely that I shall write separately if your draft becomes the opinion of the Court." [FN130]

On July 22, Justice Potter Stewart circulated an alternative draft on the privilege issue containing the suggestions of Justice White. The draft no longer contained any reference to a heightened standard, and the cover memo indicated that the opinion had received the approval of Justices White and Thurgood Marshall. The Chief Justice then quickly incorporated the Stewart section into his opinion and recirculated the entire draft the next day, July 23. All of the Justices then joined, and the opinion was issued on July 24, 1974. [FN131]

This interpretation of Nixon was advanced by Judge Silberman in his 1990 concurrence in United States v. North. [FN132] The district court in that case, Judge Silberman noted, had interpreted Nixon as "constructing a very high barrier to a criminal defendant who wishes to call a President or ex- President who, it is asserted, will give evidence relevant to the defense." [FN133] Finding "it instructive to note how easily the Court in Nixon was satisfied that the tapes sought by the Special Prosecutor ... were relevant," Judge Silberman indicated that in cases where national security is not asserted, no special showing other than relevance is necessary even after executive privilege is claimed. [FN134] Judge Silberman continued:
To be sure, the Court used the language "essential to the justice of the pending criminal case" and "demonstrated specific need for evidence" in describing what was needed to overcome the President's qualified privilege. But the Court does not appear to have meant anything more than the showing that satisfied Rule 17(c). Nowhere in the opinion does the Court ever describe any offer by the Special Prosecutor other than the rather perfunctory showing of relevance .... Even in the section of the opinion dealing with executive privilege, the Court stated that "the President's broad interest in confidentiality ***2171** of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." [FN135]

In the 1997 dispute between President Clinton and the Whitewater Independent Counsel over the governmental attorney-client privilege, the Eighth Circuit addressed President Clinton's contention that Nixon set forth some higher standard for executive branch documents than that required by Rule 17. The Court concluded otherwise, stating that "Nixon is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." [FN136] The Court stated that it "doubt ed " that a case-by-case need determination "constitutes the proper need threshold" set forth in Nixon. [FN137]

The D.C. Circuit also addressed an executive privilege dispute between the President and Independent Counsel Donald Smaltz in the investigation of former Secretary of Agriculture Michael Espy. [FN138] The decision is essentially in accord with the above analysis, although certain parts advance a slightly different articulation. In particular, noting Judge Silberman's opinion in North, the court first opined that it would be "strange" if Nixon required nothing more to overcome the presidential privilege than the showing required by Rule 17, because then the privilege "would have no practical benefit." [FN139] Of course, Nixon indicated that the privilege may well be absolute in civil, congressional, and FOIA proceedings; it is only in the discrete realm of criminal proceedings where the privilege may be overcome. [FN140]

In any event, any difference between Judge Silberman and this D.C. Circuit panel is more apparent than real, more procedural than substantive. At the outset, it is significant that the Court specifically rejected the President's argument that "the information sought must be shown to be critical to an accurate judicial determination." [FN141] That argument, the Court said, "simply is incompatible with the Supreme Court's repeated emphasis in Nixon on the importance ***2172** of access to relevant evidence in a criminal proceeding." [FN142] The court concluded that in grand jury cases where national security is not at issue and where the Rule 17 standard is satisfied, presidential communications can be obtained, first, if "each discrete group of the subpoenaed materials likely contains important evidence," and, second, if the evidence "is not available with due diligence elsewhere." [FN143]

The court stated that this first component "can be expected to have limited impact." [FN144] In the grand jury

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setting, moreover, "the fact that evidence covered by the presidential communications privilege may be inadmissible should not affect a court's determination of the grand jury's need for the material." [FN145] The court further stated that the second component also will be "easily" satisfied when "an immediate White House advisor is being investigated for criminal behavior." [FN146] Even in cases where a person outside the White House is under investigation, the court said that this second component still will be satisfied when the proponent can "demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove." [FN147] Of course, that showing can be made in virtually all investigations--few facts are ever fully confirmed or disproved. The court further stated that this standard would not impose "too heavy" a burden on the subpoena proponent. [FN148]

In short, the D.C. Circuit opinion does not deviate in substance from Nixon, the Eighth Circuit's opinion, or Judge Silberman's approach; it differs, if at all, only with respect to the time when relevant information can be obtained, as the court itself recognized. [FN149]

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege

Nixon is important not only for constitutionally based privileges, but also because it establishes a principle that applies to other common law privilege claims that the President might raise. For example, even if § 535 of Title 28 were erased from the U.S. Code, Nixon itself demonstrates, as the Eighth ***2173** Circuit held, that any claim of governmental attorney- client or work product privilege would be similarly overcome in federal criminal proceedings.

The judicial process in this country is deeply committed to the principle that "the public ... has a right to every [person's] evidence." [FN150] Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." [FN151] Privileges thus "are not lightly created nor expansively construed." [FN152] In light of these settled principles, the Supreme Court has recognized privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the states, and is justified by overriding public policy considerations.

In criminal proceedings, a governmental attorney-client or work product privilege has no roots whatsoever. There is no case, statute, rule, or agency opinion suggesting that a department or agency of the United States (or any state governmental entity) can maintain a full-blown governmental attorney- client or work product privilege in federal criminal or grand jury proceedings. [FN153]

Nixon, moreover, held that even the deeply rooted and constitutionally mandated executive privilege for presidential communications did not override the need for relevant evidence in criminal proceedings, except when a specific claim of national security was at issue. The decision in Nixon demonstrates that a governmental attorney-client and work product privilege (the other two privileges that have been at issue in investigations of executive branch officials) also cannot overcome the need for relevant evidence in criminal proceedings. If the constitutionally rooted executive privilege for presidential communications is overcome by the need for relevant evidence in criminal proceedings, the result cannot be different for a newly conceived governmental attorney-client and work product privilege. A fortiori, a governmental attorney-client or work product privilege fails in federal criminal proceedings.

4. The Policy of Executive Privileges

Section 535, the Eighth Circuit decision, and the Supreme Court decision in Nixon demonstrate as a matter of law that the only executive privilege currently valid against the United States in federal criminal proceedings is a national security/state secrets privilege. As a policy matter, that rule reflects the proper ***2174** balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings.

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Government officials, even government attorneys, are public officials who work for the people. Any claim to confidentiality against the United States stands on a radically different footing than a claim made by a private party. The Supreme Court recognized the difference between such public and private responsibilities in declining to apply an attorney-like privilege to an accountant's work papers:

The Hickman work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. ... [T]he independent auditor assumes a public responsibility transcending any employment relationship with the client. ... This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [FN154]

For this same reason, in addressing the narrow question of a governmental attorney-client privilege, respected commentators and the American Law Institute (ALI) reject equating private corporations with public entities. The McCormick treatise states that "[w]here the entity in question is governmental ..., significantly different considerations appear." [FN155] Professors Wright and Graham note that "the costs of the government privilege may be very high. ... L egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information." [FN156] Indeed, the ALI's Restatement (Third) of the Law Governing Lawyers states that the rules for private lawyers do not translate to public lawyers; instead, " m ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." [FN157]

These commonsense propositions led the Eighth Circuit flatly to reject any claim that a governmental or executive attorney-client or work product privilege could be asserted against the federal grand jury. The court stated that the "general duty of public service calls upon government employees and agencies ***2175** to favor disclosure over concealment." [FN158] Citing Arthur Young, the court explained that " t he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." [FN159] The court added:

[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. [FN160]

If the law embodied the contrary position, a government official (including the President or White House Counsel) safely could tell a White House or other agency attorney (or other official) that he destroyed subpoenaed documents, paid off potential witnesses, erased a subpoenaed tape, or concealed subpoenaed materials--or worse. The courts have rightly rejected the executive's attempt to conceal such information, and Congress should codify those results to prevent future Presidents from trying the same gambit.

Supporters of broad executive privileges contend that limiting privileges will have a chilling effect--that the presidency might be disabled and that governmental officials might be less forthcoming to a President or government attorney if they knew that the information could be disclosed in criminal proceedings. This argument, however, was rejected by the Supreme Court in Nixon (in the context of the all-encompassing presidential communications privilege) and was rejected by the Eighth Circuit (in the context of governmental attorney-client and work product privileges).

It is surely true that a President and government attorneys must be able to obtain information in order to perform their functions, but that assertion proves nothing. The interest in gathering facts to perform those functions does not require the further step of concealing facts from a federal grand jury if they are (or become) relevant to a federal criminal investigation.

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As noted above, the dire claims about the disabling of the presidency are false, moreover, because the President is always free to withhold other information if he finds that necessary. To do so, a President must simply order the federal prosecutor not to seek the information and fire him if he refuses, thus taking political responsibility for his privilege claims. [FN161]

The chilling-effect argument is illusory, in any event, because executive branch employees and attorneys know that they do not control the ultimate ***2176** assertion of privilege in any forum. [FN162] As a result, the government employee can have no expectation of confidentiality and no assurance that his communications or work product will remain confidential if called for in federal criminal proceedings. Thus, government employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.

In addition, the frequency of disclosure will be low. Even in today's environment, the overwhelming majority of White House business and federal agency work never comes under grand jury scrutiny. [FN163] Grand jury investigations obviously occur more often than criminal trials, but grand juries operate in secret and thus present little risk of chilling particular conversations, as the Supreme Court has emphasized. [FN164]

Finally, the debate over privileges, particularly a governmental attorney- client privilege, often is framed in generalities and fails to consider actual situations where the issue might arise. There are three basic situations where a government attorney or official might obtain information from other government employees and where the information might become relevant to a subsequent criminal investigation.

The first situation occurs when the employee seeks advice from a government attorney or official about his possible future course of conduct. If the employee follows the advice and does not commit a criminal act, it is hard to see what chill or harm might be caused by subsequent disclosure of the information. On the other hand, if the employee ignores the advice and commits a criminal act, then what possible governmental interest is there in protecting the employee from the charge that he knew his activity was criminal? Moreover, if the attorney mistakenly advises the employee that a proposed course of conduct is not criminal, even the employee will wish that communication disclosed if he is subsequently prosecuted. In the end, the only employee seeking advice about proposed conduct who will be chilled is the employee who hopes to obtain a government attorney's blessing for potentially criminal conduct. That scenario, however, hardly justifies creation of a far-reaching privilege.

The second category arises where the employee seeks to discuss past conduct that might be criminal. In that situation, of course, the primary interest of the United States is and must be in detecting and prosecuting crime, as the OLC repeatedly has emphasized. The United States has no interest in harboring criminals in government employment, even at high levels. Agency attorneys employed by and representing the United States are not authorized to act as criminal defense attorneys against the United States.

***2177** The OLC thus has long rejected any suggestion that the United States can participate on both sides of a criminal investigation. [FN165] That explains why there is no tradition suggesting that a government attorney can consult with an employee about the employee's past criminal conduct and then refuse to disclose that information to the federal grand jury. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States, so an agency cannot be adverse to the United States in a criminal prosecution. When an agency becomes aware of internal wrongdoing, the agency's sole interest is to ferret it out, and there can be no risk of endangering a governmental interest by doing so and by disclosing the results to federal law enforcement authorities.

The third situation occurs not where the employee initiates conversation, but where the agency elicits information from its employees about some event. Government agencies and government agency attorneys often have a legitimate interest in obtaining facts about a particular event; the fact- gathering process enables an agency head (or delegate) to discipline employees, institute new policies that will prevent similar errors in the future, inform the Congress or the public of the facts, or merely deal with the latest political controversy. Thus, the White House has conducted numerous internal investigations, as have many agencies and inspectors general. Given the number of

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such investigations, a far-reaching and novel governmental attorney-client privilege is, by definition, unnecessary to encourage such activity. [FN166] Unlike a corporation (which is subject to indictment), no legitimate government agency would be, or has been, discouraged from conducting internal factfinding by the knowledge that any evidence of crime uncovered will in fact be presented to the relevant law enforcement authorities. Indeed, this was the premise behind the enactment of Section 535 (and the many inspector general statutes as well).

CONCLUSION

Outside federal prosecutors are here to stay. They have existed at least since President Grant's Administration. As we have seen over the last twenty- five ***2178** years, the system of outside prosecutors can make an extraordinary difference in how our nation is governed. As Justice Scalia stated, the debate over a special counsel is about power--that is, "[t]he allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish ...." [FN167]

The fundamental flaw with the current independent counsel statute is that it creates, almost by definition, a scenario whereby the President and the independent counsel are adversaries. From that basic mistake flows most of the other problems that critics identify in the statute. Clarifying the role of the President in the manner proposed in this article would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.

[FNa1]. Mr. Kavanaugh served as Associate Counsel in the Office of the Whitewater Independent Counsel from 1994 to 1997 and also for a period in 1998. The views reflected in this article are his own.

[FN1]. The Attorney General is a political actor, as are all high officials of the Justice Department. In other words, the Attorney General supports not only the ideas and policies of the incumbent administration but also publicly supports candidates for elective office who espouse those policies.

[FN2]. Mr. Cox has noted that the "normal position" of the Justice Department is "one for defending an expanding executive privilege," whereas the Special Prosecutor in Watergate and other subsequent investigations "were challenging executive privilege. So there are some real conflicts." 67th Annual Judicial Conference of the United States Court of Appeals for the Fourth Circuit, The Independent Counsel Process: Is It Broken and How Should It Be Fixed?, at 138 (June 27, 1997) [hereinafter Fourth Circuit Judicial Conference] (emphasis added). The Justice Department's brief in the litigation between the President and the Whitewater Independent Counsel Kenneth W. Starr demonstrated this point. The Justice Department has agreed with neither the White House nor the Independent Counsel about the proper scope of privilege. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Office of the President v. Office of Independent Counsel at 20, 117 S.Ct. 2482 (1997) (No. 96-1783) ("The United States has compelling interests in investigating and prosecuting crimes--inside or outside the government--and the Justice Department's performance of those tasks is aided by the duty of the President and other government officials to report evidence of criminal violations to the Attorney General. At the same time ... the President must have access to legal advice that is frank, fully informed, and confidential.").

[FN3]. 1975 REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, at 137- 38.

[FN4]. 28 U.S.C. §§ 591-99 (1994).

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[FN5]. The Olympian term "independent counsel" has always promised more than it could deliver. Moreover, the term would be inappropriate under the regime proposed here because "independent" connotes a counsel appointed outside the Executive Branch and accountable to no one. The Ethics in Government Act initially called for the appointment of a "special prosecutor," but Congress changed the name in 1982 to "independent counsel." The term "special counsel" best captures the position and is used here in describing the proposed regime.

[FN6]. 487 U.S. 654 (1988).

[FN7]. See George D. Brown, The Gratuities Offense, and the RICO Approach to Independent Counsel Jurisdiction, 86 GEO. L.J. 2045, 2049 (1998).

[FN8]. 78 F.3d 1313 (8th Cir.), cert. denied, 1 17 S.Ct. 76 (1996).

[FN9]. The Justice Department is a department within the executive branch whose head is appointed by the President. See 28 U.S.C. § 501 (1994) ("The Department of Justice is an executive department of the United States at the seat of Government."); 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

[FN10]. KATY J. HARRIGER, THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 153 (1992) (emphasis added) (quotation marks omitted).

[FN11]. 28 U.S.C. § 515 (1994); 28 U.S.C. § 543 (1994).

[FN12]. See infra text accompanying notes 28-40.

[FN13]. 28 U.S.C. § 592(c)(1)(A). The Attorney General's decision is judicially unreviewable, however, which means that threat of impeachment or other congressional retaliation is the only legally enforceable check requiring the Attorney General to enforce the law.

[FN14]. 28 U.S.C. § 592(c).

[FN15]. Id. § 593(b).

[FN16]. Id. § 593(b)(3).

[FN17]. Morrison, 487 U.S. at 679.

[FN18]. 28 U.S.C. § 594(a)(9). The symbolism of this nomenclature is important and should be retained in any future legislation. Criminal defendants (and other critics) inevitably try to imply to juries (and the public) that the

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appointed counsel is somehow an extra-governmental official who does not warrant the same respect as prosecutors representing the United States. In the 1996 trial of Jim Guy Tucker, James McDougal, and Susan McDougal, for example, the defendants refused to refer to the prosecutors as the "United States," arguing that "they are independent Counsel appointed under a special act." The Court put a quick end to this tactic: "The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins." United States v. McDougal, Tucker, and McDougal, No. LR-CR-95-173, Tr. at 4525-27 (E.D. Ark. Apr. 11, 1996).

[FN19]. 28 U.S.C. § 594(h).

[FN20]. Id. § 593(c).

[FN21]. Julie R. O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 505 (1996).

[FN22]. TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL 134 (1989).

[FN23]. Fourth Circuit Judicial Conference, supra note 2, at 133.

[FN24]. Id.

[FN25]. Reauthorization of the Independent Counsel Law: Hearing on S. 3131 Before the Subcomm. on Oversight of the Senate Comm. on Governmental Affairs, 102nd Cong. 15 (1992) (testimony of George J. Terwilliger III Deputy Attorney General of the United States).

[FN26]. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[FN27]. In the final pages of his dissent, Justice Scalia also pointed out what he termed the "[un]fairness" of an independent counsel investigation, and he did so in broad terms that arguably seem to apply to all special counsel, whether appointed by a court or by the President (or Attorney General). In comparing a special counsel to an "ordinary" Justice Department prosecutor, however, Justice Scalia appeared to rely on a romantic vision of "ordinary" federal prosecutors. In fact, an "ordinary" federal prosecutor is at least as likely to engage in hardball, near-the-edge tactics as a special counsel whose every move is publicly tracked, analyzed, and criticized. Moreover, the only concrete measure of over-aggressiveness is the prosecutor's conviction rate. A careful prosecutor should not bring many cases that end in outright acquittal on all counts. As it turns out, the record of independent counsels appointed under the statute is better than that of the Justice Department. Only one independent counsel appointed under the statute has ever suffered an outright jury acquittal, which is an impressive record, particularly given the skilled attorneys retained by the defendants in such cases.
Justice Scalia also pointed out that ordinary federal prosecutors suffer from constraints on resources and that independent counsels generally do not. Morrison, 487 U.S. at 727-33 (Scalia, J., dissenting). That is not an entirely accurate or persuasive argument. First, the fact that some federal prosecutors' offices may be understaffed and thus unable to prosecute federal crimes that should be prosecuted is hardly a model for investigations of possible crimes by our highest national officials. Indeed, that is the kind of backwards logic that Justice Scalia ordinarily ridicules.

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Second, in allocating its enormous annual appropriation, the Department of Justice regularly determines that certain kinds of crimes warrant intensive investigation and prosecution, whether it be drug distribution or health care fraud or abortion clinic bombings or church burnings or the like. By means of the independent counsel statute, Congress has simply made the altogether rational judgment that public corruption by high federal officials should be one such area of concentration. That policy judgment hardly warrants condemnation. It is worth noting, in that regard, that the United States Attorney's office for the District of Columbia recently has received severe public criticism for devoting insufficient resources to public corruption cases. See. e.g., Paul Butler, Why Won't the Prosecutor Prosecute?, LEGAL TIMES, Jan. 19, 1998, at 19 (discussing the lack of prosecutions for corruption among public officials). Third, contrary to the implicit undercurrent of Justice Scalia's discussion of "fairness," the Justice Department itself devotes extraordinary resources to numerous high-profile public corruption cases. The Congressman Dan Rostenkowski case, the Mayor Marion Barry prosecution, the campaign fundraising investigation, the Governor Fife Symington case in Arizona, and the Congressman Joseph McDade investigation in Pennsylvania are all recent examples of massive, single-minded, intense, and occasionally out-of-control (in the case of Congressman McDade, perhaps) investigations. The history of independent counsel investigations certainly measures up no worse than those investigations. Fourth, any true comparison of resource constraints is, in the end, virtually impossible because the Justice Department never identifies exactly how much money its prosecutors and the FBI spend on particular investigations and prosecutions; thus, the Department is able to "hide" its costs and avoid the kind of public and congressional scrutiny that independent counsels constantly face. How much money did the United States spend pursuing Congressman McDade? Governor Symington? Mayor Barry? A lot.

[FN28]. See RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT (C. Vann Woodward ed., 1974).

[FN29]. See EASTLAND, supra note 22, at 8; DAVID A. LOGAN, HISTORICAL USES OF A SPECIAL PROSECUTOR: THE ADMINISTRATIONS OF PRESIDENTS GRANT, COOLIDGE AND TRUMAN 7 (Congressional Research Service Nov. 23, 1973).

[FN31]. Id. at 8.

[FN30]. EASTLAND, supra note 22, at 8, 14.

[FN32]. S.J. RES. 54, 68th Cong. (1924).

[FN33]. This article advocates the procedure of presidential appointment and Senate confirmation used during the Teapot Dome Scandal.

[FN34]. EASTLAND, supra note 22, at 8-9.

[FN35]. Id. at 8. The Justice Department was not created until 1870, and there was very little federal criminal law before the 20th century.

[FN36]. 28 U.S.C. §§ 591-99 (1994).

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[FN37]. See Reauthorization Hearings, supra note 25, at 15 (1992).

[FN38]. The independent counsel statute states: "The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States." 28 U.S.C. § 593(b)(2). This provision on its face disqualified Mr. Fiske from appointment as independent counsel under the statute. In the public law reauthorizing the statute in 1994, however, Congress stated that the usual disqualification did not apply to persons appointed as regulatory independent counsel, thus granting the Special Division discretion whether to appoint Mr. Fiske. See Pub. L. No. 103-270, §§ 7(a), (h). The court chose not to appoint Mr. Fiske on the theory that, notwithstanding Congress' ad hoc suspension of § 593(b)(2), the policy, if not the strict terms of the provision, still disqualified Mr. Fiske because he was an administration official.

[FN39]. EASTLAND, supra note 22, at 8. This tradition is not confined to the federal system. The state of New York also has a tradition of appointing special prosecutors (Thomas Dewey, for example) to investigate and prosecute public corruption cases. See Harriger, supra note 10, at 3.

[FN40]. Id. at 15. At the same time, there is a long tradition of congressional investigation of executive branch malfeasance. These investigations often occur simultaneously with criminal investigations of executive branch officials. Some of these congressional investigations have led to the resignation of executive branch officials, and sometimes efforts have been made to impeach (although no executive branch official has been impeached by the House and convicted by the Senate). Congressional investigations historically have been the primary manner in which the public learns whether executive branch officials have committed malfeasance in office. This tradition has continued to the present day. This article argues that Congress must continue to have primary responsibility for determining whether the President should be removed.

[FN41]. Although the Supreme Court upheld the system of court-appointed outside counsel in Morrison v. Olson, the separation of powers analysis in that case is quite inconsistent with the analysis in more recent cases such as Edmond v. United States, 117 S.Ct. 1573 (1997). In particular, Morrison held that the independent counsel was an "inferior officer" whose appointment thus could be wrested from the President. Morrison, 487 U.S. at 671-72. In Edmond, however, the Court said that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." Edmond, 117 S.Ct. at 1581. Under this mode of analysis, an independent counsel could not realistically be considered an inferior officer. Thus, if the issue were presented today and there were no stare decisis concerns, there is little telling how the Court would resolve the issue. Justices Anthony Kennedy, Clarence Thomas, David Souter, Ruth Bader Ginsburg, and Stephen Breyer have been appointed to the Court since the decision in Morrison.

[FN42]. This was a foreseeable flaw that Justice Scalia correctly identified in his dissent. See Morrison, 487 U.S. at 730 (Scalia, J., dissenting).

[FN43]. See, e.g., CNN Capital Gang (CNN Television Broadcast, Dec. 13, 1997) (Senator Orrin Hatch questioning Attorney General Reno's decision not to appoint an independent counsel to investigate Vice President Al Gore's fundraising, calling it a "conflict of interest").

[FN44]. Some might say that we should find totally apolitical persons to serve as independent counsel. But even if that were desirable (in our democracy, one would hope, all people would be active participants in a variety of political and social causes), "[n]early everybody who is qualified to be independent counsel has some kind of political involvement in their background." Fourth (Circuit Judicial Conference, supra note 2, at 39 (comments of

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Special Division Judge David B. Sentelle).

[FN45]. Even with respect to ordinary cases, Eric Holder, a former United States Attorney for the District of Columbia and now Deputy Attorney General, has written that a prosecutor cannot remain publicly silent in the face of challenges to the prosecutor's ethics and motivations. Eric H. Holder & Kevin A. Ohlson, Dealing With the Media in High-Profile White Collar Crime Cases: The Prosecutor's Dilemma (on file with author).

[FN46]. In the Whitewater investigation, the independent counsel obtained the convictions of Jim Guy Tucker, James McDougal, and Susan McDougal in June 1996 despite sustained attacks on his credibility. In a subsequent August 1996 Arkansas trial of two bankers, the result was a hung jury.

[FN47]. See, e.g., Ruth Marcus, The Prosecutor: Following Leads or Digging Dirt?, WASH. POST, Jan. 30, 1998, at A1 (calling Faircloth a "leading crusader" against Fiske).

[FN48]. Edmond v. United States, 117 S.Ct. 1573, 1579 (1997) (quotations omitted). As Justice Joseph Story noted, "If [the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favur." 3 Joseph Story, Commentaries on the Constitution of the United States 375 (1833).

[FN49]. THE FEDERALIST NO. 76, at 457-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN50]. Edmond, 117 S.Ct. at 1579.

[FN51]. 28 U.S.C. § 596(a)(1).

[FN52]. Id. § 515; id. § 543.

[FN53]. Morrison, 487 U.S. at 723-24 & n.4 (Scalia, J., dissenting). Justice Scalia stated that "the President must have control over all exercises of the executive power" and that "failure to accept supervision" constitutes "good cause" for removal. Id. at 724 n.4 (Scalia, J., dissenting). That, in essence, defines "good cause" such that it means little more than "at will." Although Justice Scalia disclaimed the logical conclusion of his position, it would seem that he believes, as the Court described his position, that "every officer of the United States exercising any part of [the Executive power] must serve at the pleasure of the President and be removable by him at will." Id. at 690 n.29 (majority opinion describing Justice Scalia's position).

[FN54]. Id. at 728-29 (Scalia, J., dissenting).

[FN55]. President Grant and President Truman's Attorney General also ordered dismissal of special prosecutors. See EASTLAND, supra note 22, at 14, 16.

[FN56]. See CNN Capital Gang, supra note 43 (Senator Hatch argued: "Who cares about the phone calls ... It's all

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the other stuff that ought to be investigated.").

[FN57]. Susan Schmidt & Roberto Suro, Troubled from the Start; Basic Conflict Impeded Justice Probe of Fundraising, WASH. POST, Oct. 3, 1997, at A1.

[FN58]. United States v. Tucker, 78 F.3d 1313, 1316-19 (8th Cir.1996).

[FN59]. That friction revealed itself, for example, in the investigation conducted by Independent Counsel Donald Smaltz.

[FN60]. Fourth Circuit Judicial Conference, supra note 2, at 91.

[FN61]. 28 U.S.C. § 594(h)(1)(B).

[FN62]. 28 U.S.C.A. § 594(h)(1) (West 1993), as amended by Pub. L. No. 103-270 § 3(o) (1994). After the 1994 revision, the statute also requires that the independent counsel submit to Congress "annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made." 28 U.S.C. § 595(a)(2).

[FN63]. 28 U.S.C. § 595(c).

[FN64]. See, e.g., The Independent Counsel Reauthorization Act of 1993: Hearing on S. 24 Before the Comm. on Governmental Affairs, 103d Cong. 49 (1993) (Professor Samuel Dash, Georgetown University Law Center, stating: "Independent counsel investigations and prosecutions carry out the responsibilities of the executive branch to enforce the Federal criminal laws. The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel.").

[FN65]. Congress has the power to provide privileges or immunities regardless whether they are constitutionally required. See Clinton v. Jones, 117 S.Ct. 1636, 1652 (1997) ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). On the other hand, Congress would not have the power to definitively say that a President is subject to indictment. The courts have the final word on the minimum level of immunity the Constitution affords the President. See id. ("If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it.").

[FN66]. See U.S. CONST, art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

[FN67]. REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, supra note 3, at 122.

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[FN68]. See Brief for Respondent, Cross-Petitioner at 101, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834) [hereinafter Brief for President Nixon].

[FN69]. Brief for the United States, Agnew v. United States (D. Md. 1974) (No. 73-0535).

[FN70]. Nixon v. Sirica, 487 F.2d 700, 757 (D.C. Cir.1973) (MacKinnon, J., concurring in part, dissenting in part).

[FN71]. Id.

[FN72]. Id.

[FN73]. 117 S.Ct. 1636 (1997).

[FN74]. See id. at 1639 (noting that suit was brought by "private citizen" for damages); id. at 1642 n.12 (noting that question presented involved "litigation of a private civil damages action"); id. at 1645 ("With respect to acts taken in his 'public characte '--that is official acts--the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts."); id. at 1648 n.36 (referring to "suits against the President for actions taken in his private capacity"); id. at 1650 ("We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office."); id. (referring to "burdens of private litigation"); id. at 1651 (referring to private plaintiff's "interest in bringing the case to trial"); id. at 1652 (referring to possibility that Congress could provide for "deferral of civil litigation").

[FN75]. Determining how to conduct an investigation or whether to seek an indictment is not a ministerial task, but involves the exercise of judgment and discretion. The exercise of judgment and discretion inevitably means that the decision cannot be separated, in the eyes of the public, from its political consequences.

[FN76]. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN77]. Id. at 397.

[FN78]. Id. at 398. This passage was written largely with respect to a debate over whether the Senate or the Supreme Court should try an impeachment. But the ideas and themes discussed in explaining why the Senate was superior to the Supreme Court in passing public judgment upon the conduct of the President apply, a fortiori, to a single prosecutor attempting to do so.

[FN79]. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966).

[FN80]. THE FEDERALIST NO. 65, supra note 76, at 398-99 (Alexander Hamilton).

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[FN81]. THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).

[FN82]. U.S. CONST. art. II.

[FN83]. As indicated in the statutory language proposed by this article, Congress should take appropriate steps to ensure that the statute of limitations would not prevent prosecution of a President after he leaves office.

[FN84]. President Clinton has litigated privilege claims against both the Whitewater and Espy independent counsels. He also has raised privilege claims against the Justice Department. See S.Rep. No. 104-280, at 67-70, 82-83 (1996). The Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R.Rep. No. 104-849, at 152-53 (1996).

[FN85]. 418 U.S. 683 (1974).

[FN86]. 112 F.3d 910 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

[FN87]. 910 F.2d 843, 950-54 (D.C.Cir. 1990) (Silberman, J., concurring in part, dissenting in part).

[FN88]. 121 F.3d 729 (D.C.Cir. 1997).

[FN89]. This proposed language is premised on the assumption that a special counsel's motion to enforce a subpoena would be justiciable. The Court in Nixon so held, 418 U.S. at 697, and there is no reason to revisit that decision, particularly because the President retains authority to prevent such disputes from reaching the courts.

[FN90]. Even under the current "good cause" restriction, as Justice Scalia stated in Morrison, an inferior officer such as an independent counsel is removable for cause if he refuses to accept supervision. See Morrison, 487 U.S. at 724 n.4 (Scalia. J., dissenting).

[FN91]. Notwithstanding Nixon, it is at least theoretically conceivable that the Supreme Court might rule that the Constitution provides a greater scope of executive privileges than this section would grant. If so, then the Constitution would trump. See Clinton v. Jones, 117 S.Ct at 1652. But that is unlikely, given the clarity of Nixon.

[FN92]. 28 U.S.C. § 535(b). The subsection states in full:
Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless--
(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

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[FN93]. In re Grand Jury Subpoena, 112 F.3d at 920 (emphasis added).

[FN94]. See Petition for a Writ of Certiorari, Office of the President v. Office of Independent Counsel (No. 96-1783) cert. denied, 117 S.Ct. 22, 23 n.7 (1997).

[FN95]. 28 U.S.C. § 535 (b)(2).

[FN96]. See Honig v. Doe, 484 U.S. 305, 325 (1988) (stating a court is "not at liberty to engraft onto the statute an exception Congress chose not to create"). In general, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." Brogan v. United States, 118 S.Ct. 805, 811-12 (1998).

[FN97]. H.R.Rep. No. 83-2622, at 1 (1954) (emphasis added), reprinted in 1954 U.S.C.C.A.N. 3551, 3551.

[FN98]. Id. at 3552 (emphasis added).

[FN99]. Id. at 3553 (emphasis added). In an independent counsel investigation, the independent counsel is the official who receives information about matters within his jurisdiction. "When issuing ... subpoenas, an independent counsel stands in the place of the Attorney General." S.Rep. No. 100-123, at 22 (1987); see 28 U.S.C. § 594(a).

[FN100]. Lloyd N. Cutler, The Role of the Counsel to the President of the United States, 8 REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 470, 472 (1980).

[FN101]. Id.

[FN102]. Id.

[FN103]. A Conversation with Robert H. Bork, 26 D.C.B.REP. No. 3, at 9 (Dec. 1997-Jan. 1998).

[FN104]. White House Travel Office Management Review, 23 (1993) (emphases added). In addition, federal regulations require each agency to have a "designated agency ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. § 2635.107 (1997). The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. § 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." Id. (emphasis added).

[FN105]. In re Grand Jury Subpoena, 112 F.3d at 921 n.10. The Attorney General has authorized an exception to § 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. § 50.15) , represent government employees in their personal capacities--for example, in civil suits alleging Bivens violations. The OLC memoranda address only the exception for these personal representations. See Office of Legal

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Counsel Memorandum, at 5 (Mar. 29, 1985) (analyzing duty under C.F.R. § 50.15 and U.S.C. § 535(b) of an Assistant U.S. Attorney who discovered information while representing Bivens defendants); Office of Legal Counsel Memorandum, at 1 (Apr. 3, 1979) (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); Office of Legal Counsel Memorandum, at 4 (Aug. 30, 1978) (analyzing under C.F.R. § 50.15 and U.S.C. § 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); Office of Legal Counsel Memorandum, at 1 (Nov. 30, 1976) (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages" and the employee has told the Assistant U.S. Attorney information that could incriminate the employee).

[FN106]. See 6 Opinion of the Off. of Legal Couns. 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535") (emphasis added). The OLC recognizes in the crucial distinction between representation of the personal interests of a government employee and representation of the governmental interests of a government agency. See, e.g., 4B Op. of the Off. of Legal Couns. 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[FN107]. 418 U.S. 683 (1974).

[FN108]. Id. at 706-13.

[FN109]. Id. at 687-88.

[FN110]. Brief for President Nixon, supra note 68, at 122-31. Rule 17 requires that the government demonstrate relevance and admissibility when seeking a trial subpoena. The Rule 17 standard for grand jury subpoenas is more relaxed, reflecting the different goals of grand jury investigation. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297-301 (1991).

[FN111]. Brief for President Nixon, supra note 68, at 48-86.

[FN112]. Id. at 86-87.

[FN113]. Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir.1973).

[FN114]. Nixon, 418 U.S. at 700.

[FN115]. Id. at 708.

[FN116]. Id. at 705.

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[FN117]. Id. at 708.

[FN118]. Id.

[FN119]. Id. at 710 (quoting C&S Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[FN120]. Id. at 712 n.19.

[FN121]. Id.

[FN122]. Id. at 709 (quotation marks omitted).

[FN123]. Id.

[FN124]. Id. at 712-13.

[FN125]. Id. at 714.

[FN126]. The privilege considered in Nixon was the privilege for presidential communications, not the more general executive privilege for deliberative processes. The deliberative process privilege is, of course, even less weighty than the presidential communications privilege. See In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir.1997).

[FN127]. See Files of Justice Thurgood Marshall, United States v. Nixon, 418 U.S. 683 (1974) (available at Library of Congress).

[FN128]. Id.

[FN129]. Id. This memo is veryimportant as an historical matter. Justice White stated that President Nixon would have been entitled to withhold the tapes had some higher standard been adopted. Those who currently favor the adoption of such a higher standard must come to grips with that fact--and how it might have altered the course of Watergate.

[FN130]. Id.

[FN131]. As reported in The Brethren, Justice Powell had last-minute reservations about the legal standard and said at the conference on July 23 that he was considering a last-minute concurrence because "[t]hey were ruling that any grand jury could subpoena material from the President in a criminal investigation. That was too sweeping. They could, and they should, rule more narrowly. ..." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 409 (1979). Woodward and Armstrong report that the room "erupted" and Justice William Brennan

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"made an impassioned plea for unanimity." Id. Justice Powell then decided to adhere to the Chief Justice's opinion, and thus the opinion rejected a Nixon v. Sirica kind of standard and instead held that evidence meeting the requirements of Rule 17 must be produced unless there was a claim of state secrets. Id. at 410.

[FN132]. United States v. North, 910 F.2d 843, 950-53 (D.C. Cir.1990) (Silberman, J., concurring in part, dissenting in part).

[FN133]. Id. at 951. The issue arose in connection with a trial subpoena to President Ronald Reagan sought by North. The court affirmed the District Court's denial of the subpoena, ruling that such evidence would not have been material or favorable to the defense, and the majority therefore did not reach the question of privilege. Id. at 892 n.26 (per curiam).

[FN134]. Id. at 952.

[FN135]. Id. (citation omitted). Similarly, Professor Laurence Tribe has stated: "Ostensibly, United States v. Nixon suggests that, while presidential conversations are presumptively privileged, the presumption will always be overcome by a showing that the information is relevant to a pending criminal trial in federal court." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 281 (1988) (emphasis added).

[FN136]. In re Grand Jury Subpoena, 112 F.3d 910, 919 (8th Cir.1997). In his dissent on the facts of that case, Judge Richard Kopf agreed that "[a]t this elevated level of abstraction"--namely the "public interest"--"Nixon teaches that the President's general need for confidentiality ... is outweighed by a grand jury's need for evidence of the truth." Id. at 936 (Kopf, J., dissenting).

[FN137]. Id. at 918 n.9.

[FN138]. See In re Sealed Case, 121 F.3d 729 (D.C.Cir.1997).

[FN139]. Id. at 754.

[FN140]. See Nixon, 418 U.S. at 712 n.19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information ....").

[FN141]. In re Sealed Case, 121 F.3d at 754.

[FN142]. Id.

[FN143]. Id.

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[FN144]. Id.

[FN145]. Id. at 757.

[FN146]. Id. at 755. See also id. at 760 (noting, in explaining standard, that "[h]ere, unlike in the Nixon cases, the actions of White House officers do not appear to be under investigation").

[FN147]. Id. at 761.

[FN148]. Id. at 756.

[FN149]. The Court said that "[i]n practice, the primary effect of this standard will be to require a grand jury to delay subpoenaing evidence." Id. at 756 (emphasis added).
Any open-ended balancing test requiring some higher need showing would violate the Supreme Court's repeated emphasis that the criminal process should not tolerate such delays. See, e.g., United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991) ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); Branzburg v. Hayes, 408 U.S. 665, 705 (1972) (under proposed heightened relevance standard, "courts would ... be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid").

[FN150]. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quotation marks omitted).

[FN151]. Branzburg, 408 U.S. at 691 n.29, 686.

[FN152]. Nixon, 418 U.S. at 710.

[FN153]. The Office of Legal Counsel has not issued an opinion about the application of Executive privileges in criminal proceedings, as the Eighth Circuit correctly recognized. See In re Grand Jury Subpoena, 112 F.3d 910, 921 n.10 (1997). Even for purposes of congressional inquiries, moreover, the OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Opinion of the Off. of Legal Couns. 68, 78 (1986) (emphasis added).

[FN154]. United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984) (emphases added).

[FN155]. MCCORMICK ON EVIDENCE § 87.1, 321 (J. W. Strong ed. 1992).

[FN156]. 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure § 5475, 126-27 (1986).

[FN157]. Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (1996) (Proposed Final Draft No. 1)

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(also stating that "unlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business").

[FN158]. In re Grand Jury Subpoena, 112 F.3d at 920.

[FN159]. Id. at 921.

[FN160]. Id.

[FN161]. See supra notes 89-91 and accompanying text.

[FN162]. The President at the time the information is sought controls the privilege. With respect to the attorney-client privilege (as opposed to the Presidential communications privilege), a President no longer in office would have no authority to assert the privilege. See CFTC v. Weintraub, 471 U.S. 343, 349 & n.5 (1985) (stating that common-law privilege for entities belongs to current management, not former management).

[FN163]. See Nixon, 418 U.S. at 712; cf. Branzburg, 408 U.S. at 691.

[FN164]. See Branzburg, 408 U.S. at 700.

[FN165]. See 4B Opinion of the Off. of Legal Couns. 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

[FN166]. The President (or relevant agency head) can require that the employee cooperate in an internal agency investigation. See 4B Opinion of the Off. of Legal Couns. 421, 427 (1980) ("The obligation of public officials to answer questions related to the performance of their public duties is well- recognized"). To be sure, an agency employee questioned by an agency attorney may refuse to answer questions out of a fear of self-incrimination, although the failure to answer questions may lead to his dismissal. See LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) ("It may well be that an agency ... would take into consideration the failure of the employee to respond.").
The government employee who does not claim the Fifth Amendment and speaks to the attorney could be investigated or prosecuted based at least in part on the communications to government attorneys (Oliver North, for example). But that is a good result: Insulating government employees from criminal investigation and prosecution has never been considered a governmental interest that justifies withholding relevant information from the federal grand jury. Indeed, the only governmental interest is precisely the opposite.

[FN167]. Morrison, 487 U.S. at 699 (Scalia, J., dissenting).

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